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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA-2015-8138; Directorate Identifier 2014-NM-112-AD; Amendment 39-18552; AD 2016-12-03]

RIN 2120-AA64

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

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

**ACTION:** Final rule.

**SUMMARY:** We are superseding Airworthiness Directive (AD) 2011-17-10, for all Fokker Services B.V. Model F.28 Mark 1000, 2000, 3000, and 4000 airplanes. AD 2011-17-10 required inspecting for a by-pass wire between the housing of each in-tank fuel quantity indication (FQI) cable plug and the cable shield, and corrective actions if necessary. AD 2011-17-10 also required revising the airplane maintenance program. This new AD removes certain airplanes from the applicability. This new AD applies only to Model F.28 Mark 1000 airplanes and also requires revising the airplane maintenance or inspection program by incorporating the instructions in revised service information. This AD was prompted by the issuance of revised service information to update the critical design configuration control limitations (CDCCLs) that address potential ignition sources inside fuel tanks. We are issuing this AD to prevent potential ignition sources inside the fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

**DATES:** This AD becomes effective July 15, 2016.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of July 15, 2016.

The Director of the Federal Register approved the incorporation by reference of a certain other publication listed in this AD as of September 16, 2011 (76 FR 50111, August 12, 2011).

**ADDRESSES:** For service information identified in this final rule, contact Fokker Services B.V., Technical Services Dept., P.O. Box 1357, 2130 EL Hoofddorp, the Netherlands; telephone +31 (0)88-6280-350; fax +31 (0)88-6280-111; email [technicalservices@fokker.com](mailto:technicalservices@fokker.com); Internet <http://www.myfokkerfleet.com>. You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425-227-1221. It is also available on the Internet at <http://www.regulations.gov> by searching for and locating Docket Number FAA-2015-8138.

#### Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket Number FAA-2015-8138; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone 800-647-5527) is in the **ADDRESSES** section.

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

#### SUPPLEMENTARY INFORMATION:

##### Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2011-17-10, Amendment 39-16774 (76 FR 50111, August 12, 2011) ("AD 2011-17-10"). AD 2011-17-10 applied to all Model F.28 Mark 1000, 2000, 3000, and 4000 airplanes. The NPRM published in the

**Federal Register** on January 4, 2016 (81 FR 34) ("the NPRM"). The NPRM was prompted by the issuance of revised service information to update the CDCCLs that address potential ignition sources inside fuel tanks. The NPRM proposed to retain the requirements of AD 2011-17-10, and to require revising the airplane maintenance or inspection program by incorporating the instructions in the revised service information. The NPRM also proposed to remove certain airplanes from the applicability. We are issuing this AD to prevent potential ignition sources inside the fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive 2014-0111, dated May 8, 2014 (referred to after this as the Mandatory Continuing Airworthiness Information, or "the MCAI"), to correct an unsafe condition on certain Model F.28 Mark 1000 airplanes. The MCAI states:

[T]he FAA published Special Federal Aviation Regulation (SFAR) 88 [Amendment 21-78 (66 FR 23086, May 7, 2001)]. Subsequently, SFAR 88 was amended by: Amendment 21-82 (67 FR 57490, September 10, 2002; corrected at 67 FR 70809, November 26, 2002) and Amendment 21-83 (67 FR 72830, December 9, 2002; corrected at 68 FR 37735, June 25, 2003, to change "21-82" to "21-83"), and the Joint Aviation Authorities (JAA) published Interim Policy INT/POL/25/12.

The review conducted by Fokker Services on the F28 design, in response to these regulations, revealed that on certain aeroplanes, an interrupted shield contact may exist or develop between the housing of an in-tank Fuel Quantity Indication (FQI) cable plug and the cable shield of the shielded FQI system cables in the main and collector fuel tanks, which can, under certain conditions, form a spark gap.

This condition, if not detected and corrected, may create an ignition source in the fuel tank vapour space, possibly resulting in a wing fuel tank explosion and consequent loss of the aeroplane.

To address and correct this unsafe condition, Fokker Services published Service Bulletin (SB) SBF28-28-053 which provides instructions, for early production aeroplanes, for a one-time inspection to check for the presence of a by-pass wire between the housing of each in-tank FQI cable plug and the cable shield and, depending on findings, for the installation of a by-pass wire. In addition, SBF28-28-053 provides a Critical

Design Configuration Control Limitation (CDCCL) item to make certain that the by-pass wire remains installed on these aeroplanes.

On later production aeroplanes, an improved plug Part Number (P/N) 20P227-2 was introduced with a better shield connection to the housing of the plug. Therefore, SBF28-28-053 (original issue and Revision 1) also provided a CDCCL item to ensure that this type of plug remains installed on those aeroplanes.

EASA issued AD 2010-0217 [which corresponds to FAA AD 2011-17-10, Amendment 39-16774 (76 FR 50111, August 12, 2011)] to require accomplishment of the instructions related to the by-pass wire and implementation of the CDCCL items as specified in Fokker Services SBF28-28-053 Revision 1, as applicable to aeroplane s/n.

Since EASA AD 2010-0217 was issued, it was identified that P/N 20P227-1 and 20P228-1 plugs are also approved and can therefore be installed on the later production aeroplanes. Prompted by this finding, Fokker Services issued SBF28-28-055 to address the implementation of a CDCCL item to make certain that only approved plug types remain installed on the later production aeroplanes, while SBF28-28-053 Revision 2 was issued for early production aeroplanes to address the by-pass wire related actions only.

Consequently, EASA issued AD 2011-0184, retaining the requirements of EASA AD 2010-0217, which was superseded, to require implementation of the related CDCCL items as specified in Fokker Services SBF28-28-053 Revision 2, or SBF28-28-055, as applicable to aeroplane s/n.

More recently, Fokker Services published Revision 3 of SBF28-28-053, to eliminate the use of a heat gun in or near to the fuel tank, and prompted by a change to the definition of the related CDCCL item. Fokker Services also cancelled SBF28-28-055, due to the introduction of a revised definition of the CDCCL item that has been published in Fokker Services SBF28-28-050, Revision 2.

For the reason described above, this [EASA] AD retains the requirements related to SBF28-28-053 of EASA AD 2011-0184, which is superseded, but requires those actions to be accomplished in accordance with the instructions of Fokker Services SBF28-28-053, Revision 3 (R3).

All the actions related to SBF28-28-055, as previously required through paragraphs (5) and (6) of EASA AD 2011-0184, are now addressed by EASA AD 2014-0110 [[http://ad.easa.europa.eu/ad/2014-0110\\_1.pdf](http://ad.easa.europa.eu/ad/2014-0110_1.pdf)].

The CDCCL requirement in AD 2011-17-10 for Model F.28 Mark 2000, 3000, and 4000 airplanes is now addressed in other related rulemaking. Therefore, this AD does not include Model F.28 Mark 2000, 3000, and 4000 airplanes in the applicability.

This AD also removes airplanes having serial numbers 11993 and 11994 from the applicability because those airplanes were scrapped and removed from the type certificate data sheet.

The unsafe condition is the potential of ignition sources inside fuel tanks.

Such ignition sources, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane. You may examine the MCAI in the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating it in Docket No. FAA-2015-8138.

#### Comments

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

#### Conclusion

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

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

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

Fokker Services B.V. has issued Fokker Service Bulletin SBF28-28-053, Revision 3, dated January 9, 2014. The service information describes procedures for inspecting for a by-pass wire between the housing of each in-tank FQI cable plug and the cable shield, and installing a by-pass wire if necessary. The service information also describes CDCCL Item 1.7 for fuel quantity indicating system (FQIS) wiring in wing tanks. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the ADDRESSES section.

#### Costs of Compliance

We estimate that this AD affects 5 airplanes of U.S. registry. This AD adds a requirement to revise the airplane maintenance or inspection program by incorporating the instructions in revised service information. The current costs associated with this AD are repeated as follows for the convenience of affected operators:

The actions required by AD 2011-17-10 will take about 6 work-hours per product, at an average labor rate of \$85 per work-hour. Required parts cost about \$0 per product. Based on these figures, the estimated cost of the actions that were required by AD 2011-17-10 is \$510 per product.

In addition, we estimate that any necessary follow-on actions required by AD 2011-17-10 take about 7 work-hours and require parts costing \$308, for a cost of \$903 per product. We have no way of determining the number of products that may need these actions.

We also estimate that it takes about 1 work-hour per product to revise the maintenance or inspection program. The average labor rate is \$85 per work-hour. Based on these figures, we estimate the cost of this AD on U.S. operators to be \$425, or \$85 per product.

#### Authority for This Rulemaking

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

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

#### Regulatory Findings

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

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

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

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

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

## Adoption of the Amendment

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

### PART 39—AIRWORTHINESS DIRECTIVES

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

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

#### § 39.13 [Amended]

- 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2011–17–10, Amendment 39–16774 (76 FR 50111, August 12, 2011), and adding the following new AD:

#### 2016–12–03 Fokker Services B.V.:

Amendment 39–18552. Docket No. FAA–2015–8138; Directorate Identifier 2014–NM–112–AD.

#### (a) Effective Date

This AD becomes effective July 15, 2016.

#### (b) Affected ADs

This AD replaces AD 2011–17–10, Amendment 39–16774 (76 FR 50111, August 12, 2011) (“AD 2011–17–10”).

#### (c) Applicability

This AD applies to Fokker Services B.V. Model F.28 Mark 1000 airplanes; certificated in any category; serial numbers (S/Ns) 11003 through 11041 inclusive, and S/Ns 11991 and 11992.

#### (d) Subject

Air Transport Association (ATA) of America Code 28, Fuel.

#### (e) Reason

This AD was prompted by the issuance of revised service information to update the critical design configuration control limitations (CDCCLs) that address potential ignition sources inside fuel tanks. We are issuing this AD to prevent potential ignition sources inside the fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

#### (f) Compliance

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

#### (g) Retained Inspection and Installation, With Revised Service Information

This paragraph restates the requirements of paragraph (g) of AD 2011–17–10, with revised service information. At a scheduled opening of the fuel tanks, but not later than 84 months after September 16, 2011 (the effective date of AD 2011–17–10), do a general visual inspection for the presence of a by-pass wire between the housing of each in-tank fuel quantity indication (FQI) cable plug and the cable shield, in accordance with Part 1 of the Accomplishment Instructions of Fokker Service Bulletin SBF28–28–053,

Revision 1, dated September 20, 2010; or Fokker Service Bulletin SBF28–28–053, Revision 3, dated January 9, 2014. As of the effective date of this AD, only Fokker Service Bulletin SBF28–28–053, Revision 3, dated January 9, 2014, may be used.

#### (h) Retained Corrective Actions, With Revised Service Information

This paragraph restates the requirements of paragraph (h) of AD 2011–17–10, with revised service information. If during the general visual inspection required by paragraph (g) of this AD, it is found that a by-pass wire is not installed: Before the next flight, install the by-pass wire between the housing of the in-tank FQI cable plug and the cable shield, in accordance with Part 2 of the Accomplishment Instructions of Fokker Service Bulletin SBF28–28–053, Revision 1, dated September 20, 2010; or Fokker Service Bulletin SBF28–28–053, Revision 3, dated January 9, 2014. As of the effective date of this AD, only Fokker Service Bulletin SBF28–28–053, Revision 3, dated January 9, 2014, may be used.

#### (i) Retained Maintenance Program Revision To Add Fuel Airworthiness Limitation, With a New Exception

This paragraph restates the requirements of paragraph (i) of AD 2011–17–10, with a new exception. Except as required by paragraph (k) of this AD, concurrently with the actions required by paragraph (g) of this AD, revise the airplane maintenance program by incorporating CDCCL–1 specified in paragraph 1.L.(1)(c) of Fokker Service Bulletin SBF28–28–053, Revision 1, dated September 20, 2010.

#### (j) Retained Requirement for No Alternative Actions, Intervals, and/or CDCCLs, With a New Exception

This paragraph restates the requirements of paragraph (k) of AD 2011–17–10 with a new exception. Except as required by paragraph (k) of this AD: After accomplishing the revision required by paragraph (i) of this AD, no alternative actions (*e.g.*, inspection, interval) and/or CDCCLs may be used unless the actions, intervals, and/or CDCCLs are approved as an alternative methods of compliance (AMOC) in accordance with the procedures specified in paragraph (n)(1) of this AD.

#### (k) New Maintenance or Inspection Program Revision To Add Fuel Airworthiness Limitation

Within 30 days after the effective date of this AD: Revise the airplane maintenance or inspection program, as applicable, by incorporating CDCCL Item 1.7 as specified in paragraph 1.L.(1)(c) of Fokker Service Bulletin SBF28–28–053, Revision 3, dated January 9, 2014. Accomplishing the revision required by this paragraph terminates the revision required by paragraph (i) of this AD.

#### (l) No Alternative CDCCLs

After the maintenance or inspection program has been revised as required by paragraph (k) of this AD, no alternative CDCCLs may be used unless the CDCCLs are approved as an AMOC in accordance with

the procedures specified in paragraph (n)(1) of this AD.

#### (m) Credit for Previous Actions

This paragraph provides credit for the applicable actions required by paragraph (k) of this AD, if those actions were performed before the effective date of this AD using Fokker Service Bulletin SBF28–28–053, Revision 2, dated June 22, 2011. This document is not incorporated by reference in this AD.

#### (n) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs)*: The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1137; fax 425–227–1149. Information may be emailed to: [9-ANM-116-AMOC-REQUESTS@faa.gov](mailto:9-ANM-116-AMOC-REQUESTS@faa.gov). Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer*: As of the effective date of this AD, for any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Fokker B.V. Service's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

#### (o) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2014–0111, dated May 8, 2014, for related information. This MCAI may be found in the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA–2015–8138.

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (p)(5) and (p)(6) of this AD.

#### (p) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless this AD specifies otherwise.

(3) The following service information was approved for IBR on July 15, 2016.

(i) Fokker Service Bulletin SBF28–28–053, Revision 3, dated January 9, 2014.

(ii) Reserved.

(4) The following service information was approved for IBR on September 16, 2011 (76 FR 50111, August 12, 2011).

(i) Fokker Service Bulletin SBF28–28–053, Revision 1, dated September 20, 2010.

(ii) Reserved.

(5) For service information identified in this AD, contact Fokker Services B.V., Technical Services Dept., P.O. Box 1357, 2130 EL Hoofddorp, the Netherlands; telephone +31 (0)88–6280–350; fax +31 (0)88–6280–111; email [technicalservices@fokker.com](mailto:technicalservices@fokker.com); Internet <http://www.myfokkerfleet.com>.

(6) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

(7) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

Issued in Renton, Washington, on May 31, 2016.

**Michael Kaszycski,**

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

[FR Doc. 2016–13545 Filed 6–9–16; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA–2015–4813; Directorate Identifier 2013–NM–161–AD; Amendment 39–18532; AD 2016–11–05]

**RIN 2120–AA64**

#### Airworthiness Directives; Airbus Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** We are superseding Airworthiness Directive (AD) 99–16–01 for certain Airbus Model A300 B4–600, B4–600R, and F4–600R series airplanes, and Model A300 C4–605R Variant F airplanes (collectively called Model A300–600 series airplanes). AD 99–16–01 required repetitive inspections of certain bolt holes where parts of the main landing gear (MLG) are attached to the wing rear spar, and repair if necessary. Since we issued AD 99–16–01, we have determined that the risk of cracking in the wing rear spar is higher

than initially determined. This new AD adds airplanes to the applicability, reduces the compliance times and repetitive intervals for the inspections, and changes the inspection procedures. This AD was prompted by a determination that the risk of cracking in the wing rear spar is higher than initially determined. We are issuing this AD to detect and correct cracking of the rear spar of the wing, which could result in reduced structural integrity of the airplane.

**DATES:** This AD becomes effective July 15, 2016.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of July 15, 2016.

The Director of the Federal Register approved the incorporation by reference of a certain other publication listed in this AD as of November 9, 1995 (60 FR 52618, October 10, 1995).

**ADDRESSES:** For service information identified in this final rule, contact Airbus SAS, Airworthiness Office—EAW, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email [account.airworth-eas@airbus.com](mailto:account.airworth-eas@airbus.com); Internet <http://www.airbus.com>. You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA–2015–4813.

#### Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA–2015–4813; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (telephone 800–647–5527) is Docket Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:** Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA

98057–3356; telephone: 425–227–2125; fax: 425–227–1149.

#### SUPPLEMENTARY INFORMATION:

##### Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 99–16–01, Amendment 39–11236 (64 FR 40743, July 28, 1999) (“AD 99–16–01”). AD 99–16–01 superseded AD 95–20–02, Amendment 39–9380 (60 FR 52618, October 10, 1995). AD 99–16–01 applied to certain Airbus Model A300 B4–600, B4–600R, and F4–600R series airplanes, and Model A300 C4–605R Variant F airplanes (collectively called Model A300–600 series airplanes). The NPRM published in the **Federal Register** on November 17, 2015 (80 FR 71751) (“the NPRM”).

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive 2013–0180, dated August 9, 2013 (referred to after this as the Mandatory Continuing Airworthiness Information, or “the MCAI”), to correct an unsafe condition for certain Airbus Model A300 B4–600, B4–600R, and F4–600R series airplanes, and Model A300 C4–605R Variant F airplanes (collectively called Model A300–600 series airplanes). The MCAI states:

During full-scale fatigue testing, cracks were found on the rear spar from certain bolt holes at the attachment of the Main Landing gear (MLG) forward pick-up fitting and the MLG Rib 5 aft.

This condition, if not detected and corrected, could reduce the structural integrity of the aeroplane.

DGAC [Direction Générale de l’Aviation Civile] France issued \* \* \* [an AD] (later revised) to require High Frequency Eddy Current (HFEC) or Ultrasonic (U/S) inspections of certain fastener holes where the MLG forward pick-up fitting and MLG Rib 5 aft are attached to the rear spar.

Since DGAC France \* \* \* [issued a revised AD, which corresponded to FAA AD 99–16–01, Amendment 39–11236 (64 FR 40743, July 28, 1999), which superseded FAA AD 95–20–02, Amendment 39–9380 (60 FR 52618, October 10, 1995)] \* \* \*, a fleet survey and updated Fatigue and Damage Tolerance analyses have been performed in order to substantiate the second A300–600 Extended Service Goal (ESG2) exercise. The results of these analyses have shown that the threshold and interval must be reduced to allow timely detection of these cracks and accomplishment of an applicable corrective action.

For the reasons described above, this [EASA] AD retains the requirements of [the revised DGAC France AD], which is superseded, but reduces the related compliance times.

The new, reduced threshold for the initial inspection ranges between 8,900

total flight cycles/20,000 total flight hours, and 34,600 total flight cycles/77,800 total flight hours, depending on the modification. The grace periods (750 or 1,500 landings) for airplanes that have exceeded the specified thresholds are unchanged from those provided in AD 99–16–01. The new, reduced intervals for the repetitive inspections range between 4,000 flight cycles/9,000 flight hours (whichever occurs first), and 8,900 flight cycles/20,000 flight hours (whichever occurs first), depending on the modification. You may examine the MCAI in the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA–2015–4813.

### Comments

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

### Conclusion

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

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

### Related Service Information Under 14 CFR Part 51

We reviewed Airbus Service Bulletin A300–57–6017, Revision 04, including Appendix 1, dated February 4, 2011. This service information describes procedures for repetitive inspections of certain bolt holes where parts of the MLG are attached to the wing rear spar, and repair. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the ADDRESSES section.

### Costs of Compliance

We estimate that this AD affects 71 airplanes of U.S. registry.

The actions required by AD 99–16–01 and retained in this AD, take about 226 work-hours per product, at an average labor rate of \$85 per work hour. Required parts cost about \$0 per product. Based on these figures, the estimated cost of the actions that are required by AD 99–16–01 is \$19,210 per product, per inspection cycle.

We also estimate that it will take about 226 work-hours per product to comply with the new basic requirements of this AD. The average labor rate is \$85 per work-hour. Based on these figures, we estimate the cost of this AD on U.S. operators to be \$1,363,910, or \$19,210 per product.

We have received no definitive data that will enable us to provide cost estimates for the on-condition actions specified in this AD.

### Authority for This Rulemaking

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

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

### Regulatory Findings

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

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

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

### List of Subjects in 14 CFR Part 39

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

### Adoption of the Amendment

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

### PART 39—AIRWORTHINESS DIRECTIVES

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

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

#### § 39.13 [Amended]

- 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 99–16–01, Amendment 39–11236 (64 FR 40743, July 28, 1999), and adding the following new AD:

**2016–11–05 Airbus:** Amendment 39–18532; Docket No. FAA–2015–4813; Directorate Identifier 2013–NM–161–AD.

#### (a) Effective Date

This AD becomes effective July 15, 2016.

#### (b) Affected ADs

This AD replaces AD 99–16–01, Amendment 39–11236 (64 FR 40743, July 28, 1999) ("AD 99–16–01").

#### (c) Applicability

This AD applies to Airbus Model A300 B4–601, B4–603, B4–620, and B4–622 airplanes; Model A300 B4–605R and B4–622R airplanes; Model A300 F4–605R airplanes; and Model A300 C4–605R Variant F airplanes; certificated in any category; all manufacturer serial numbers.

#### (d) Subject

Air Transport Association (ATA) of America Code 57, Wings.

#### (e) Reason

This AD was prompted by the results of a full-scale fatigue test when cracking was found on the rear spar of the wing, and the subsequent determination that the risk of such cracking is higher than initially determined. We are issuing this AD to detect and correct cracking of the rear spar of the wing, which could result in reduced structural integrity of the airplane.

#### (f) Compliance

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

#### (g) Retained Inspections and Corrective Actions, With Revised Service Information

This paragraph restates the requirements of paragraphs (a), (b), (c), (d), (e), and (f) of AD 99–16–01 with revised service information and reduced thresholds and repetitive intervals, for Airbus Model A300 B4–600, B4–600R, and F4–600R series airplanes, and Model A300 C4–605R Variant F airplanes; manufacturer serial numbers (MSNs) 252 through 553 inclusive; except those airplanes on which Airbus Modification 07601 has been accomplished prior to delivery.

- (1) Perform a high frequency eddy current (HFEC) rototest inspection to detect cracks in

certain bolt holes where the main landing gear (MLG) forward pick-up fitting and MLG rib 5 aft are attached to the rear spar, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A300–57–6017, Revision 01, including Appendix 1, dated July 25, 1994; or Airbus Service Bulletin A300–57–6017, Revision 04, including Appendix 1, dated February 24, 2011. As of the effective date of this AD, only Airbus Service Bulletin A300–57–6017, Revision 04, including Appendix 1, dated February 24, 2011, may be used for the actions required by this paragraph.

(i) For airplanes that have accumulated 17,300 total landings or less as of November 9, 1995 (the effective date of AD 95–20–02, Amendment 39–9380 (60 FR 52618, October 10, 1995)) (“AD 95–20–02”): Inspect prior to the accumulation of 17,300 total landings, or within 1,500 landings after November 9, 1995, whichever occurs later.

(ii) For airplanes that have accumulated 17,301 or more total landings, but less than 19,300 total landings as of November 9, 1995 (the effective date of AD 95–20–02): Inspect within 1,500 landings after November 9, 1995.

(iii) For airplanes that have accumulated 19,300 or more total landings as of November 9, 1995 (the effective date of AD 95–20–02): Inspect within 750 landings after November 9, 1995 (the effective date of AD 95–20–02).

(2) If no crack is found during the inspection required by paragraph (g)(1) of this AD, repeat that inspection thereafter at the time specified in either paragraph (g)(2)(i) or (g)(2)(ii) of this AD, as applicable.

(i) For airplanes on which Airbus Modification 07716 (as specified in Airbus Service Bulletin A300–57–6020) has not been accomplished: Inspect at the time specified in paragraph (g)(2)(i)(A) or (g)(2)(i)(B) of this AD, as applicable.

(A) For airplanes having MSNs 465 through 553 inclusive: Repeat the inspection at intervals not to exceed 13,000 landings, until the inspection required by paragraph (g)(4)(ii)(A)(1) of this AD has been accomplished.

(B) For airplanes having MSNs 252 through 464 inclusive: Repeat the inspection at intervals not to exceed 8,400 landings, until the inspection required by paragraph (g)(4)(ii)(A)(2) of this AD has been accomplished.

(ii) For airplanes on which Airbus Modification 07716 has been accomplished: Inspect at the time specified in either paragraph (g)(2)(ii)(A) or (g)(2)(ii)(B) of this AD, as applicable.

(A) For airplanes having MSNs 465 through 553 inclusive: Repeat the inspection at intervals not to exceed 11,800 landings, until the inspection required by paragraph (g)(4)(i)(B) of this AD has been accomplished.

(B) For airplanes having MSNs 252 through 464 inclusive: Repeat the inspection within 10,700 landings following the initial inspection required by paragraph (g)(1) of this AD, and thereafter at intervals not to exceed 7,500 landings, until the inspection required by paragraph (g)(4)(ii)(B)(2) has been accomplished.

(3) If any crack is found during the inspection required by either paragraph (g)(1)

or (g)(2) of this AD, prior to further flight, accomplish the requirements of either paragraph (g)(3)(i) or (g)(3)(ii) of this AD, as applicable.

(i) For airplanes on which Airbus Modification 07716 has not been accomplished: Oversize the bolt hole by 1/32 inch and repeat the HFEC inspection required by paragraph (g)(1) of this AD, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A300–57–6017, Revision 01, including Appendix 1, dated July 25, 1994. After accomplishing the oversizing and HFEC inspection, repeat the inspection, as required by paragraph (g)(2) of this AD, at the applicable schedule specified in that paragraph, until the inspection required by paragraph (g)(4)(ii)(B)(1) or (g)(4)(ii)(B)(2) of this AD has been accomplished.

(A) If no cracking is detected, install the second oversize bolt in accordance with the Accomplishment Instructions of Airbus Service Bulletin A300–57–6017, Revision 01, including Appendix 1, dated July 25, 1994.

(B) If any cracking is detected, repair in accordance with a method approved by the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate.

(ii) For airplanes on which Airbus Modification 07716 has been accomplished: Repair in accordance with a method approved by the Manager, International Branch, ANM–116. After repair, repeat the inspections as required by paragraph (g)(2) of this AD at the applicable schedule specified in that paragraph, until the inspection required by paragraph (g)(4)(ii)(B)(1) or (g)(4)(ii)(B)(2) of this AD has been accomplished.

(4) Perform an ultrasonic inspection to detect cracks in certain bolt holes where the MLG forward pick-up fitting and MLG rib 5 aft are attached to the rear spar, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A300–57–6017, Revision 03, dated November 19, 1997; or Revision 04, including Appendix 1, dated February 24, 2011; at the time specified in paragraph (g)(4)(i) or (g)(4)(ii) of this AD, as applicable. As of the effective date of this AD, only Airbus Service Bulletin A300–57–6017, Revision 04, including Appendix 1, dated February 24, 2011, may be used for the actions in this paragraph.

(i) For airplanes not inspected prior to September 1, 1999 (the effective date of AD 99–16–01), as specified in Airbus Service Bulletin A300–57–6017, dated November 22, 1993; or Revision 01, including Appendix 1, dated July 25, 1994: Inspect at the time specified in paragraph (g)(4)(i)(A), (g)(4)(i)(B), or (g)(4)(i)(C) of this AD, as applicable. Accomplishment of this inspection terminates the requirements of paragraph (g)(1) of this AD.

(A) For airplanes that have accumulated 17,300 total landings or fewer as of the effective date of this AD: Inspect prior to the accumulation of 17,300 total landings, or within 1,500 landings after September 1, 1999 (the effective date of AD 99–16–01), whichever occurs later.

(B) For airplanes that have accumulated 17,301 total landings or more but fewer than 19,300 total landings as of September 1, 1999

(the effective date of AD 99–16–01): Inspect within 1,500 landings after September 1, 1999 (the effective date of AD 99–16–01).

(C) For airplanes that have accumulated 19,300 total landings or more as of September 1, 1999 (the effective date of AD 99–16–01): Inspect within 750 landings after September 1, 1999 (the effective date of AD 99–16–01).

(ii) For airplanes on which an HFEC inspection was performed prior to September 1, 1999 (the effective date of AD 99–16–01), in accordance with the requirements of paragraph (g)(1) of this AD, or in accordance with the Accomplishment Instructions of Airbus Service Bulletin A300–57–6017, dated November 22, 1993: Inspect at the time specified in paragraph (g)(4)(ii)(A) or (g)(4)(ii)(B) of this AD, as applicable.

(A) If no cracking was detected during any HFEC inspection accomplished prior to September 1, 1999 (the effective date of AD 99–16–01), and if Airbus Modification 07716 has not been accomplished: Inspect at the time specified in paragraph (g)(4)(ii)(A)(1) or (g)(4)(ii)(A)(2) of this AD, as applicable.

(1) For airplanes having MSNs 465 through 553 inclusive: Inspect within 13,000 landings after the most recent HFEC inspection, and thereafter at intervals not to exceed 8,900 landings. Accomplishment of this inspection constitutes terminating action for the repetitive inspection requirement of paragraph (g)(2)(i)(A) of this AD.

(2) For airplanes having MSNs 252 through 464 inclusive: Inspect within 8,400 landings after the most recent HFEC inspection, and thereafter at intervals not to exceed 5,500 landings. Accomplishment of this inspection constitutes terminating action for the repetitive inspection requirement of paragraph (g)(2)(i)(B) of this AD.

(B) If any cracking was detected during any HFEC inspection performed prior to the effective date of this AD, regardless of the method of repair, or if Airbus Modification 07716 has been accomplished: Inspect at the time specified in paragraph (g)(4)(ii)(B)(1) or (g)(4)(ii)(B)(2) of this AD, as applicable.

(1) For airplanes having MSNs 465 through 553 inclusive: Inspect within 11,800 landings after the most recent HFEC inspection, and thereafter at intervals not to exceed 8,200 landings. Accomplishment of this inspection constitutes terminating action for the repetitive inspection requirement of paragraph (g)(3)(i) or (g)(3)(ii) of this AD, as applicable.

(2) For airplanes having MSNs 252 through 464 inclusive: Inspect within 10,700 landings after the initial inspection in accordance with paragraph (g)(1) of this AD, or within 7,500 landings after the most recent HFEC inspection, whichever occurs later, and thereafter at intervals not to exceed 4,900 landings. Accomplishment of this inspection constitutes terminating action for the repetitive inspection requirement of paragraph (g)(3)(i) or (g)(3)(ii) of this AD, as applicable.

(5) If no cracking is detected during the ultrasonic inspection required by paragraph (g)(4)(i) of this AD, repeat that inspection thereafter at the time specified in paragraph (g)(5)(i) or (g)(5)(ii) of this AD, as applicable, until the initial ultrasonic inspection required by paragraph (h) of this AD is done.

(i) For airplanes having MSNs 465 through 553 inclusive: Repeat the inspection at intervals not to exceed 8,900 landings.

(ii) For airplanes having MSNs 232 through 464 inclusive: Repeat the inspection at intervals not to exceed 5,500 landings.

(6) If any cracking is detected during any inspection performed in accordance with the requirements of paragraph (g)(4) or (g)(5) of this AD: Prior to further flight, repair in accordance with a method approved by the Manager, International Branch, ANM-116; or the Direction Générale de l'Aviation Civile (or its delegated agent); or the European Aviation Safety Agency (EASA); or Airbus's EASA Design Organization Approval (DOA).

**Note 1 to paragraph (g) of this AD:** Airbus Service Bulletin A300-57-6017, Revision 01, including Appendix 1, dated July 25, 1994; and Airbus Service Bulletin A300-57-6017, Revision 04, including Appendix 1, dated February 24, 2011; also reference Airbus Service Bulletin A300-57-6020, dated November 22, 1993, as an additional source of service information for installation of oversize studs in the bolt holes.

#### (h) New Repetitive Inspections

At the applicable times specified in paragraph 1.B.(5), "Accomplishment Timescale," of Airbus Service Bulletin A300-57-6017, Revision 04, including Appendix 1, dated February 24, 2011: Do ultrasonic inspections to detect cracks in the MLG attachment fitting holes on the wing rear spar, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A300-57-6017, Revision 04, including Appendix 1, dated February 24, 2011. Repeat the inspections thereafter at the applicable intervals specified in paragraph 1.B.(5), "Accomplishment Timescale," of Airbus Service Bulletin A300-57-6017, Revision 04, including Appendix 1, dated February 24, 2011. For airplanes modified as specified in Airbus Service Bulletin A300-57-6073, the initial inspection threshold is counted from the completion date of the modification. Clarification of compliance time terminology used in table 1, "Structural Inspection Program," of Airbus Service Bulletin A300-57-6017, Revision 04, including Appendix 1, dated February 24, 2011, is provided in paragraphs (h)(1) through (h)(4) of this AD. Accomplishment of the initial inspection terminates the repetitive inspections required by paragraph (g)(5) of this AD.

(1) For pre-Airbus Modification 07716 or pre-Airbus Modification 11440 airplanes:

(i) The term "flight cycles" in the "Inspection Threshold" column is total flight cycles accumulated by the airplane.

(ii) The term "flight hours" in the "Inspection Threshold" column is total flight hours accumulated by the airplane.

(2) For post-Airbus Modification 07716 airplanes:

(i) The term "flight cycles" in the "Inspection Threshold" column is total flight cycles accumulated by the airplane.

(ii) The term "flight hours" in the "Inspection Threshold" column is total flight hours accumulated by the airplane.

(3) For post-Airbus Modification 11440 (Airbus Service Bulletin A300-57-6073) airplanes:

(i) The term "flight cycles" in the "Inspection Threshold" column is flight cycles accumulated by the airplane after the modification was done.

(ii) The term "flight hours" in the "Inspection Threshold" column is flight hours accumulated by the airplane after the modification was done.

(4) For post-Airbus Modification 07601 airplanes:

(i) The term "flight cycles" in the "Inspection Threshold" column is total flight cycles accumulated by the airplane.

(ii) The term "flight hours" in the "Inspection Threshold" column is total flight hours accumulated by the airplane.

#### (i) Repairs

If any crack is found during any inspection required by paragraph (h) of this AD: Before further flight, repair using a method approved by the Manager, International Branch, ANM-116, Transport Airplane Directorate, FAA; or the EASA; or Airbus's EASA DOA.

#### (j) Non-Terminating Repair

Accomplishment of any repair as required by paragraph (i) of this AD is not terminating action for the repetitive inspections required by paragraph (g) or (h) of this AD.

#### (k) Credit for Previous Actions

This paragraph provides credit for actions required by paragraphs (g) and (h) of this AD, if those actions were performed before the effective date of this AD using any of the following service information.

(1) Airbus Service Bulletin A300-57-6017, dated November 22, 1993, which is not incorporated by reference in this AD.

(2) Airbus Service Bulletin A300-57-6017, Revision 01, including Appendix 1, dated July 25, 1994, which was incorporated by reference in AD 95-20-02 and is retained in this AD.

(3) Airbus Service Bulletin A300-57-6017, Revision 02, dated January 14, 1997, including Appendix 1, dated July 25, 1994, which is not incorporated by reference in this AD.

(4) Airbus Service Bulletin A300-57-6017, Revision 03, including Appendix 1, dated November 19, 1997, which was incorporated by reference in AD 99-16-01, but is not retained in this AD.

#### (l) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM-116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Dan Rodina, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057-3356; telephone: 425-227-2125; fax: 425-227-

1149. Information may be emailed to: 9-ANM-116-AMOC-REQUESTS@faa.gov.

(i) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(ii) AMOCs approved previously for AD 99-16-01 are approved as AMOCs for the corresponding provisions of this AD.

(2) *Contacting the Manufacturer:* As of the effective date of this AD, for any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM-116, Transport Airplane Directorate, FAA; or EASA; or Airbus's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

#### (m) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2013-0180, dated August 9, 2013, for related information. This MCAI may be found in the AD docket on the Internet at <http://www.regulations.gov> searching for and locating Docket No. FAA-2015-4813.

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (n)(5) and (n)(6) of this AD.

#### (n) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless this AD specifies otherwise.

(3) The following service information was approved for IBR on July 15, 2016.

(i) Airbus Service Bulletin A300-57-6017, Revision 04, including Appendix 1, dated February 24, 2011.

(ii) Reserved.

(4) The following service information was approved for IBR on November 9, 1995 (60 FR 52618, October 10, 1995).

(i) Airbus Service Bulletin A300-57-6017, Revision 01, including Appendix 1, dated July 25, 1994.

(ii) Reserved.

(5) For service information identified in this AD, contact Airbus SAS, Airworthiness Office—EAW, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email [account.airworth-eas@airbus.com](mailto:account.airworth-eas@airbus.com); Internet <http://www.airbus.com>.

(6) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425-227-1221.

(7) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call

202–741–6030, or go to: <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

Issued in Renton, Washington, on May 18, 2016.

**Dionne Palermo,**

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

[FR Doc. 2016–12324 Filed 6–9–16; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA–2015–2134; Directorate Identifier 2015–CE–012–AD; Amendment 39–18547; AD 2016–11–20]

**RIN 2120–AA64**

#### **Airworthiness Directives; B/E Aerospace Protective Breathing Equipment Part Number 119003–11**

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

**ACTION:** Final rule.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for certain B/E Aerospace protective breathing equipment (PBE) that is installed on airplanes. This AD was prompted by a report of a PBE catching fire upon activation by a crewmember. This AD requires replacing the PBE. We are issuing this AD to correct the unsafe condition on these products.

**DATES:** This AD is effective July 15, 2016.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of July 15, 2016.

**ADDRESSES:** For service information identified in this final rule, contact B/E Aerospace, Inc., Commercial Aircraft Products Group, 10800 Pflumm Road, Lenexa, Kansas 66215; phone: (913) 338–9800; fax: (913) 338–8419; Internet: [www.beaerospace.com](http://www.beaerospace.com). You may view this referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148. It is also available on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA–2015–2134.

#### **Examining the AD Docket**

You may examine the AD docket on the Internet at <http://www.regulations.gov> by searching for

and locating Docket No. FAA–2015–2134; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800–647–5527) is Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

#### **FOR FURTHER INFORMATION CONTACT:**

David Enns, Aerospace Engineer, Wichita Aircraft Certification Office, FAA, 1801 S. Airport Road, Room 100, Wichita, Kansas 67209; phone: (316) 946–4147; fax: (316) 946–4107; email: [david.enns@faa.gov](mailto:david.enns@faa.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **Discussion**

We issued a supplemental notice of proposed rulemaking (SNPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain B/E Aerospace protective breathing equipment (PBE) that is installed on airplanes. The SNPRM published in the **Federal Register** on January 15, 2016 (81 FR 2131). We preceded the SNPRM with a notice of proposed rulemaking (NPRM) that published in the **Federal Register** on June 16, 2015 (80 FR 34330). The NPRM proposed to require inspecting the PBE to determine if the pouch has the proper vacuum seal and replacing if necessary. The NPRM was prompted by a report of a PBE catching fire upon activation by a crewmember. The SNPRM proposed to require replacement of the PBE following newly issued service information, regardless of inspection results. We are issuing this AD to correct the unsafe condition on these products.

##### **Comments**

We gave the public the opportunity to participate in developing this AD. We have considered the comments received. We received one anonymous comment in support of the SNPRM (81 FR 2131, January 15, 2016).

##### **Request To Change Compliance Time**

Penney Baudin of United Airlines requested a change to the PBE replacement compliance time.

The commenter requested a 12-month repetitive inspection with a 36-month terminating replacement action. The commenter stated that the change would alleviate restrictive shipping means and complex distribution of the PBEs since the units contain oxygen generators.

We do not agree with the commenter. We believe that the replacement compliance time of 18 months after the effective date of this AD is sufficient time since we are allowing even more time than specified in the related service information. Also, the public has been aware of this safety issue since we first published the first NPRM on June 16, 2015 (80 FR 34330). We have not changed the final rule AD action based on this comment.

##### **Request To Correct Service Information**

John Barker of B/E Aerospace stated that Service Bulletin 119003–35–009, dated November 9, 2015, is incorrectly referenced as Rev. 009 instead of Rev. 000 in the preamble of the SNPRM (81 FR 2131, January 15, 2016). The commenter requested the reference to the revision number be corrected.

We agree with the commenter. However, on April 12, 2016, Rev. 001 of B/E Aerospace Service Bulletin 119003–35–009 was released. We are incorporating the Revision 001, dated April 12, 2016, into the final rule AD action because the procedures for doing the inspection and replacement of the PBE have not changed.

We have changed the final rule AD action to include the newly revised service bulletin and to give credit to owners/operators who may have already done the required replacement following B/E Aerospace Service Bulletin No. 119003–35–009, Rev. 000, dated November 9, 2015, which was correctly referenced in paragraph (h) of the regulatory text in the SNPRM (81 FR 2131, January 15, 2016).

##### **Conclusion**

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

- Are consistent with the intent that was proposed in the SNPRM (81 FR 2131, January 15, 2016) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the SNPRM (81 FR 2131, January 15, 2016).

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

We reviewed B/E Aerospace Service Bulletin No. 119003–35–011, Rev. 000, dated February 4, 2015, and B/E Aerospace Service Bulletin 119003–35–009, Rev. 001, dated April 12, 2016. B/E Aerospace Service Bulletin No. 119003–35–011, Rev. 000, dated

February 4, 2015, describes procedures for inspecting PBE, part number (P/N) 119003–11, to determine if the vacuum seal of the pouch containing the PBE is compromised. B/E Aerospace Service Bulletin 119003–35–009, Rev. 001, dated April 12, 2016, describes procedures for replacing PBE P/N 119003–11 with P/N 119003–21. This service information is reasonably available because the interested parties have access to it through their normal

course of business or by the means identified in the **ADDRESSES** section.

#### Differences Between This AD and the Service Information

B/E Aerospace Service Bulletin No. 119003–35–011, Rev. 000, dated February 4, 2015, applies to all PBE with P/N 119003–11 and P/N 119003–21. We have determined that this AD will apply only to a PBE P/N 119003–11 with regard to the inspection requirement of paragraph (g) of this AD.

B/E Aerospace Service Bulletin 119003–35–009, Rev. 001, dated April 12, 2016, includes instructions for disposal. In this AD, we are requiring only the replacement action.

#### Costs of Compliance

We estimate that this AD affects 9,000 products installed on airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

#### ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspecting the pouch containing the PBE for proper vacuum seal.	.5 work-hour × \$85 per hour = \$42.50 .....	Not applicable	\$42.50	\$382,500
Replace the PBE P/N 119003–11 with a PBE P/N 119003–21.	.5 work-hour × \$85 per hour = \$42.50 .....	1,510 .....	1,552.50	13,972,500

#### Authority for This Rulemaking

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

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

#### Regulatory Findings

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

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

- (1) Is not a "significant regulatory action" under Executive Order 12866,
- (2) Is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),
- (3) Will not affect intrastate aviation in Alaska, and

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

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

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

#### Adoption of the Amendment

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

#### PART 39—AIRWORTHINESS DIRECTIVES

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

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

#### § 39.13 [Amended]

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

**2016–11–20 B/E Aerospace:** Amendment 39–18547; FAA–2015–2134; Directorate Identifier 2015–CE–012–AD.

#### (a) Effective Date

This AD is effective July 15, 2016.

#### (b) Affected ADs

None.

#### (c) Applicability

This AD applies to B/E Aerospace Protective Breathing Equipment (PBE), part number (P/N) 119003–11, that is installed on airplanes.

#### (d) Subject

Joint Aircraft System Component (JASC)/ Air Transport Association (ATA) of America Code 35; Oxygen.

#### (e) Unsafe Condition

This AD was prompted by a report of a PBE, P/N 119003–11, catching fire upon activation by a crewmember. We are issuing this AD to correct the unsafe condition on these products.

#### (f) Compliance

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

#### (g) Inspection

Within 3 months after July 15, 2016 (the effective date of this AD), while still in the stowage box, physically inspect the PBE pouch to determine if it has an intact vacuum seal. Do this inspection following paragraph III.A.1. of the Accomplishment Instructions in B/E Aerospace Service Bulletin No. 119003–35–011, Rev. 000, dated February 4, 2015.

#### (h) Replacement

(1) *If a PBE pouch is found that does not have an intact vacuum seal during the inspection required in paragraph (g) of this AD:* Before further flight or following existing minimum equipment list (MEL) procedures, replace the PBE with a PBE, P/N 119003–21, following paragraphs III.C., III.D.(4), III.D.(6), and III.D.(7) of the Accomplishment Instructions in B/E Aerospace Service Bulletin No. 119003–35–009, Rev. 001, dated April 12, 2016, or replace it with another FAA-approved serviceable PBE.

(2) *If a PBE pouch is found during the inspection required in paragraph (g) of this AD where the vacuum seal is intact:* Within 18 months after July 15, 2016 (the effective date of this AD), remove PBE, P/N 119003–11, and replace the PBE with PBE, P/N 119003–21, following paragraphs III.C., III.D.(4), III.D.(6), and III.D.(7) of the Accomplishment Instructions in B/E

Aerospace Service Bulletin No. 119003-35-009, Rev. 001, dated April 12, 2016, or replace it with another FAA-approved serviceable PBE.

#### (i) Credit for Actions Done Following Previous Service Information

If you performed the replacement action required in paragraphs (h)(1) and (2) of this AD before July 15, 2016 (the effective date of this AD) using B/E Aerospace Service Bulletin No. 119003-35-009, Rev. 000, dated November 9, 2015, you met the requirements of those paragraphs of this AD.

#### (j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Wichita Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in paragraph (k) of this AD.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

#### (k) Related Information

For more information about this AD, contact David Enns, Aerospace Engineer, Wichita ACO, FAA, 1801 S. Airport Road, Room 100, Wichita, Kansas 67209; phone: (316) 946-4147; fax: (316) 946-4107; email: david.enns@faa.gov.

#### (l) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) B/E Aerospace Service Bulletin No. 119003-35-009, Rev. 001, dated April 12, 2016.

(ii) B/E Aerospace Service Bulletin No. 119003-35-011, Rev. 000, dated February 4, 2015.

(3) For B/E Aerospace, Inc. service information identified in this AD, contact B/E Aerospace, Inc., 10800 Pflumm Road, Commercial Aircraft Products Group, Lenexa, Kansas 66215; phone: (913) 338-9800; fax: (913) 338-8419; Internet: [www.beaerospace.com](http://www.beaerospace.com).

(4) You may view this service information at FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329-4148. It is also available on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2015-2134.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call

202-741-6030, or go to: <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

Issued in Kansas City, Missouri, on May 25, 2016.

Pat Mullen,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016-13250 Filed 6-9-16; 8:45 am]

BILLING CODE 4910-13-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA-2016-5284; Directorate Identifier 2016-CE-006-AD; Amendment 39-18550; AD 2016-12-01]

RIN 2120-AA64

#### Airworthiness Directives; PILATUS AIRCRAFT LTD. Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for PILATUS AIRCRAFT LTD. Models PC-12, PC-12/45, PC-12/47, and PC-12/47E airplanes. This AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as incorrect installation instructions of the torlon plates in the airplane maintenance manual resulting in the incorrect installation of the torlon plates in the forward wing-to-fuselage attachment. We are issuing this AD to require actions to address the unsafe condition on these products.

**DATES:** This AD is effective July 15, 2016.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of July 15, 2016.

**ADDRESSES:** You may examine the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2016-5284; or in person at Document Management Facility, U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590.

For service information identified in this AD, contact PILATUS AIRCRAFT LTD., Customer Support Manager, CH-

6371 STANS, Switzerland; phone: +41 (0)41 619 33 33; fax: +41 (0)41 619 73 11; email: [SupportPC12@pilatus-aircraft.com](mailto:SupportPC12@pilatus-aircraft.com); internet: <http://www.pilatus-aircraft.com>. You may view this referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329-4148. It is also available on the Internet at <http://www.regulations.gov> by searching for Docket No. FAA-2016-5284.

#### FOR FURTHER INFORMATION CONTACT:

Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329-4059; fax: (816) 329-4090; email: [doug.rudolph@faa.gov](mailto:doug.rudolph@faa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to PILATUS AIRCRAFT LTD. Models PC-12, PC-12/45, PC-12/47, and PC-12/47E airplanes. The NPRM was published in the **Federal Register** on March 28, 2016 (81 FR 17107). The NPRM proposed to correct an unsafe condition for the specified products and was based on mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country. The MCAI states:

Incorrect installations of torlon plates in the forward lower wing-to-fuselage attachment were reported on aeroplanes in service. Investigation determined that wrong torlon plate installation instructions were published in June 2007 in Revision (Rev.) 18 to 27 of the Aircraft Maintenance Manual (AMM) 02049, Data Module (DM) 12-A-57-00-00A-520A-A and DM 12-A-57-00-00A-720A-A, for the PC-12, PC-12/45 and PC-12/47 aeroplanes, and in the initial issue to Rev. 10 of AMM 02300, in DM 12-B-57-00-00A-520A-A and DM 12-B-57-00-00A-720A-A, for PC-12/47E aeroplanes.

This condition, if not corrected, could lead to additional loads at the wing-to-fuselage interface, which detrimentally affects the fatigue life of the structural joint.

To address this potential unsafe condition, Pilatus issued Service Bulletin (SB) No. 57-007 to provide inspection instructions to verify the correct installation of torlon plates in the wing-to-fuselage attachments, and the rectification instructions for incorrect installed torlon plates.

For the reason described above, this AD requires a one-time inspection of the forward lower wing-to-fuselage attachments, both left hand (LH) and right hand (RH) sides and, depending on findings, accomplishment of applicable corrective action(s).

The MCAI can be found in the AD docket on the Internet at: <https://www.regulations.gov>

[www.regulations.gov/](http://www.regulations.gov/)  
#!documentDetail;D=FAA-2016-5284-0002.

## Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM (81 FR 17107, March 28, 2016) or on the determination of the cost to the public.

## Conclusion

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

- Are consistent with the intent that was proposed in the NPRM (81 FR 17107, March 28, 2016) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (81 FR 17107, March 28, 2016).

## Related Service Information Under 1 CFR Part 51

We reviewed PILATUS AIRCRAFT LTD. PC-12 Service Bulletin No: 57-007, dated September 29, 2015. The service information describes procedures for inspection, and if necessary realignment or replacement of the torlon plates in the forward lower wing-to-fuselage attachments. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section of the AD.

## Costs of Compliance

We estimate that this AD will affect 268 products of U.S. registry. We also estimate that it would take about 1 work-hour per wing per product to comply with the basic requirements of this AD. The average labor rate is \$85 per work-hour.

Based on these figures, we estimate the cost of the AD on U.S. operators to be \$45,560, or \$170 per product.

In addition, we estimate that any necessary follow-on actions would take about 3 work-hours per wing and require parts costing \$1,000 per wing, for a total cost of \$2,510 per product. We have no way of determining the number of products that may need these actions.

According to the manufacturer, some of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected individuals. We do not control warranty coverage for affected individuals. As a result, we

have included all costs in our cost estimate.

## Authority for This Rulemaking

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

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

## Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

## Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2016-5284; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647-5527) is in the **ADDRESSES** section.

Comments will be available in the AD docket shortly after receipt.

## List of Subjects in 14 CFR Part 39

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

## Adoption of the Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

- 2. The FAA amends § 39.13 by adding the following new AD:

#### 2016-12-01 Pilatus Aircraft LTD.:

Amendment 39-18550; Docket No. FAA-2016-5284; Directorate Identifier 2016-CE-006-AD.

#### (a) Effective Date

This airworthiness directive (AD) becomes effective July 15, 2016.

#### (b) Affected ADs

None.

#### (c) Applicability

This AD applies to PILATUS AIRCRAFT LTD. PC-12, PC-12/45, PC-12/47, and PC-12/47E airplanes, all serial numbers delivered before January 1, 2015, certificated in any category.

Note 1 to paragraph (c) of this AD: The date of delivery may be found as the issue date of the EASA Form 52, which is part of the airplane records.

#### (d) Subject

Air Transport Association of America (ATA) Code 57: Wings.

#### (e) Reason

This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as incorrect installation instructions of the torlon plates in the airplane maintenance manual resulting in the incorrect installation of the torlon plates in the forward wing-to-fuselage attachment. We are issuing this AD to identify and correct incorrectly installed torlon plates which could cause additional loads affecting the fatigue life at the wing-to-fuselage interface.

#### (f) Actions and Compliance

Do the actions in paragraphs (f)(1) through (4) of this AD. If paragraphs (f)(1), (2), and (3) of this AD have already been done before July 15, 2016 (the effective date of this AD), then only paragraph (f)(4) of this AD applies.

(1) *For any airplane that has had a wing removed and reinstalled or replaced between June 2007 and July 15, 2016 (the effective date of this AD):* Within the next 12 months after July 15, 2016 (the effective date of this AD), inspect the torlon plates in the forward lower wing-to-fuselage attachments (both left hand (LH) and right hand (RH) sides) for correct installation following the accomplishment instructions in PILATUS AIRCRAFT LTD. PC-12 Service Bulletin No: 57-007, dated September 29, 2015.

(2) *For any airplane that has had a wing removed and reinstalled or replaced, between June 2007 and July 15, 2016 (the effective date of this AD):* If an incorrect installation of the torlon plates is found during the inspection required in paragraph (f)(1) of this AD, remove the affected torlon plates, visually inspect the torlon plates and the affected lugs using a mirror and light source (if necessary) for any damage, and reinstall the torlon plates in the correct sequence, following the accomplishment instructions in paragraph 3.C. of PILATUS AIRCRAFT LTD. PC-12 Service Bulletin No: 57-007, dated September 29, 2015.

(3) *For any airplane that has had a wing removed and reinstalled or replaced, between June 2007 and July 15, 2016 (the effective date of this AD):* If any damage is found during the inspection of the torlon plates and lugs required in paragraph (f)(2) of this AD, before further flight, contact PILATUS AIRCRAFT LTD. for FAA-approved repair instructions and accomplish those instructions accordingly. You may find contact information for PILATUS AIRCRAFT LTD. in paragraph (h) of this AD.

(4) *For all airplanes:* As of July 15, 2016 (the effective date of this AD), do not install or re-install a wing on any airplane, unless concurrent with the wing installation, the torlon plates of the forward lower wing-to-fuselage attachment (both LH and RH sides) of the airplane are inspected and found to be installed correctly in accordance with the accomplishment instructions in paragraph 3.B. of PILATUS AIRCRAFT LTD. PC-12 Service Bulletin No: 57-007, dated September 29, 2015.

**Note 2 to paragraph (f)(4) of this AD:** Installation of a wing on an airplane in accordance with the instructions of PILATUS aircraft maintenance manual (AMM) 02049, Revision 28 or later, or AMM 02300, Revision 11 or later, is an acceptable alternative method to comply with this inspection requirement.

#### (g) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329-4059; fax: (816) 329-4090; email: [doug.rudolph@faa.gov](mailto:doug.rudolph@faa.gov). Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the

FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

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

(3) *Reporting Requirements:* For any reporting requirement in this AD, a federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120-0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES-200.

#### (h) Related Information

Refer to MCAI European Aviation Safety Agency (EASA) AD No.: 2016-0037, dated February 26, 2016, for related information. The MCAI can be found in the AD docket on the Internet at: <https://www.regulations.gov/#/documentDetail;D=FAA-2016-5284-0002>.

#### (i) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) PILATUS AIRCRAFT LTD. PC-12 Service Bulletin No: 57-007, dated September 29, 2015.

(ii) Reserved.

(3) For PILATUS AIRCRAFT LTD. service information identified in this AD, contact PILATUS AIRCRAFT LTD., Customer Support Manager, CH-6371 STANS, Switzerland; phone: +41 (0)41 619 33 33; fax: +41 (0)41 619 73 11; email: [SupportPC12@pilatus-aircraft.com](mailto:SupportPC12@pilatus-aircraft.com); Internet: <http://www.pilatus-aircraft.com>.

(4) You may view this service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329-4148. In addition, you can access this service information on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2016-5284.

(5) You may view this service information that is incorporated by reference at the

National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

Issued in Kansas City, Missouri, on June 1, 2016.

**Pat Mullen,**

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

[FR Doc. 2016-13372 Filed 6-9-16; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA-2016-4878; Directorate Identifier 2016-CE-001-AD; Amendment 39-18551; AD 2016-12-02]

RIN 2120-AA64

#### Airworthiness Directives; Various Aircraft Equipped With BRP-Powertrain GmbH & Co KG 912 A Series Engine

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

**ACTION:** Final rule.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for various aircraft equipped with a BRP-Powertrain GmbH & Co KG (formerly Rotax Aircraft Engines) 912 A series engine. This AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as a design change of the engine cylinder head temperature sensor without a concurrent revision of the engine model designation, the engine part number, or the cockpit indication to the pilot. We are issuing this AD to require actions to address the unsafe condition on these products.

**DATES:** This AD is effective July 15, 2016.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of July 15, 2016.

**ADDRESSES:** You may examine the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2016-4878; or in person at Document Management Facility, U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor,

Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590.

For service information identified in this AD, contact BRP-Powertrain GmbH & Co. KG, Welser Strasse 32, A-4623 Gunskirchen, Austria; phone: +43 7246 601 0; fax: +43 7246 601 9130; Internet: [www.rotax-aircraft-engines.com](http://www.rotax-aircraft-engines.com). You may view this referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329-4148. It is also available on the Internet at <http://www.regulations.gov> by searching for Docket No. FAA-2016-4878.

**FOR FURTHER INFORMATION CONTACT:** Jim Rutherford, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329-4165; fax: (816) 329-4090; email: [jim.rutherford@faa.gov](mailto:jim.rutherford@faa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to various aircraft equipped with a BRP-Powertrain GmbH & Co KG (formerly Rotax Aircraft Engines) 912 A series engine. The NPRM was published in the **Federal Register** on March 28, 2016 (81 FR 17109). The NPRM proposed to correct an unsafe condition for the specified products and was based on mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country. The MCAI states:

A design change of the engine cylinder heads was introduced by BRP-Powertrain in March 2013 which modifies the engine/ aircraft interfaces by substituting the previous cylinder head temperature (CHT) measurement (limit temperature 135 °C/150 °C) with a coolant temperature (CT) measurement (limit temperature 120 °C). The design change was communicated on 15 May 2013 by BRP-Powertrain Service Instruction (SI) 912-020R7/914-022R7 (single document) but was not identified by a change of the engine model designation or of the engine P/N, but only through the cylinder head P/N and the position of the temperature sensor.

Consequently, engines with the new cylinder heads (installed during production or replaced in-service during maintenance) may be installed on an aircraft without concurrent modification of that aircraft, instructions for which should be provided by the Type Certificate (TC) holder or Supplemental Type Certificate (STC) holder, as applicable. In this case, the coolant temperature with a maximum engine operating limit of 120 °C (valid for engines operated with water diluted glycol coolant) is displayed on a CHT indicator with a typical

limit marking (red radial/range) of more than 120 °C.

This condition, if not detected and corrected, will prevent the pilot to identify coolant limit exceedances, with subsequent loss of coolant (120 °C is the boiling temperature of the coolant), which could lead to engine in-flight shut-down, possibly resulting in a forced landing, with consequent damage to the aircraft and injury to occupants.

BRP-Powertrain published revised SI-912-020R8/914-022R8 to clarify that, on the new cylinder heads, the coolant temperature, instead of the cylinder head temperature in the aluminum, is measured. EASA issued SIB 2014-34 to raise awareness that installation of affected engines and spare parts, without concurrent incorporation of aircraft TC/STC holder approved modifications, and even if unintended and unnoticed by production or maintenance, constitutes an unapproved aircraft modification.

Since EASA published the SIB, further investigation has finally determined that sufficient reason exists to warrant AD action.

For the reason stated above, this AD requires a one-time inspection to determine the actual engine configuration and, depending on findings, engine reidentification and (depending on TC or STC holder installation) modification of the affected aircraft. This also affects engines that are operated with waterless coolant.

The MCAI can be found in the AD docket on the Internet at <https://www.regulations.gov/#!documentDetail;D=FAA-2016-4878-0002>.

##### Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM (81 FR 17109, March 28, 2016) or on the determination of the cost to the public.

##### Conclusion

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

- Are consistent with the intent that was proposed in the NPRM (81 FR 17109, March 28, 2016) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (81 FR 17109, March 28, 2016).

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

We reviewed BRP-Powertrain GmbH & CO KG issued Rotax Aircraft Engines BRP Service Bulletin SB-912-068 and SB-914-049 (co-published as one document), dated April 16, 2015. The service information describes procedures for re-identifying the engine

that has new cylinder heads, part numbers 413235 and 413236 installed. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section of the AD.

##### Costs of Compliance

We estimate that this AD will affect 65 products of U.S. registry.

We also estimate that it will take about 1 work-hour per product to comply with the engine re-identification requirement of this AD. The average labor rate is \$85 per work-hour.

Based on these figures, we estimate the cost of this portion of this AD on U.S. operators to be \$5,525, or \$85 per product.

We also estimate that it will take about 1 work-hour per product to comply with the engine installation modification to indicate a Maximum Coolant Temperature requirement of this AD. The average labor rate is \$85 per work-hour.

Based on these figures, we estimate the cost of this portion of this AD on U.S. operators to be \$5,525, or \$85 per product.

We also estimate that it will take about 1.5 work-hours per product to comply with the cylinder head replacement option of this AD. The average labor rate is \$85 per work-hour. Required parts will cost about \$2,500 to replace a single engine cylinder head.

Based on these figures, we estimate the cost of this portion of this AD on U.S. operators to be \$2,627.50 per engine cylinder head.

##### Authority for This Rulemaking

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

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

## Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

## List of Subjects in 14 CFR Part 39

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

## Adoption of the Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

## § 39.13 [Amended]

- 2. The FAA amends § 39.13 by adding the following new AD:

**2016–12–02 Various Aircraft:** Amendment 39–18551; Docket No. FAA–2016–4878; Directorate Identifier 2016–CE–001–AD.

### (a) Effective Date

This airworthiness directive (AD) becomes effective July 15, 2016.

### (b) Affected ADs

None.

### (c) Applicability

This AD applies to all serial numbers of the airplanes listed in table 1 of paragraph (c) of this AD, that are:

- (1) equipped with a BRP-Powertrain GmbH & Co KG (formerly Rotax Aircraft Engines) 912 A series engine with a part number (P/N) 413235 or 413236 cylinder head installed in position 2 or 3; and
- (2) certificated in any category.

TABLE 1 OF PARAGRAPH (c)—AFFECTED AIRPLANES

Type certificate holder	Aircraft model	Engine model
Aeromot-Indústria Mecânico-Metalúrgica Ltda .....	AMT–200 .....	912 A2
Diamond Aircraft Industries .....	HK 36 R “SUPER DIMONA” .....	912 A
DIAMOND AIRCRAFT INDUSTRIES GmbH .....	HK 36 TS and HK 36 TC .....	912 A3
Diamond Aircraft Industries Inc. ....	DA20–A1 .....	912 A3
HOAC-Austria .....	DV 20 KATANA .....	912 A3
Iniziativa Industriali Italiane S.p.A. ....	Sky Arrow 650 TC .....	912 A2
SCHEIBE-Flugzeugbau GmbH .....	SF 25C .....	912 A2, 912 A3

### (d) Subject

Air Transport Association of America (ATA) Code 72: Engine—Reciprocating.

### (e) Reason

This AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. This AD was prompted by design change of the engine cylinder head temperature sensor without a concurrent revision of the engine model designation, the engine part number, or the cockpit indication to the pilot. The sensor now measures the coolant temperature rather than the cylinder head temperature. If the engine coolant temperature with a maximum engine operating limit of 120 °C is displayed on a Cylinder Head Temperature indicator with a typical limit marking greater than 120 °C, the pilot will be unable to identify coolant temperature limit exceedances. This could result in loss of coolant, which could cause an inflight engine shutdown and forced landing.

### (f) Actions and Compliance

Unless already done, do the following actions:

- (1) Within 6 months after July 15, 2016 (the effective date of this AD), for engines with cylinder heads listed in paragraph (c)(1) of this AD installed on both position 2 and position 3, change the engine model designation on the engine type data plate to

include a “–01” suffix following paragraph 3.1.1) of the Accomplishment/Instructions in Rotax Aircraft Engines BRP Service Bulletin SB–912–068 and SB–914–049 (co-published as one document), dated April 16, 2015.

(2) Within 6 months after July 15, 2016 (the effective date of this AD), for engines with only one cylinder head listed paragraph (c)(1) of this AD installed in a position 2 or 3, in order to keep such cylinder installed, you must replace the cylinder head installed on the unchanged position (2 or 3, as applicable) with a cylinder head having a P/N listed in paragraph (c)(1) of this AD, and change the engine model designation on the engine type data plate to include a “–01” suffix following paragraph 3.1.1) of the Accomplishment/Instructions in Rotax Aircraft Engines BRP Service Bulletin SB–912–068 and SB–914–049 (co-published as one document), dated April 16, 2015.

(3) Before further flight after doing the required actions in paragraphs (f)(1) or (f)(2) of this AD as applicable, modify the aircraft and related documentation to indicate a Maximum Coolant Temperature limit of 120 °C using FAA-approved procedures.

(i) Such procedures can be found by contacting your aircraft type certificate holder or the FAA contact specified in paragraph (g)(1) of this AD. The service documents referenced in paragraph (h) of this AD are examples of FAA-approved procedures for the applicable aircraft.

(ii) These re-identified engines remain eligible for installation on approved aircraft-engine combinations.

(4) As of July 15, 2016 (the effective date of this AD), do not install any other P/N cylinder head unless that installation is done following approved instructions provided by BRP-Powertrain at the address provided in paragraph (i)(3) of this AD.

### (g) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Jim Rutherford, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4165; fax: (816) 329–4090; email: [jim.rutherford@faa.gov](mailto:jim.rutherford@faa.gov). Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

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

**(h) Related Information**

Refer to MCAI European Aviation Safety Agency (EASA) AD No.: 2015-0240, dated December 18, 2015; Rotax Aircraft Engines BRP Service Bulletin SB-912-066 R1/SB-914-047 R1 (published as one document), Revision 1, dated April 23, 2015; Diamond Aircraft Industries GmbH Optional Service Bulletin OSB 36-111, dated September 17, 2015; Diamond Aircraft Industries GmbH Work Instruction WI-OSB 36-111, dated September 17, 2015; Diamond Aircraft Service Bulletin No.: DA20-72-04, dated January 22, 2015; Diamond Aircraft Industries GmbH Optional Service Bulletin OSB 20-066, dated September 17, 2015; Diamond Aircraft Industries GmbH Work Instruction WI-OSB 20-066, dated September 17, 2015; and Scheibe Aircraft GmbH Service Information 02/14-1, dated December 15, 2014, for related information. You may examine the MCAI on the Internet at <https://www.regulations.gov/> #!documentDetail;D=FAA-2016-4878-0002. For information on the availability of the service documents above, contact the FAA, Small Airplane Directorate, at 816-329-4148.

**(i) Material Incorporated by Reference**

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) Rotax Aircraft Engines BRP Service Bulletin SB-912-068 and SB-914-049 (copublished as one document), dated April 16, 2015.

(ii) Reserved.

(3) For BRP-Powertrain GmbH & CO KG service information identified in this AD, contact BRP-Powertrain GmbH & Co. KG, Welser Strasse 32, A-4623 Gunskirchen, Austria; phone: +43 7246 601 0; fax: +43 7246 601 9130; Internet: [www.rotax-aircraft-engines.com](http://www.rotax-aircraft-engines.com).

(4) You may view this service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329-4148. In addition, you can access this service information on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2016-4878.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

Issued in Kansas City, Missouri, on June 1, 2016.

**Pat Mullen,**

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

[FR Doc. 2016-13542 Filed 6-9-16; 8:45 am]

**BILLING CODE 4910-13-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Food and Drug Administration****21 CFR Part 886**

[Docket No. FDA-2016-N-1308]

**Medical Devices; Ophthalmic Devices; Classification of Nasolacrimal Compression Device**

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

**ACTION:** Final order.

**SUMMARY:** The Food and Drug Administration (FDA) is classifying the nasolacrimal compression device into class I (general controls). The Agency is classifying the device into class I (general controls) in order to provide a reasonable assurance of safety and effectiveness of the device.

**DATES:** This order is effective June 10, 2016. The classification was applicable on April 20, 2016.

**FOR FURTHER INFORMATION CONTACT:** Daniel Fedorko, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 2414, Silver Spring, MD 20993-0002, 301-796-6620.

**SUPPLEMENTARY INFORMATION:****I. Background**

In accordance with section 513(f)(1) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 360c(f)(1)), devices that were not in commercial distribution before May 28, 1976 (the date of enactment of the Medical Device Amendments of 1976), generally referred to as postamendments devices, are classified automatically by statute into class III without any FDA rulemaking process. These devices remain in class III and require premarket approval, unless and until the device is classified or reclassified into class I or II, or FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the FD&C Act, to a predicate device that does not require premarket approval. The Agency determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and part 807 (21 CFR part 807) of the regulations.

Section 513(f)(2) of the FD&C Act, as amended by section 607 of the Food and Drug Administration Safety and Innovation Act (Pub. L. 112-144), provides two procedures by which a person may request FDA to classify a

device under the criteria set forth in section 513(a)(1) of the FD&C Act. Under the first procedure, the person submits a premarket notification under section 510(k) of the FD&C Act for a device that has not previously been classified and, within 30 days of receiving an order classifying the device into class III under section 513(f)(1) of the FD&C Act, the person requests a classification under section 513(f)(2). Under the second procedure, rather than first submitting a premarket notification under section 510(k) of the FD&C Act and then a request for classification under the first procedure, the person determines that there is no legally marketed device upon which to base a determination of substantial equivalence and requests a classification under section 513(f)(2) of the FD&C Act. If the person submits a request to classify the device under this second procedure, FDA may decline to undertake the classification request if FDA identifies a legally marketed device that could provide a reasonable basis for review of substantial equivalence with the device or if FDA determines that the device submitted is not of “low-moderate risk” or that general controls would be inadequate to control the risks and special controls to mitigate the risks cannot be developed.

In response to a request to classify a device under either procedure provided by section 513(f)(2) of the FD&C Act, FDA will classify the device by written order within 120 days. This classification will be the initial classification of the device.

On June 27, 2014, Innovavet, Inc., submitted a request for classification of the Tear Duct Occluder (originally referred to as the Glaucoma Companion Nasolacrimal Compression Device) under section 513(f)(2) of the FD&C Act. The manufacturer recommended that the device be classified into class I (Ref. 1).

In accordance with section 513(f)(2) of the FD&C Act, FDA reviewed the request in order to classify the device under the criteria for classification set forth in section 513(a)(1) of the FD&C Act. FDA classifies devices into class I if general controls by themselves are sufficient to provide reasonable assurance of safety and effectiveness of the device for its intended use. After review of the information submitted in the de novo request, FDA determined that the device can be classified into class I. FDA believes general controls will provide reasonable assurance of the safety and effectiveness of the device.

Therefore, on April 20, 2016, FDA issued an order to the requestor classifying the device into class I. FDA

is codifying the classification of the device by adding 21 CFR 886.5838.

The device is assigned the generic name nasolacrimal compression device, and it is identified as a prescription device that is fitted to apply mechanical pressure to the nasal aspect of the orbital rim to reduce outflow through the nasolacrimal ducts.

The risks to health that may be associated with use of the nasolacrimal compression device are improper fit of the device (extended or aggressive use of this device may cause sequelae such as bruising and/or soreness) and improper use of the device (for the uncoordinated, a corneal abrasion may occur inadvertently). General controls of the FD&C Act, including compliance with the labeling requirements in 21 CFR part 801 and the Quality System Regulation (21 CFR part 820), are sufficient to mitigate these risks and reasonably assure safety and effectiveness. FDA believes that the general controls provide reasonable assurance of safety and effectiveness.

The nasolacrimal compression device is not safe for use except under the supervision of a practitioner licensed by law to direct the use of the device. As such, the device is a prescription device and must satisfy prescription labeling requirements (see 21 CFR 801.109, *Prescription devices*).

Section 510(l) of the FD&C Act provides that a class I device is not subject to the premarket notification requirements under section 510(k) of the FD&C Act, unless the device is of substantial importance in preventing impairment of human health or presents a potential unreasonable risk of illness or injury. FDA has determined that the device does meet these criteria and, therefore, premarket notification is not required for the device. Thus, persons who intend to market this device need not submit a premarket notification containing information on the nasolacrimal compression device they intend to market prior to marketing the device, subject to the limitations on exemptions in 21 CFR 886.9.

## II. Analysis of Environmental Impact

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

## III. Paperwork Reduction Act of 1995

This final order refers to previously approved collections of information found in other 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 part 807, subpart E, regarding premarket notification submissions, have been approved under OMB control number 0910–0120; the collections of information in 21 CFR part 820, regarding the quality system regulation, have been approved under OMB control number 0910–0073; and the collections of information in 21 CFR part 801, regarding labeling, have been approved under OMB control number 0910–0485.

## IV. Reference

The following reference is on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, and is available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; it is also available electronically at <http://www.regulations.gov>.

1. DEN140022: De novo request from Innovatex, Inc., dated June 27, 2014.

## List of Subjects in 21 CFR Part 886

Medical devices, Ophthalmic goods and services.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 886 is amended as follows:

## PART 886—OPHTHALMIC DEVICES

■ 1. The authority citation for 21 CFR part 886 continues to read as follows:

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

■ 2. Add § 886.5838 to subpart F to read as follows:

### § 886.5838 Nasolacrimal compression device.

(a) *Identification.* A nasolacrimal compression device is a prescription device that is fitted to apply mechanical pressure to the nasal aspect of the orbital rim to reduce outflow through the nasolacrimal ducts.

(b) *Classification.* Class I (general controls). The device is exempt from the premarket notification procedures in subpart E of part 807 of this chapter, subject to the limitations in § 886.9.

Dated: June 6, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–13788 Filed 6–9–16; 8:45 am]

BILLING CODE 4164–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Chapter I

[Docket No. FDA–2015–D–3539]

### Interim Policy on Compounding Using Bulk Drug Substances Under Section 503B of the Federal Food, Drug, and Cosmetic Act; Guidance for Industry; Availability

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

**ACTION:** Notice of availability.

**SUMMARY:** The Food and Drug Administration (FDA or the Agency) is announcing the availability of a guidance for industry entitled “Interim Policy on Compounding Using Bulk Drug Substances Under Section 503B of the Federal Food, Drug, and Cosmetic Act.” The guidance describes FDA’s interim regulatory policy regarding outsourcing facilities that compound human drug products using bulk drug substances while FDA develops the list of bulk drug substances that can be used in compounding under the Federal Food, Drug, and Cosmetic Act (the FD&C Act).

**DATES:** Submit electronic or written comments on Agency guidances at any time.

**ADDRESSES:** You may submit comments as follows:

### Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <http://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <http://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the

manner detailed (see “Written/Paper Submissions” and “Instructions”).

### Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

**Instructions:** All submissions received must include the Docket No. FDA-2015-D-3539 for “Interim Policy on Compounding Using Bulk Drug Substances Under Section 503B of the Federal Food, Drug, and Cosmetic Act”. Received comments will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <http://www.regulations.gov> or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions**—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <http://www.regulations.gov>. Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <http://www.fda.gov/>

[www.regulations.gov](http://www.regulations.gov)/dockets/default.htm.

**Docket:** For access to the docket to read background documents or the electronic and written/paper comments received, go to <http://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of this guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

**FOR FURTHER INFORMATION CONTACT:** Sara Rothman, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 5197, Silver Spring, MD 20993-0002, 301-796-3110.

### SUPPLEMENTARY INFORMATION:

#### I. Background

FDA is announcing the availability of a guidance for industry entitled “Interim Policy on Compounding Using Bulk Drug Substances Under Section 503B of the Federal Food, Drug, and Cosmetic Act.” A new section 503B (21 U.S.C. 353b), added to the FD&C Act by the Drug Quality and Security Act in 2013, describes the conditions that must be satisfied for human drug products compounded by an outsourcing facility to be exempt from the following three sections of the FD&C Act: Section 505 (21 U.S.C. 355) (concerning the approval of drugs under new drug applications or abbreviated new drug applications); section 502(f)(1) (21 U.S.C. 352(f)(1)) (concerning the labeling of drugs with adequate directions for use); and section 582 (21 U.S.C. 360eee-1) (concerning drug supply chain security requirements). One of the conditions that must be met for a drug product compounded by an outsourcing facility to qualify for these exemptions is that the outsourcing facility does not compound drug products using a bulk drug substance unless: It appears on a list established by the Secretary identifying bulk drug substances for which there is a clinical need (see section 503B(a)(2)(A)(i) of the FD&C Act); or the drug compounded from such bulk drug substances appears on

the drug shortage list in effect under section 506E of the FD&C Act (21 U.S.C. 356e) at the time of compounding, distribution, and dispensing (see section 503B(a)(2)(A)(ii) of the FD&C Act).

This guidance describes the conditions under which FDA does not intend to take action against an outsourcing facility for compounding a drug product from a bulk drug substance that does not appear on a list of bulk drug substances that can be used in compounding and is not used to compound a drug product that appears on the FDA drug shortage list at the time of compounding, distribution, and dispensing, while FDA develops the list of bulk drug substances that can be used in compounding pursuant to section 503B(a)(2)(A)(i) of the FD&C Act (503B bulks list).<sup>1</sup>

The guidance also describes FDA’s process to establish the 503B bulks list, and it describes categories of substances that were nominated for inclusion on the 503B bulks list. These categories include:

- **503B Category 1—Bulk Drug Substances Under Evaluation:** These bulk drug substances may be eligible for inclusion on the 503B bulks list, were nominated with sufficient supporting information for FDA to evaluate them, and do not appear on any other list.

- **503B Category 2—Bulk Drug Substances That Raise Significant Safety Risks:** These bulk drug substances were nominated with sufficient supporting information to permit FDA to evaluate them and they may be eligible for inclusion on the 503B bulks list. However, FDA has identified significant safety risks relating to the use of these bulk substances in compounding, and therefore does not intend to adopt the policy described for the bulk substances in Category 1.

- **503B Category 3—Bulk Drug Substances Nominated Without Adequate Support:** These bulk drug substances may be eligible for inclusion on the 503B bulks list but were nominated with insufficient supporting information for FDA to evaluate them. These substances can be re-nominated with sufficient supporting information

<sup>1</sup> Elsewhere in this issue of the **Federal Register**, the Agency is making available a guidance entitled “Interim Policy on Compounding Using Bulk Drug Substances Under Section 503A of the Federal Food, Drug, and Cosmetic Act,” which describes the conditions under which FDA does not intend to take action against a licensed pharmacist in a State-licensed pharmacy or Federal facility, or a licensed physician, for compounding a drug product from a bulk drug substance that cannot otherwise be used in compounding under section 503A of the FD&C Act while FDA develops the list of bulk drug substances that can be used in compounding under section 503A(b)(1)(A)(i)(III).

through a docket that FDA has established.

In the **Federal Register** of October 27, 2015 (80 FR 65768), FDA issued a notice announcing the availability of the draft version of this guidance. The comment period on the draft guidance ended on December 28, 2015. FDA received 11 comments on the draft guidance. In response to received comments or on its own initiative, FDA made several changes to the guidance to clarify particular points. In addition, FDA has made the following updates to the lists on its Web site of bulk drug substances that were nominated for inclusion on the 503A bulks list:<sup>2</sup>

- 503B Category 2: FDA has added one bulk drug substances to Category 2, germanium sesquioxide, because FDA identified significant safety risks relating to the use of this bulk drug substance in compounding.

- 503B Category 4: The draft interim guidance included a fourth category of bulk drug substances that would have identified substances that FDA evaluated for inclusion on the 503B bulks list but, after obtaining and considering public comments, decided not to place on the 503B bulks list. In the final interim guidance, FDA removed this fourth category because the Agency intends to identify the bulk drug substances that will not be placed on the 503B bulks list in the **Federal Register** notice that establishes the 503B bulks list. Therefore, we do not believe it is necessary to also include them in the categories identified in this guidance.

## II. 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>.

Dated: June 7, 2016.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2016-13798 Filed 6-9-16; 8:45 am]

**BILLING CODE 4164-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Chapter I

[Docket No. FDA-2015-D-3517]

#### Interim Policy on Compounding Using Bulk Drug Substances Under Section 503A of the Federal Food, Drug, and Cosmetic Act; Guidance for Industry; Availability.

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

**ACTION:** Notice of availability.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) is announcing the availability of a guidance for industry entitled “Interim Policy on Compounding Using Bulk Drug Substances Under Section 503A of the Federal Food, Drug, and Cosmetic Act.” The guidance describes FDA’s interim regulatory policy regarding the use of bulk drug substances by licensed pharmacists in State-licensed pharmacies or Federal facilities and by licensed physicians to compound human drug products while FDA develops the list of bulk drug substances that can be used in compounding under section 503A of the Federal Food, Drug, and Cosmetic Act (the FD&C Act).

**DATES:** Submit electronic or written comments on Agency guidances at any time.

**ADDRESSES:** You may submit comments as follows:

#### Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <http://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <http://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the

public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

#### Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

**Instructions:** All submissions received must include the Docket No. FDA-2015-D-3517 for “Interim Policy on Compounding Using Bulk Drug Substances Under Section 503A of the Federal Food, Drug, and Cosmetic Act.” Received comments will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <http://www.regulations.gov> or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions**—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <http://www.regulations.gov>. Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access

<sup>2</sup> In the future, if FDA makes changes to the categories of bulk drug substances on its Web site, we intend to follow the procedure identified in the guidance.

the information at: <http://www.fda.gov/regulatoryinformation/dockets/default.htm>.

**Docket:** For access to the docket to read background documents or the electronic and written/paper comments received, go to <http://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of this guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

**FOR FURTHER INFORMATION CONTACT:** Sara Rothman, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 5197, Silver Spring, MD 20993-0002, 301-796-3110.

#### **SUPPLEMENTARY INFORMATION:**

#### **I. Background**

FDA is announcing the availability of a guidance for industry entitled "Interim Policy on Compounding Using Bulk Drug Substances Under Section 503A of the Federal Food, Drug, and Cosmetic Act." Section 503A of the FD&C Act (21 U.S.C. 353a) describes the conditions that must be satisfied for human drug products compounded by a licensed pharmacist in a State-licensed pharmacy or Federal facility, or by a licensed physician, to be exempt from the following three sections of the FD&C Act:

- Section 505 (21 U.S.C. 355) (concerning the approval of drugs under new drug applications or abbreviated new drug applications);
- Section 502(f)(1) (21 U.S.C. 352(f)(1)) (concerning the labeling of drugs with adequate directions for use); and
- Section 501(a)(2)(B) (21 U.S.C. 351(a)(2)(B)) (concerning current good manufacturing practice requirements).

One of the conditions that must be met for a compounded drug product to qualify for these exemptions is that a licensed pharmacist, or licensed physician, compounds the drug product using bulk drug substances that:

- (1) Comply with the standards of an applicable United States Pharmacopeia

(USP) or National Formulary (NF) monograph, if a monograph exists, and the USP chapter on pharmacy compounding;

- (2) If such a monograph does not exist, are drug substances that are components of drugs approved by the Secretary; or

- (3) If such a monograph does not exist and the drug substance is not a component of a drug approved by the Secretary, appears on a list developed by the Secretary through regulations issued by the Secretary under subsection (c) of section 503A (503A bulks list).

(See section 503A(b)(1)(A)(i) of the FD&C Act).

This guidance describes the conditions under which FDA does not intend to take action against a licensed pharmacist or licensed physician for compounding a drug product from a bulk drug substance that is not the subject of an applicable USP or NF monograph, is not a component of an FDA-approved drug, or does not appear on the list of bulk drug substances that can be used in compounding under section 503A(b)(1)(A)(i)(III) of the FD&C Act while FDA is developing the 503A bulks list.<sup>1</sup> The guidance also describes FDA's process to establish the 503A bulks list and describes categories of substances that were nominated for inclusion on the 503A bulks list. The guidance includes a link to FDA's Web site listing bulk drug substances in each of the following categories:

**503A Category 1—Bulk Drug Substances Under Evaluation:** These bulk drug substances may be eligible for inclusion on the 503A bulks list, were nominated with sufficient supporting information for FDA to evaluate them, and do not appear on any other list.

**503A Category 2—Bulk Drug Substances That Raise Significant Safety Risks:** These bulk drug substances were nominated with sufficient supporting information to permit FDA to evaluate them and they may be eligible for inclusion on the 503A bulks list. However, FDA has identified significant safety risks relating to the use of these bulk substances in compounding, and therefore does not intend to adopt the policy described for the bulk substances in Category 1.

<sup>1</sup> Elsewhere in this issue of the **Federal Register**, the Agency is making available a final guidance entitled "Interim Policy on Compounding Using Bulk Drug Substances Under Section 503B of the Federal Food, Drug, and Cosmetic Act," which describes the conditions under which FDA does not intend to take action against an outsourcing facility for compounding a drug product from certain bulk drug substances while FDA develops the list of bulk drug substances that can be used in compounding under section 503B(a)(2)(A)(i) of the FD&C Act.

**503A Category 3—Bulk Drug Substances Nominated Without Adequate Support:** These bulk drug substances may be eligible for inclusion on the 503A bulks list, but were nominated with insufficient supporting information for FDA to evaluate them. These substances can be re-nominated with sufficient supporting information through a docket that FDA has established.

In the **Federal Register** of October 27, 2015 (80 FR 65781), FDA issued a notice announcing the availability of the draft version of this guidance. The comment period on the draft guidance ended on December 28, 2015. FDA received 14 comments on the draft guidance. In response to received comments or on its own initiative, FDA made several changes to the guidance to clarify particular points. In addition, FDA has made the following updates to the lists on its Web site of bulk drug substances that were nominated for inclusion on the 503A bulks list:<sup>2</sup>

1. **503A Category 2:** FDA has added two bulk drug substances to Category 2, quinacrine hydrochloride for intrauterine administration and germanium sesquioxide, because FDA identified significant safety risks relating to the use of these bulk substances in compounding.

2. **503A Category 3:** FDA removed bulk drug substances from Category 3 that the Agency previously included on this list in error. Many of these substances are components of FDA-approved drugs or the subject of an applicable USP or NF monograph, and, therefore, can be used in compounding under section 503A without being placed on the 503A bulks list.

3. **503A Category 4:** The draft interim guidance included a fourth category of bulk drug substances that would have identified substances that FDA evaluated for inclusion on the 503A bulks list but, after notice-and-comment rulemaking, decided not to place on the 503A bulks list. In the final interim guidance, FDA removed this fourth category because the Agency intends to identify the bulk drug substances that will not be placed on the 503A bulks list in the final rule that establishes the 503A bulks list. Therefore, we do not believe it is necessary to also include them in the categories identified in this guidance.

In this document, FDA is also announcing a Level 2 change to the final guidance, "Pharmacy Compounding of

<sup>2</sup> In the future, if FDA makes changes to the categories of bulk drug substances on its Web site, we intend to follow the procedure identified in the guidance.

Human Drug Products Under Section 503A of the FD&C Act,” (503A Final Guidance) published in 2014 (79 FR 37742) and revised in 2015 (80 FR 65781). That guidance stated, “Until a bulk drug substances list is published in the **Federal Register** as a final rule, human drug products should be compounded using only bulk drug substances that are components of drugs approved under section 505 of the FD&C Act, or are the subject of USP or NF monographs.”

When FDA issued the interim guidance concerning compounding using certain bulk drug substances under section 503A (Interim 503A Bulks Guidance) as a draft guidance for public comment, FDA announced in the notice of availability that because this draft interim guidance proposed to change the Agency’s policy relating to compounding with bulk drug substances while FDA develops a list of bulk drug substances that can be used in compounding, FDA was adding a footnote to the 503A final guidance referencing this draft interim guidance. FDA stated that once this Interim 503A Bulks Guidance is finalized, FDA would remove that footnote from the 503A final guidance and cross-reference the final Interim 503A Bulks Guidance as establishing the policy for compounding with bulk drug substances during the development of the 503A bulks list.

Therefore, concurrent with the issuance of the final Interim 503A Bulks Guidance, FDA is removing the sentence in the 503A final guidance referenced previously and is replacing it with the following statement, which the Agency proposed for public comment in the draft Interim 503A Bulks Guidance: “FDA’s interim policy concerning bulk drug substances that are not components of drugs approved under section 505 of the FD&C Act or that are not the subject of applicable USP or NF monographs can be found in the guidance, ‘Interim Policy on Compounding Using Bulk Drug Substances Under Section 503A of the Federal Food, Drug and Cosmetic Act.’” This change is a Level 2 change under 21 CFR 10.115, and comments on the proposed change in policy were solicited as part of the notice of availability of the draft Interim 503A Bulks Guidance.

## II. Electronic Access

Persons with access to the Internet may obtain the guidance at either <http://www.fda.gov/Drugs/Guidance/ComplianceRegulatoryInformation/Guidances/default.htm> or <http://www.regulations.gov>.

Dated: June 7, 2016.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2016–13799 Filed 6–9–16; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 1

[TD 9771]

**RIN 1545–BJ14**

#### **Guidance Under Section 108(a) Concerning the Exclusion of Section 61(a)(12) Discharge of Indebtedness Income of a Grantor Trust or a Disregarded Entity**

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

**ACTION:** Final regulation.

**SUMMARY:** This document contains final regulations relating to the exclusion from gross income of discharge of indebtedness income of a grantor trust or an entity that is disregarded as an entity separate from its owner. These final regulations provide rules regarding the term “taxpayer” for purposes of applying the exclusion from gross income of discharge of indebtedness income of a grantor trust or a disregarded entity. These final regulations affect grantor trusts, disregarded entities, and their owners.

**DATES:** *Effective Date:* These regulations are effective on June 10, 2016.

*Applicability Date:* These regulations apply to discharge of indebtedness income occurring on or after June 10, 2016.

**FOR FURTHER INFORMATION CONTACT:** Frank J. Fisher or Amy Chang, (202) 317–6850 (not a toll-free number).

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

These final regulations contain amendments to the Income Tax Regulations (26 CFR part 1) under section 108 of the Internal Revenue Code (Code). Section 61(a)(12) provides that income from the discharge of indebtedness is includible in gross income. However, such income may be excludable from gross income under section 108 in certain circumstances. Section 108(a)(1)(A) and (B) exclude from gross income any amount that would be includible in gross income by reason of the discharge of indebtedness of the taxpayer if the discharge occurs in a title 11 case or when the taxpayer

is insolvent. Section 108(d)(1) through (3) provide the meaning of the terms “indebtedness of the taxpayer,” “title 11 case,” and “insolvent,” for purposes of applying section 108, and each definition uses the term “taxpayer.” Section 7701(a)(14) defines “taxpayer” as any person subject to any internal revenue tax.

On April 13, 2011, the Treasury Department and the IRS published in the **Federal Register** (76 FR 20593) a notice of proposed rulemaking (REG–154159–09) (the proposed regulations) to provide rules under section 108(a) regarding the term “taxpayer” for purposes of applying section 108 to the discharge of indebtedness income of a grantor trust or an entity that is disregarded as an entity separate from its owner (disregarded entity). The proposed regulations provide that, for purposes of applying section 108(a)(1)(A) and (B) to the discharge of indebtedness income of a grantor trust or a disregarded entity, the term “taxpayer,” as used in section 108(a)(1) and (d)(1) through (3), refers to the owner of the grantor trust or the disregarded entity. The proposed regulations also provide that, in the case of a partnership, the owner rules apply at the partner level to the partners to whom the discharge of indebtedness is allocable. For example, if a partnership holds an interest in a grantor trust or a disregarded entity, the applicability of section 108(a)(1)(A) and (B) to the discharge of indebtedness income is tested by looking to each partner to whom the income is allocable. Lastly, the proposed regulations clarify that, subject to the special rule for partnerships under section 108(d)(6), the insolvency exclusion is available only if the owner is insolvent and the bankruptcy exclusion is available only if the owner is under the bankruptcy court’s jurisdiction.

The Treasury Department and the IRS received written comments responding to the notice of proposed rulemaking. The comments are available for public inspection at [www.regulations.gov](http://www.regulations.gov). No public hearing was requested or held. The comments are discussed in this preamble.

#### **Summary of Comments and Explanation of Revisions**

After consideration of all the comments, the final regulations adopt the proposed regulations as modified by this Treasury decision. The purpose and scope of the proposed regulations and these final regulations are primarily limited to defining the term “taxpayer” for purposes of applying the bankruptcy and the insolvency exclusions from

gross income, under section 108(a)(1)(A) and (B), to the discharge of indebtedness income of a grantor trust or a disregarded entity. These final regulations are not intended to address section 108 in general and are not intended to address liabilities in general.

### 1. Other Exclusions Under Section 108(a)

Two commenters recommended that the final regulations apply the provisions of the proposed regulations to all exclusions in section 108(a), not only to the bankruptcy and the insolvency exclusions. Guidance on the other exclusions in section 108(a) is beyond the scope of these regulations.

### 2. Whether, Under Section 108(d)(2), the Owner Is “Under the Jurisdiction” of the Court in a Title 11 Case

Section 108(a)(1)(A) provides, in part, that gross income does not include any amount which would be includible in gross income by reason of the discharge of the indebtedness of the taxpayer if the discharge occurs in a title 11 case. Section 108(d)(2) defines “title 11 case” as a case under title 11 of the United States Code (relating to bankruptcy), but only if the taxpayer is under the jurisdiction of the court in such case and the discharge of indebtedness is granted by the court or is pursuant to a plan approved by the court.

Consistent with the proposed regulations, these regulations provide that the bankruptcy exclusion is available only if the owner of the grantor trust or the owner of the disregarded entity is under the jurisdiction of the court in a title 11 case. It is insufficient for the grantor trust or the disregarded entity to be under the jurisdiction of the court in a title 11 case. These regulations further clarify that the owner of the grantor trust or the owner of the disregarded entity must be under the jurisdiction of the court in a title 11 case of that owner as the “debtor,” as that term is defined in title 11 of the United States Code (the title 11 debtor).

The commenters suggested that section 108(d)(2) does not require that the taxpayer be a title 11 debtor to be considered under the jurisdiction of the court in a title 11 case. One commenter recommended that an owner of a grantor trust or a disregarded entity be considered under the jurisdiction of the court in a title 11 case when that owner is indirectly liable for the debt of the grantor trust or the disregarded entity and the court in a title 11 case eliminates the owner’s liability in conjunction with the cancellation of the

debt of the grantor trust or disregarded entity. Another commenter recommended that an owner of a grantor trust or a disregarded entity be considered under the jurisdiction of the court in a title 11 case when either the owner has taken affirmative actions, such as filing a proof of claim or a proof of interest, that place the owner under the court’s jurisdiction in a title 11 case, or the court otherwise asserts jurisdiction over the owner in connection with a title 11 case. A third commenter recommended that the owner of a disregarded entity be considered under the jurisdiction of the court in a title 11 case when: (1) The court asserts jurisdiction over that owner during the title 11 proceeding of the disregarded entity; (2) the owner’s liability on the discharged debt had been previously established (by contract or otherwise); (3) the owner is liable for all, or substantially all, of the discharged debt; and (4) qualifying for the bankruptcy exclusion was not a principal purpose of the owner’s undertaking of such liability.

The Treasury Department and the IRS have not adopted these recommendations because extending the bankruptcy exclusion to the owner of a grantor trust or a disregarded entity when that owner is not itself in bankruptcy would be inconsistent with the intended purpose of section 108(a)(1)(A), as reflected in the legislative history of that provision. Congress added the bankruptcy exclusion to the Code to allow insolvent debtors a “fresh start” after they have liquidated their assets to pay off creditors. S. Rep. No. 1035, 96th Cong., 2d Sess. 9–10 (1980), 1980–2 CB 620, 624, provides:

The rules of the [Bankruptcy Tax Act of 1980, Public Law 96–589, 94 Stat. 3389 (1980)] concerning income tax treatment of debt discharge in bankruptcy are intended to accommodate bankruptcy policy and tax policy. To preserve the debtor’s “fresh start” after bankruptcy, the bill provides that no income is recognized by reason of debt discharge in bankruptcy, so that a debtor coming out of bankruptcy (or an insolvent debtor outside bankruptcy) is not burdened with an immediate tax liability.

Here, Congress was referring to “debtor” as that term is defined in title 11. See 11 U.S.C. 101(12) (1980) (defining “debtor” as a person or municipality concerning which a case under title 11 has been commenced).

The Bankruptcy Tax Act of 1980 was enacted to supplement the Bankruptcy Reform Act of 1978, Public Law 95–598, 92 Stat. 2549 (1978). See S. Rep. No. 1035, 96th Cong., 2d Sess. 9 (1980), 1980–2 CB 620, 624. As indicated in the

legislative history of the Bankruptcy Reform Act of 1978, the debtor’s “fresh start” is conditioned upon the debtor committing all of its nonexempt assets to the jurisdiction of the bankruptcy court, either for sale by the trustee or to determine an appropriate plan to repay creditors. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 118, 125–26, 176 (1977). Congress did not intend that a solvent, non-debtor owner of a grantor trust or a disregarded entity, which has committed some but not all of its nonexempt assets to the bankruptcy court’s jurisdiction, have an exclusion from discharge of indebtedness income merely by virtue of having some of its assets subject to the jurisdiction of the bankruptcy court.

The commenters’ recommendations are thus inconsistent with the Congressional intent underlying the Bankruptcy Tax Act of 1980 because those recommendations would provide a non-debtor owner that conducts only some of its activities through the grantor trust or disregarded entity with an unwarranted benefit when that owner is not a title 11 debtor and is able to pay its tax liability.

Accordingly, these regulations clarify that the owner of the grantor trust or disregarded entity must itself be under the jurisdiction of the court in a title 11 case as the title 11 debtor to qualify for the bankruptcy exclusion.

### 3. The Gracia Cases and the Application of the Bankruptcy Exclusion at the Partner Level

A commenter noted uncertainty under existing law as to whether the holding in certain case law would be followed by the IRS. See *Gracia v. Commissioner*, T.C. Memo. 2004–147; *Mirarchi v. Commissioner*, T.C. Memo. 2004–148; *Price v. Commissioner*, T.C. Memo. 2004–149; *Estate of Martinez v. Commissioner*, T.C. Memo. 2004–150 (collectively, the Gracia Cases). Because the bankruptcy court had asserted jurisdiction over non-debtor partners for certain matters, the Tax Court in the Gracia Cases upheld the application of the bankruptcy exclusion to the partners of a partnership that was a title 11 debtor, despite the fact that the partners were not title 11 debtors. The IRS’s position is that the Gracia Cases failed to interpret correctly the limited scope of section 108(a)(1)(A), which applies only to partners that are also title 11 debtors. See Action on Decision 2015–01 (2015–6 IRB 579) (nonacquiescence in the Gracia Cases).

These regulations provide that, in the case of a partnership that holds an interest in a grantor trust or a disregarded entity, the owner rules

apply at the level of the partners to whom the income is allocable. These regulations provide that the owner must be under the jurisdiction of the court in a title 11 case as the title 11 debtor to qualify for the bankruptcy exclusion. Accordingly, when the owner of the grantor trust or disregarded entity is a partnership, the partner to whom the income is allocable must be under the jurisdiction of the court in a title 11 case of that partner as the title 11 debtor to qualify for the bankruptcy exclusion.

#### 4. *Whether a Grantor Trust Can Be a Debtor in a Title 11 Case*

One commenter noted that a trust cannot generally be a debtor in a title 11 case. On the other hand, a business trust can be a debtor in a title 11 case but is generally treated as a business entity for both bankruptcy and Federal tax purposes. As such, the commenter noted uncertainty as to whether these regulations concerning the bankruptcy exclusion could ever apply to the bankruptcy of a grantor trust.

These regulations account for the possibility that a trust that is treated as a grantor trust for Federal tax purposes may be treated as a business trust for purposes of eligibility to be a debtor in a title 11 case. To provide comprehensive guidance, the Treasury Department and the IRS have retained references in these regulations to grantor trusts in the provisions concerning the bankruptcy exclusion.

#### 5. *Multiple-Owner Grantor Trusts*

A grantor trust is any portion of a trust that is treated, under subpart E of part I of subchapter J of chapter 1, as being owned by a grantor or another person. One commenter recommended that future guidance specify how a grantor's share of a multiple-owner grantor trust's liability should be determined for purposes of determining insolvency under section 108(d)(3). Specifically, that commenter recommended that future guidance or tax forms provide that a grantor trust is required to report the owner's share of the trust's liabilities. These regulations do not address these issues but the Treasury Department and the IRS invite comments regarding the application of section 108(d)(3) to the owners of a multiple-owner grantor trust.

Submissions should be submitted to:

In the case of submissions to the IRS submitted by U.S. Mail: Internal Revenue Service, Attn: Frank J. Fisher, CC:PSI:1, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

In the case of submissions to the IRS submitted by a private delivery service: Internal Revenue Service, Attn: Frank J.

Fisher, CC:PSI:1, 1111 Constitution Ave. NW., Washington, DC 20224.

#### 6. *Extent to Which Indebtedness of a Grantor Trust or a Disregarded Entity Is Treated as Indebtedness of the Owner, Whether Indebtedness Is Recourse or Nonrecourse Debt of the Owner, and the Effect on Insolvency*

For purposes of section 108, section 108(d)(1) defines the term "indebtedness of the taxpayer" as any indebtedness for which the taxpayer is liable or subject to which the taxpayer holds property. One commenter recommended that the final regulations clarify that, for purposes of section 108(d)(1), indebtedness of a disregarded entity is indebtedness of the owner. In addition, a commenter recommended that the Treasury Department and the IRS clarify whether debt of a disregarded entity should be treated as recourse or nonrecourse debt of the owner for purposes of determining the amount of cancellation of debt income realized by the owner. That commenter suggested that the Treasury Department and the IRS issue guidance, in the form of an example in a regulation or a revenue ruling, as to whether the indebtedness of a grantor trust or a disregarded entity is recourse or nonrecourse indebtedness of the owner.

In addition, commenters recommended approaches for determining the extent to which liabilities of a grantor trust or a disregarded entity are taken into account in measuring the owner's insolvency under section 108(d)(3) for purposes of the insolvency exclusion under section 108(a)(1)(B), including applying the principles of Revenue Ruling 92-53 (1992-2 CB 48). For purposes of the insolvency exclusion, section 108(d)(3) defines "insolvency" as the excess of liabilities over the fair market value of assets. Revenue Ruling 92-53 provides that the amount by which a nonrecourse debt exceeds the fair market value of the property securing the debt (excess nonrecourse debt) is taken into account in determining whether a taxpayer is insolvent within the meaning of section 108(d)(3) only to the extent that the excess nonrecourse debt is discharged.

Comprehensive guidance on these issues is beyond the scope of these regulations. However, the Treasury Department and the IRS are of the view that indebtedness of a grantor trust or a disregarded entity is indebtedness of the owner for purposes of section 108(d)(1); assuming the owner has not guaranteed the indebtedness and is not otherwise liable for the indebtedness under applicable law, such indebtedness

should generally be treated as nonrecourse indebtedness for purposes of applying the section 108(a)(1)(B) insolvency exclusion; and accordingly the principles of Revenue Ruling 92-53 apply to determine the extent to which such indebtedness is taken into account in determining the owner's insolvency under section 108(d)(3). The Treasury Department and the IRS continue to study these issues and anticipate publishing additional guidance providing further clarification. Accordingly, the Treasury Department and the IRS invite comments on these issues. Submissions should be submitted to:

In the case of submissions to the IRS submitted by U.S. Mail: Internal Revenue Service, Attn: Seoyeon Sharon Park, CC:ITA:5, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

In the case of submissions to the IRS submitted by a private delivery service: Internal Revenue Service, Attn: Seoyeon Sharon Park, CC:ITA:5, 1111 Constitution Ave. NW., Washington, DC 20224.

#### 7. *Valuation Discounts for Purposes of Section 108(d)(3)*

One commenter requested that the Treasury Department and the IRS clarify whether valuation discounts, if applicable to the owner's interest in a disregarded entity, could apply to the valuation of the assets and liabilities held by a disregarded entity for purposes of determining insolvency under section 108(d)(3). Guidance on this issue is beyond the scope of these regulations.

#### 8. *Effective/Applicability Date*

These final regulations apply to the discharge of indebtedness income occurring on or after the date these final regulations are published in the **Federal Register**.

Some commenters requested that the Treasury Department and the IRS permit taxpayers to apply the final regulations retroactively to taxable years for which the period of limitations remain open. Another commenter requested that the final regulations specifically provide that the IRS will not challenge positions taken by taxpayers that apply the rules in the proposed regulations. The proposed regulations and these regulations are consistent with the existing statute. Accordingly, the IRS will not challenge return positions consistent with the proposed regulations, as clarified in these final regulations, for the period prior to the effective/applicability date of these final regulations.

## Availability of IRS Documents

For copies of recently issued Revenue Procedures, Revenue Rulings, notices, and other guidance published in the Internal Revenue Bulletin, please visit the IRS Web site at <http://www.irs.gov>.

## Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received.

## Drafting Information

The principal authors of these regulations are Frank J. Fisher and Amy Chang, Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the Treasury Department and the IRS participated in the development of these regulations.

## List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

## Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

## PART 1—INCOME TAXES

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

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

■ **Par. 2.** Section 1.108–9 is added to read as follows:

### § 1.108–9 Application of the bankruptcy and the insolvency provisions of section 108 to grantor trusts and disregarded entities.

(a) *General rule*—(1) *Owner is the taxpayer.* For purposes of applying section 108(a)(1)(A) and (B) to discharge of indebtedness income of a grantor trust or a disregarded entity, neither the grantor trust nor the disregarded entity shall be considered to be the

“taxpayer,” as that term is used in section 108(a)(1) and (d)(1) through (3). Rather, for purposes of section 108(a)(1)(A) and (B) and (d)(1) through (3) and subject to section 108(d)(6), the owner of the grantor trust or the owner of the disregarded entity is the “taxpayer.”

(2) *The bankruptcy exclusion.* If indebtedness of a grantor trust or a disregarded entity is discharged in a title 11 case, section 108(a)(1)(A) applies to that discharged indebtedness only if the owner of the grantor trust or the owner of the disregarded entity is under the jurisdiction of the court in a title 11 case as the title 11 debtor. If the grantor trust or the disregarded entity is under the jurisdiction of the court in a title 11 case as the title 11 debtor, but the owner of the grantor trust or the owner of the disregarded entity is not, section 108(a)(1)(A) does not apply to the discharge of indebtedness income.

(3) *The insolvency exclusion.* Section 108(a)(1)(B) applies to the discharged indebtedness of a grantor trust or a disregarded entity only to the extent the owner of the grantor trust or the owner of the disregarded entity is insolvent. If the grantor trust or the disregarded entity is insolvent, but the owner of the grantor trust or the owner of the disregarded entity is solvent, section 108(a)(1)(B) does not apply to the discharge of indebtedness income.

(b) *Application to partnerships.* Under section 108(d)(6), in the case of a partnership, section 108(a)(1)(A) and (B) applies at the partner level. If a partnership holds an interest in a grantor trust or a disregarded entity, the applicability of section 108(a)(1)(A) and (B) to the discharge of indebtedness income is tested by looking to each partner to whom the income is allocable.

(c) *Definitions*—(1) *Disregarded entity.* For purposes of this section, a *disregarded entity* is an entity that is disregarded as an entity separate from its owner for Federal income tax purposes. See § 301.7701–2(c)(2)(i) of this chapter, the Procedure and Administration Regulations. Examples of disregarded entities include a domestic single-member limited liability company that does not elect to be classified as a corporation for Federal income tax purposes pursuant to § 301.7701–3 of this chapter, a corporation that is a qualified REIT subsidiary (within the meaning of section 856(i)(2)), and a corporation that is a qualified subchapter S subsidiary (within the meaning of section 1361(b)(3)(B)).

(2) *Grantor trust.* For purposes of this section, a *grantor trust* is any portion of

a trust that is treated under subpart E of part I of subchapter J of chapter 1 of subtitle A of title 26 of the United States Code as being owned by the grantor or another person.

(3) *Owner.* Notwithstanding any other provision of this section to the contrary, neither a grantor trust nor a disregarded entity shall be considered an owner for purposes of this section.

(4) *Title 11 debtor.* For purposes of this section, a *title 11 debtor* is a debtor in a case under title 11 of the United States Code, as defined in 11 U.S.C. 101(13).

(d) *Applicability date.* The rules of this section apply to discharge of indebtedness income occurring on or after June 10, 2016.

**John Dalrymple,**

*Deputy Commissioner for Services and Enforcement.*

Approved: May 25, 2016.

**Mark J. Mazur,**

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

[FR Doc. 2016–13779 Filed 6–9–16; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 100

[Docket No. USCG–2016–0463]

RIN 1625–AA08

### Special Local Regulation; Midwest Masters Sprints; Maumee River; Toledo, OH

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary special local regulation controlling movement of vessels for certain waters of the Maumee River. This action is necessary and is intended to ensure safety of life on navigable waters to be used for a rowing event immediately prior to, during, and immediately after this event. This regulation requires vessels to maintain a minimum speed for safe navigation and maneuvering.

**DATES:** This temporary final rule is effective from 5 a.m. until 2:30 p.m. on June 11, 2016. For the purposes of enforcement, actual notice will be used on June 11, 2016.

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>, type USCG–2016–

0463 in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rule. 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 temporary final rule, call or email Petty Officer Brett Kreigh, Marine Safety Unit Toledo, Coast Guard; telephone 419-418-6046, email [Brett.A.Kreigh@uscg.mil](mailto:Brett.A.Kreigh@uscg.mil). If you have questions on viewing the docket, call Cheryl Collins, Program Manager, Docket Operations, telephone 202-366-9826.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Table of Abbreviations**

COTP Captain of the Port  
DHS Department of Homeland Security  
E.O. Executive Order  
NAD 83 North American Datum of 1983  
NPRM Notice of Proposed Rulemaking

##### **II. Background History and Regulatory Information**

On June 11, 2016, the Toledo Rowing Club is holding a rowing regatta in which at least 200 rowers will participate in a race on the Maumee River. Due to the projected amount of human-powered watercraft on the water, there is a need to require vessels in the affected waterways to maintain a minimum speed for safe navigation. The rowing regatta will occur between 5 a.m. and 2:30 p.m. on June 11, 2016. This event is taking place under the same sponsorship in the same location as last year.

##### **III. Legal Authority and Need for Rule**

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1231, 33 CFR 1.05-1 and 160.5; and Department of Homeland Security Delegation No. 0170.1. Having reviewed the application for a marine event submitted by the sponsor on January 11, 2016, the Captain of the Port Detroit (COTP) has determined that the likely combination of recreation vessels, commercial vessels, and an unknown number of spectators in close proximity to a rowing regatta along the water pose extra and unusual hazards to public safety and property. Therefore, the COTP is establishing a Special Local Regulation around the event location to help minimize risks to safety of life and property during this event.

The Coast Guard is issuing this temporary final rule without prior

notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking with respect to this rule because waiting for a notice and comment period to run would be impracticable, unnecessary, and contrary to the public interest. Although an initial marine event application was submitted on January 11, 2016, final details regarding event area and patrol parameters were not known to the Coast Guard with sufficient time for the Coast Guard to solicit public comments before the start of the event. Thus, delaying the effective date of this rule to wait for a notice and comment period to run would be impracticable and contrary to the public interest because it would inhibit the Coast Guard's ability to protect the public from the hazards associated with this power boat race.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. For the same reasons discussed in the preceding paragraph, waiting for a 30 day notice period to run would be impracticable and contrary to the public interest.

##### **IV. Discussion of Rule**

This rule establishes a temporary special local regulation from 5 a.m. until 2:30 p.m. on June 11, 2016. In light of the aforementioned hazards, the COTP has determined that a special local regulation is necessary to protect spectators, vessels, and participants. The special local regulation will encompass the following waterway: All waters of the Maumee River, Toledo, OH from the Veterans Glass Memorial Bridge at River Mile 3.25 to the Norfolk Southern Railroad Bridge at River Mile 5.76.

An on-scene representative of the COTP or event sponsor representatives may permit vessels to transit the area when no race activity is occurring. The on-scene representative may be present on any Coast Guard, state or local law enforcement vessel assigned to patrol the event. Vessel operators desiring to transit through the regulated area must contact the Coast Guard Patrol Commander to obtain permission to do so. The COTP or his designated on-

scene representative may be contacted via VHF Channel 16.

The COTP or his designated on-scene representative will notify the public of the enforcement of this rule by all appropriate means, including a Broadcast Notice to Mariners and Local Notice to Mariners.

##### **V. 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 or executive orders (E.O.).

###### *A. Regulatory Planning and Review*

This rule is not a significant regulatory action under section 3(f) of E.O. 12866, Regulatory Planning and Review, as supplemented by E.O. 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of E.O. 12866 or under section 1 of E.O. 13563. The Office of Management and Budget has not reviewed it under those Orders.

We conclude that this rule is not a significant regulatory action because we anticipate that it will have minimal impact on the economy, will not interfere with other agencies, will not adversely alter the budget of any grant or loan recipients, and will not raise any novel legal or policy issues.

The Coast Guard's use of this special local regulation will be of relatively small size and only nine and a half hours in duration, and it is designed to minimize the impact on navigation. Moreover, vessels may transit through the area affected by this special local regulation at a minimum speed for safe navigation. Overall, the Coast Guard expects minimal impact to vessel movement from the enforcement of this special local regulation.

###### *B. Impact on Small Entities*

As per the Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601-612, as amended, we have considered the potential impact of regulations on small entities during rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule will affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in this portion of the Maumee River, in the vicinity of Toledo, OH between 5 a.m. and 2:30 p.m. on June 11, 2016.

This special local regulation will not have a significant economic impact on

a substantial number of small entities for the reasons cited in the *Regulatory Planning and Review* section. Additionally, before the enforcement of the regulation, Coast Guard Sector Detroit will issue a local Broadcast Notice to Mariners so vessel owners and operators can plan accordingly.

#### C. 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 so that they can better evaluate its effects on them. If this rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against entities that question or complain about this rule or any policy or action of the Coast Guard.

#### D. 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).

#### E. Federalism

A rule has implications for federalism under E.O. 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.

#### F. 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.

#### G. Unfunded Mandates Reform Act

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

#### H. 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.

#### I. Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of E.O. 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

#### J. Protection of Children

We have analyzed this rule under E.O. 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.

#### K. Indian Tribal Governments

This rule does not have tribal implications under E.O. 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.

#### L. Energy Effects

This action is not a “significant energy action” under E.O. 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

#### M. Technical Standards

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

#### N. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.ID, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule involves the establishment of a special local regulation and is therefore categorically excluded from further review under paragraph 34(h) 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 100

Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 100 as follows:

#### PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

- 1. The authority citation for part 100 continues to read as follows:

**Authority:** 33 U.S.C. 1233.

- 2. Add § 100.35T09–0463 to read as follows:

#### § 100.35T09–0463 Special Local Regulation; Midwest Masters Sprints; Maumee River; Toledo, OH.

(a) *Regulated area.* A regulated area is established to encompass the following waterway: all waters of the Maumee River, from the Veterans Glass Memorial Bridge at River Mile 3.25 to the Norfolk Southern Railroad Bridge at River Mile 5.76.

(b) *Effective period.* This section is effective and will be enforced from 5 a.m. until 2:30 p.m. on June 11, 2016.

(c) *Regulations.* (1) Consistent with § 100.901 of this part, vessels transiting within the regulated area shall travel at a no-wake speed and remain vigilant at all times. Additionally, vessels within the regulated area must yield right-of-way for event participants and event safety craft. Commercial vessels will have right-of-way over event participants, and event safety craft.

(2) Vessel operators desiring to operate in the regulated area must contact the Coast Guard Patrol Commander to obtain permission to do so. The Captain of the Port Detroit (COTP) or his on-scene representative may be contacted via VHF Channel 16. Vessel operators given permission to operate within the regulated area must comply with all directions given to them by the COTP or his on-scene representative.

(3) The “on-scene representative” of the COTP is any Coast Guard commissioned, warrant or petty officer or a Federal, State, or local law enforcement officer designated by or assisting the COTP to act on his behalf.

Dated: June 6, 2016.

**Raymond Negron,**

*Commander, U.S. Coast Guard, Acting Captain of the Port Detroit.*

[FR Doc. 2016–13746 Filed 6–9–16; 8:45 am]

BILLING CODE 9110–04–P

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 100

[Docket Number USCG–2016–0377]

RIN 1625–AA08

#### **Special Local Regulation; On Water Activities Associated With the 2016 Macy’s 4th of July Fireworks, East River, Manhattan, NY**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary special local regulation on the navigable waters of the East River and Upper New York Bay Manhattan and Brooklyn, NY for on water vessel management associated with the Macy’s 4th of July fireworks show. This Special Local Regulation allows the Coast Guard to enforce spectator vessel movement and prohibit all vessel traffic from entering the fireworks barge buffer zone during times when the associated event could pose an imminent hazard to persons and vessels operating in the area. This rule is necessary to provide for the safety of life on the navigable waters and to establish public viewing areas during the event.

**DATES:** This rule is effective from 6 p.m. through 11 p.m. on July 4, 2016.

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>, type USCG–2016–

0377 in the “SEARCH” box and click “SEARCH.” Click on Open Docket Folder on the line associated with this rule.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or email Lieutenant Junior Grade Kathleen Kane, Vessel Traffic Services Division, Sector New York, U.S. Coast Guard; telephone (718) 354–4010, email [Kathleen.E.Kane@uscg.mil](mailto:Kathleen.E.Kane@uscg.mil).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Table of Abbreviations**

CFR Code of Federal Regulations  
COTP Captain of the Port  
DHS Department of Homeland Security  
FR Federal Register  
NPRM Notice of proposed rulemaking  
§ Section  
U.S.C. United States Code

##### **II. Background Information and Regulatory History**

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM with respect to this rule because doing so would be impracticable and contrary to the public interest. The Coast Guard was provided the final details for this event on March 31, 2016. Macy’s is unable to move their event to a later date because of the highly publicized nature of this 4th of July event. Due to a major change in the location of the event from the Hudson, to East River, the Coast Guard was unable to use the safety zone established by the recurring Macy’s 4th of July fireworks regulation published in Table 1 of 33 CFR 165.160.

We are issuing this rule, and under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making it effective less than 30 days after publication in the **Federal Register**. Any delay in this rule becoming effective would be contrary to public interest since immediate action is needed to provide for the safety of life and property on the navigable waters due to the inherent hazards created by the high concentration of spectator vessels expected in attendance for the event.

##### **III. Legal Authority and Need for Rule**

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1233. This Special Local Regulation is necessary to ensure the safety of spectators and vessels from hazards associated with the anticipated concentration of vessels, before, during, and after the scheduled event.

##### **IV. Discussion of Comments, Changes, and the Rule**

The Coast Guard is establishing a Special Local Regulation on the navigable waters of the East River and Upper New York Bay along Manhattan and Brooklyn, NY for the on water management of vessels associated with the 2016 Macy’s 4th of July event. The Special Local Regulation is necessary to ensure the safety of spectators from hazards associated with the anticipated concentration of vessels for the event.

The event is scheduled to occur from 9:20 p.m. through 9:50 p.m. and the COTP New York anticipates a large number of vessels will congregate to view the fireworks display. This rule will be enforced from 6 p.m. through 11 p.m. on July 4, 2016 in order to ensure that the area is clear of persons and vessels before the fireworks display begins, and to ensure that no hazards remain after the fireworks display ends. If the event is cancelled due to inclement weather, then this regulation will be enforced from 6 p.m. through 11 p.m. on July 5, 2016.

The COTP New York will establish seven limited access areas within the boundary of the regulated area. Access to these areas will be restricted to vessels of a certain size. The seven limited access areas are: (1) A “spectator area” designated ALFA in which access is limited to vessels greater than or equal to 20 meters in length (65.6ft); (2) a “spectator area” designated BRAVO in which access is limited to vessels less than 20 meters in length (65.6ft); (3) a “buffer zone” around the fireworks launch barges, designated area CHARLIE, limited to all vessels tending the fireworks launch barges; (4) a “spectator area” designated DELTA in which access is limited to vessels greater than 20 meters in length (65.6ft); (5) a “spectator area” designated ECHO in which access is limited to vessels less than or equal to 20 meters in length (65.6ft); (6) a “buffer zone” around the fireworks launch barge, designated area FOXTROT, limited to all vessels tending the fireworks launch barges; (7) a “spectator area” designated GOLF in which access is open to all vessels all lengths.

Based on the inherent hazards associated with large concentrations of vessels in tight confines, the COTP New York has determined that the event poses a significant risk to public safety and property. The combination of an increased number of recreational vessels, congested waterways, and darkness has the potential to result in serious injuries or fatalities. The buffer zone along with the designated viewing areas will restrict vessels from a portion of the East River around the location of the fireworks launch platform before, during, and immediately after the event. All persons and vessels shall comply with the instructions of the COTP New York or a designated representative during the enforcement of the Special Local Regulation.

Consistent with 33 CFR 165.7, the Coast Guard will notify the public and local mariners of this Special Local Regulation through appropriate means, which may include, but are not limited to, publication in the **Federal Register**, the Local Notice to Mariners, and Broadcast Notice to Mariners.

## V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

### A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has not been designated a “significant regulatory action,” under Executive Order 12866. Accordingly, it has not been reviewed by the Office of Management and Budget.

This regulatory action determination is based on the size, location, duration, and time-of-day of the safety zone. Vessel traffic will only be restricted from the regulated area for a limited duration, and the Special Local Regulation is in effect during late night hours when vessel traffic is low. Advanced public notifications will also be made to local mariners through appropriate means, which may include, but would not be limited to, Local Notice to Mariners and Broadcast Notice to Mariners.

### B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 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 received no comments from the Small Business Administration on this rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to enter or transit within the Special Local Regulation may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

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** section.

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.

### C. 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).

### D. Federalism and Indian Tribal Governments

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 have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, 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. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

### E. Unfunded Mandates Reform Act

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

### F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (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 temporary rule involves restricting vessel movement within a Limited Access Area established by a Special Local Regulation. This rule is categorically excluded from further review under paragraph 34(h) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination will be available in the docket where indicated under **ADDRESSES**, though due to the short timeline it may be made available after publication of this rule in

the FR. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

#### G. Protest Activities

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

#### List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 100 as follows:

### PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

**Authority:** 33 U.S.C. 1233.

■ 2. Add § 100.35T01–0481 to read as follows:

#### § 100.35T01–0481 Special Local Regulation; On Water Activities Associated with the 2016 Macy's 4th of July Fireworks, East River, Manhattan, NY.

(a) *Regulated area.* The regulated area includes all navigable waters of the East River and Upper New York Bay bounded by a line drawn from position 40°45'20" N., 073°57'21" W. (57th Street, New York, NY to 43rd Ave., Long Island City, NY), south along the East River to position 40°40'55" N., 074°01'21" W. (Southern tip of Governors Island, NY to Red Hook Point, NY), bounded West by a line drawn from position 40°41'47" N., 074°00'37" W. (Southern tip of Downtown Manhattan Heliport, NY to Governors Island Ventilator, NY). All geographic coordinates are North American Datum of 1983 (NAD 83). Within the overall regulated area defined above, the following are individually defined areas subject to specific requirements:

(1) *Area ALPHA.* All navigable waters of the East River south of a line drawn from position 40°45'20" N., 073°57'21" W. (57th Street, New York, to 43rd Ave, Long Island City, New York) to a line drawn from position 40°44'58" N. 073°57'41" W. (47th Street, New York, NY to N Basin Rd., Long Island City, NY) between the east shore of Manhattan and west shore of Roosevelt Island.

(2) *Area BRAVO.* All navigable waters of the East River south of a line drawn from position 40°45'20" N., 073°57'21" W. (57th Street, New York, to 43rd Ave, Long Island City, New York) to a line drawn from position 40°44'58" N. 073°57'41" W. (47th Street, New York, NY to N Basin Rd., Long Island City, NY) between the east shore of Roosevelt Island and west shore of Long Island City. (NAD 83)

(3) *Area CHARLIE.* All navigable waters of the East River bound by a line drawn from position 40°44'58" N. 073°57'41" W. (47th Street, New York, NY to N Basin Rd., Long Island City, NY), south along the East River to position 40°43'40" N., 073°57'59" W. (15th Street, New York, NY to Noble Street, Brooklyn, NY), (NAD 83).

(4) *Area DELTA.* All navigable waters of the East River by a line drawn from position 40°43'40" N., 073°57'59" W. (15th Street, New York, NY to Noble Street, Brooklyn, NY), south to a line drawn from position 40°43'19" N., 073°58'04" W. (7th Street, New York, NY to Bushwick Inlet Park), (NAD 83).

(5) *Area ECHO.* All navigable waters of the East River by a line drawn from position 40°43'19" N., 073°58'04" W. (7th Street, New York, NY to Bushwick Inlet Park), south to position 40°42'52" N., 073°58'18" W. (East River Park, New York, NY to S 4th Street), (NAD 83).

(6) *Area FOXTROT.* All navigable waters of the East River by a line drawn from position 40°42'52" N., 073°58'18" W. (East River Park, New York, NY to S 4th Street), south to position 40°41'58" N., 074°00'16" W. (Downtown Manhattan Heliport to Pier 3 Brooklyn, NY).

(7) *Area GOLF.* All navigable waters of the Upper Bay, New York Harbor, NY, south of a line drawn from position 40°41'58" N., 074°00'16" W. to a line drawn from position 40°41'29" N., 074°00'31" W. (Governors Island Ventilator to Pier 7 Brooklyn, NY), south. West by a line drawn from position 40°41'47" N., 074°00'37" W. (Downtown Manhattan Heliport to Governors Island Ventilator).

(b) *Definitions.* The following definitions apply to this section:

(1) *Designated representative.* A "designated representative" is any Coast Guard commissioned, warrant or petty officer of the U.S. Coast Guard who has been designated by the Captain of the Port (COTP) New York, to act on his or her behalf.

(2) *Official patrol vessels.* Official patrol vessels may consist of any Coast Guard, Coast Guard Auxiliary, state, or local law enforcement vessels assigned or approved by the COTP New York.

(3) *Spectators.* All persons and vessels not registered with the event sponsor as participants or official patrol vessels.

(c) *Special local regulations.* (1) In accordance with the general regulations in § 100.35, entry into, transiting, or anchoring within the regulated areas is prohibited, unless authorized by the COTP or a designated representative.

(2) Vessels are authorized by the COTP or a designated representative to enter areas of this special location regulation in accordance with the following restrictions:

(i) Area ALPHA access is limited to vessels greater than or equal to 20 meters (65.6ft) in length.

(ii) Area BRAVO access is limited to vessels less than 20 meters (65.6ft) in length.

(iii) All vessels are prohibited from entering area CHARLIE without permission from the COTP or a designated representative.

(iv) Area DELTA access is limited to vessels less than 20 meters (65.6ft) in length.

(v) Area ECHO access is limited to vessels greater than or equal to 20 meters (65.6ft) in length.

(vi) All vessels are prohibited from entering area FOXTROT without permission from the COTP or a designated representative.

(vii) Area GOLF access is not limited by vessel length.

(3) All persons and vessels in the regulated areas shall comply with the instructions of the COTP or a designated representative. Vessels shall be present in the corresponding areas by 7:30 p.m.

(4) Upon being hailed by a U.S. Coast Guard vessel or a designated representative, by siren, radio, flashing light or other means, the operator of the vessel shall proceed as directed. A designated representative may be on an official patrol vessel or may be on shore and will communicate with vessels via VHF–FM radio or loudhailer. In addition, members of the Coast Guard Auxiliary may be present to inform vessel operators of this regulation. Failure to comply with a lawful direction may result in expulsion from the area, citation for failure to comply, or both.

(5) Vessel operators desiring to enter or operate within the regulated area should contact the COTP New York at (718) 354–4356 (Sector NY Command Center) or a designated representative via VHF channel 16 to obtain permission to do so.

(6) Spectators or other vessels shall not anchor, block, loiter, or impede the transit of event participants or official patrol vessels in the regulated areas during the effective dates and times

unless authorized by COTP New York or a designated representative.

(7) The COTP New York or a designated representative may delay or terminate any marine event in this subpart at any time if it is deemed necessary to ensure the safety of life or property.

(d) *Enforcement period.* This regulation will be enforced from 6 p.m. until 11 p.m. on July 4, 2016, and if the fireworks display is postponed due to inclement weather, it will be enforced from 6 p.m. until 11 p.m. on July 5, 2016.

Dated: May 23, 2016.

**M.H. Day,**  
*Captain, U.S. Coast Guard, Captain of the Port New York.*

[FR Doc. 2016-13780 Filed 6-9-16; 8:45 am]

**BILLING CODE 9110-04-P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 100

[Docket No. USCG-2013-0327]

RIN 1625-AA00

#### Special Local Regulations; Harborfest Dragon Boat Race, South Haven, MI

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of enforcement of regulation.

**SUMMARY:** The Coast Guard will enforce the special local regulation on the Black River in South Haven, Michigan for the Harborfest Dragonboat Race on June 18 and 19, 2016. This action is necessary and intended to ensure safety of life on navigable waters immediately prior to, during, and after the Dragonboat race. During the aforementioned period, the Coast Guard will enforce restrictions upon, and control movement of, vessels in the special regulated area.

**DATES:** The regulations in 33 CFR 100.903 will be enforced from 6 a.m. until 7 p.m. on each day of June 18 and 19, 2016.

**FOR FURTHER INFORMATION CONTACT:** If you have questions about this notice of enforcement, call or email CWO Mark Stevens, Prevention Department, Coast Guard Sector Lake Michigan, Milwaukee, WI at (414) 747-7188, email [mark.l.stevens@uscg.mil](mailto:mark.l.stevens@uscg.mil).

**SUPPLEMENTARY INFORMATION:** The Coast Guard will enforce the special local regulation listed in 33 CFR 100.903 from 6 a.m. until 7 p.m. on each day of June 18 and 19, 2016. This special local

regulation encompasses the waters of the Black River in South Haven, MI within the following coordinates starting at 42°24'13.6" N., 086°16'41" W.; then southeast 42°24'12.6" N., 086°16'40" W.; then northeast to 42°24'19.2" N., 086°16'26.5" W.; then northwest to 42°24'20.22" N., 086°16'27.4" W.; then back to point of origin (NAD 83). As specified in 33 CFR 100.903, no vessel may enter, transit through, or anchor within the regulated area without the permission of the Coast Guard Patrol Commander. Furthermore, the regulations in § 100.901 apply. Vessels desiring to transit the regulated area may do so only with prior approval of the Patrol Commander and when so directed by that officer. Vessels will be operated at a no wake speed to reduce the wake to a minimum, and in a manner which will not endanger participants in the event or any other craft. The rules contained in the above two sentences shall not apply to participants in the event or vessels of the patrol operating in the performance of their assigned duties. The Patrol Commander may direct the anchoring, mooring, or movement of any boat or vessel within the regatta area. A succession of sharp, short signals by whistle or horn from vessels patrolling the area under the direction of the U.S. Coast Guard Patrol Commander shall serve as a signal to stop. Vessels so signaled shall stop and shall comply with the orders of the Patrol Commander. Failure to do so may result in expulsion from the area, citation for failure to comply, or both.

This notice of enforcement is issued under authority of 33 CFR 165.903, Harborfest Dragon Boat Race; South Haven, MI, and 5 U.S.C. 552(a). In addition to this notice of enforcement in the **Federal Register**, the Coast Guard plans to provide the maritime community with advance notification for the enforcement of this regulation via Broadcast Notice to Mariners or Local Notice to Mariners. The Patrol Commander may be contacted via Channel 16, VHF-FM.

Dated: May 18, 2016.

**A.B. Cocanour,**  
*Captain, U.S. Coast Guard, Captain of the Port Lake Michigan.*

[FR Doc. 2016-13783 Filed 6-9-16; 8:45 am]

**BILLING CODE 9110-04-P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 117

[Docket No. USCG-2016-0405]

#### Drawbridge Operation Regulation; Sloop Channel and Long Creek, Nassau, NY

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of deviation from drawbridge regulation.

**SUMMARY:** The Coast Guard has issued a temporary deviation from the operating schedule that governs the Loop Parkway Bridge, mile 0.7, across Long Creek and the Meadowbrook State Parkway Bridge, mile 12.8, across Sloop Channel, at Nassau, New York. This temporary deviation is necessary to facilitate public safety during a public event, the Annual Salute to Veterans and Fireworks Display.

**DATES:** This deviation is effective from 9:30 p.m. on June 25, 2016, to 11:59 p.m. June 26, 2016.

**ADDRESSES:** The docket for this deviation, [USCG-2016-0405] is available at <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 deviation.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this temporary deviation, call or email Ms. Judy K. Leung-Yee, Project Officer, First Coast Guard District, telephone (212) 514-4330, email [judy.k.leung-yee@uscg.mil](mailto:judy.k.leung-yee@uscg.mil).

**SUPPLEMENTARY INFORMATION:** Town of Hempstead Department of Public Safety requested and the bridge owner of both bridges, the State of New York Department of Transportation, concurred with this temporary deviation from the normal operating schedule to facilitate a public event, the Annual Salute to Veterans and Fireworks Display.

The Loop Parkway Bridge, mile 0.7, across Long Creek has a vertical clearance in the closed position of 21 feet at mean high water and 25 feet at mean low water. The existing bridge operating regulations are found at 33 CFR 117.799(f).

The Meadowbrook State Parkway Bridge, mile 12.8, across Sloop Channel has a vertical clearance in the closed position of 22 feet at mean high water and 25 feet at mean low water. The existing bridge operating regulations are found at 33 CFR 117.799(h).

Long Creek and Sloop Channel are transited by commercial fishing and recreational vessel traffic.

Under this temporary deviation, the Loop Parkway and the Meadowbrook State Parkway Bridges may remain in the closed position between 9:30 p.m. and 11:59 p.m. on June 25, 2016 (rain date: June 26, 2016 between 9:30 p.m. and 11:59 p.m.).

Vessels able to pass under the bridge in the closed position may do so at anytime. The bridges will not be able to open for emergencies and there are no immediate alternate routes for vessels to pass.

The Coast Guard will also inform the users of the waterways through our Local and Broadcast Notices to Mariners of the change in operating schedule for the bridge so that vessels can arrange their transits to minimize any impact caused by the temporary deviation.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the effective period of this temporary deviation. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: June 6, 2016.

**C.J. Bisignano,**

*Supervisory Bridge Management Specialist,  
First Coast Guard District.*

[FR Doc. 2016-13692 Filed 6-9-16; 8:45 am]

**BILLING CODE 9110-04-P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 117

[Docket No. USCG-2016-0484]

#### Drawbridge Operation Regulation; Isle of Wight (Sinepuxent) Bay, Ocean City, MD

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of deviation from drawbridge regulations.

**SUMMARY:** The Coast Guard has issued a temporary deviation from the operating schedule that governs the US 50 (Harry W. Kelly Memorial) Bridge across the Isle of Wight (Sinepuxent) Bay, mile 0.5, at Ocean City, MD. The deviation is necessary to accommodate the increased vehicular traffic of the 2016 Ocean City Air Show. This deviation allows the bridge to remain in the closed-to-navigation position.

**DATES:** The deviation is effective from 3:55 p.m. on Saturday June 18, 2016, to 4:55 p.m. Sunday June 19, 2016.

**ADDRESSES:** The docket for this deviation, [USCG-2016-0484] is available at <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 deviation.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this temporary deviation, call or email Mr. Michael Thorogood, Bridge Administration Branch Fifth District, Coast Guard, telephone 757-398-6557, email [Michael.R.Thorogood@uscg.mil](mailto:Michael.R.Thorogood@uscg.mil).

**SUPPLEMENTARY INFORMATION:** The Town of Ocean City, on behalf of the Maryland State Highway Administration, who owns the US 50 (Harry W. Kelly Memorial) Bridge, has requested a temporary deviation from the current operating regulations set out in 33 CFR 117.559, to accommodate increased vehicular traffic of the 2016 Ocean City Air Show.

Under this temporary deviation, the bridge will be closed-to-navigation from 3:55 p.m. to 4:55 p.m. on June 18, 2016, and from 3:55 p.m. to 4:55 p.m. on June 19, 2016. The bridge is a double bascule bridge and has a vertical clearance in the closed-to-navigation position of 13 feet above mean high water.

The Isle of Wight (Sinepuxent) Bay is used by a variety of vessels including small fishing vessels and recreational vessels. The Coast Guard has carefully considered the nature and volume of vessel traffic on the waterway in publishing this temporary deviation.

Vessels able to pass through the bridge in the closed position may do so at anytime. The bridge will be able to open for emergencies and there is no immediate alternate route for vessels to pass. The Coast Guard will also inform the users of the waterway through our Local Notice and Broadcast Notices to Mariners of the change in operating schedule for the bridge so that vessel operators can arrange their transits to minimize any impact caused by the temporary deviation.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the effective period of this temporary deviation. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: June 7, 2016.

**Hal R. Pitts,**

*Bridge Program Manager, Fifth Coast Guard District.*

[FR Doc. 2016-13777 Filed 6-9-16; 8:45 am]

**BILLING CODE 9110-04-P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 165

[Docket Number USCG-2015-0330]

RIN 1625-AA87

#### Security Zone; Military Ocean Terminal Concord (MOTCO); Concord, California

**AGENCY:** Coast Guard, DHS.

**ACTION:** Final rule.

**SUMMARY:** The Coast Guard is revising the existing conditional security zone regulation currently in place in the navigable waters of Suisun Bay, California, near Concord, California around each of the three piers at the Military Ocean Terminal Concord (MOTCO), California (formerly United States Naval Weapons Center Concord, California). This action is intended to clarify responsibilities and authorities for enforcement of the security zone.

**DATES:** This rule is effective from July 11, 2016.

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>, type USCG-2015-0330 in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rule.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or email Lieutenant Marcia Medina, Sector San Francisco, U.S. Coast Guard; telephone (415) 399-7443, email [D11-PF-MarineEvents@uscg.mil](mailto:D11-PF-MarineEvents@uscg.mil).

#### SUPPLEMENTARY INFORMATION:

##### I. Table of Abbreviations

CFR Code of Federal Regulations  
COTP Captain of the Port San Francisco  
DHS Department of Homeland Security  
E.O. Executive Order  
FR Federal Register  
MOTCO Military Ocean Terminal Concord  
NPRM Notice of Proposed Rulemaking  
Pub. L. Public Law  
§ Section  
U.S.C. United States Code

##### II. Background Information and Regulatory History

On August 27, 1996, the Department of the Army, Corps of Engineers published a final rule in the **Federal Register** (61 FR 43969) establishing a restricted area<sup>1</sup> around the MOTCO

<sup>1</sup> A "restricted area" is defined in § 334.2 as a defined water area for the purpose of prohibiting or limiting public access to the area that generally provides security for Government property and/or

piers (33 CFR 334.1110). Although the restricted area prohibits public access to the piers at all times, it lacks a conditional boundary extension to be enforced during the presence of munitions laden vessels and/or military onload/offload activities. Prior to January 24, 2005, the Coast Guard would address this lack of a conditional boundary by publishing a temporary security zone of sufficient size in the area for each operation at MOTCO (see e.g., 68 FR 33382).

On January 24, 2005, to address this issue on a more permanent basis, the Coast Guard published a final rule in the **Federal Register** (70 FR 3299) establishing a conditional 500-yard security zone around MOTCO's piers to be enforced during military onload/offload operations (33 CFR 165.1199). The security zone provides necessary security for military operations by providing a standoff distance for blast and collision, a surveillance and detection perimeter, and a margin of response time for security personnel.

On July 1, 2015, the Coast Guard published a NPRM (80 FR 48787), with proposed changes to clarify responsibilities and authorities for enforcement of the security zone. There we stated why we issued the NPRM, and invited comments on our proposed regulatory action related to this security zone. During the comment period that ended on September 14, 2015, we received 0 comments.

### III. Legal Authority and Need for Rule

The legal basis for this rule is 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1, which collectively authorize the Coast Guard to establish security zones. This authority is separate from the Department of the Army, Corps of Engineers authority to provide appropriate security in defense of their waterfront facilities and for vessels moored thereto in accordance with the restricted area in 33 CFR 334.1110.

The purpose of this rulemaking is to advance the Coast Guard's efforts to thwart potential terrorist activity through security measures on U.S. ports and waterways.

### IV. Discussion of Comments, Changes, and the Rule

The current regulation at § 165.1199 contains several items that are the subject of the revisions in this FR. The

revisions to § 165.1199 will clarify the regulations in a concise, understandable format.

First, the Coast Guard revises § 165.1199(c) by clarifying the Coast Guard's enforcement role during active loading operations, and the ability of the COTP to designate other representatives as having authority to enforce the security zone. The Coast Guard proposes to replace the existing term "patrol personnel," in favor of a more appropriate term, "designated representative," which includes federal, state and local officials designated by the COTP. This revision clarifies that the COTP may designate law enforcement officials other than Coast Guard personnel to patrol and enforce the security zone.

The Coast Guard also revises the security zone so that it is enforceable at any time a vessel loaded with munitions is present at a pier (in addition to during military onload/offload operations). Without this revision, the existing security zone is enforceable during military onload or offload operations only.

Additionally, the Coast Guard proposes to remove the existing provision regarding "Local Notice to Mariners" as a means of notifying the public that the security zone will be enforced. The security concern related to providing advance notification of the presence of an explosive load at a military base outweighs the benefit of advance notice of the security zone. Instead, the Coast Guard would notify the public of security zone enforcement (and suspensions of enforcement) via Broadcast Notice to Mariners and/or actual notice on-scene during military onloads or offloads. This revision would better align the notification method of this security zone with the notification method for the existing safety zone in the area (see § 165.1198).

No changes in the regulatory text of the rule in the NPRM.

### V. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes or executive orders.

#### A. Regulatory Planning and Review

E.O.s 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of

harmonizing rules, and of promoting flexibility. This rule has not been designated a "significant regulatory action," under E.O. 12866. Accordingly, it has not been reviewed by the Office of Management and Budget.

Security zone enforcement would be limited in duration, and limited to a narrowly tailored geographic area. In addition, although this rule would restrict access to the waters encompassed by the security zone, the effect of this rule would not be significant because the local waterway users will be notified via Broadcast Notice to Mariners and/or actual notice on-scene during military onloads or offloads. The entities most likely to be affected are waterfront facilities, commercial vessels, and pleasure craft engaged in recreational activities.

#### B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 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 received 0 comments from the Small Business Administration on this rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule may affect owners and operators of waterfront facilities, commercial vessels, and pleasure craft engaged in recreational activities and sightseeing. The security zone would not have a significant economic impact on a substantial number of small entities for the following reasons. The security zone would be activated, and thus subject to patrol and enforcement, for a limited duration. When the security zone is activated, vessel traffic would be directed to pass safely around the security zone. The maritime public would be advised when transiting near the activated zone.

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** section.

protection to the public from the risks of damage or injury arising from the Government's use of that area.

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.

### C. 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).

### D. Federalism and Indian Tribal Governments

A rule has implications for federalism under E.O. 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 have determined that it is consistent with the fundamental federalism principles and preemption requirements described in E.O. 13132.

Also, this rule does not have tribal implications under E.O. 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. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

### E. Unfunded Mandates Reform Act

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

we do discuss the effects of this rule elsewhere in this preamble.

### F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023-01 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (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 a security zone of limited size and duration. 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.

### G. Protest Activities

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

### List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

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

### PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

**Authority:** 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05-1, 6.04-1, 6.04-6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

- 2. Revise § 165.1199 to read as follows:

#### § 165.1199 Security Zones; Military Ocean Terminal Concord (MOTCO), Concord, California.

(a) *Location.* The security zone(s) reside(s) within the navigable waters of Suisun Bay, California, extending from

the surface to the sea floor, within 500 yards of the three Military Ocean Terminal Concord (MOTCO) piers in Concord, California.

(b) *Definitions.* As used in this section, “designated representative” means any Coast Guard commissioned, warrant, or petty officer or any Federal, state, or local law enforcement officer who has been designated by the Captain of the Port San Francisco (COTP) to act on the COTP's behalf. The COTP's representative may be on a Coast Guard vessel, a Coast Guard Auxiliary vessel, a Federal, state, or local law enforcement vessel, or a location on shore.

(c) *Regulations.* (1) The security zone(s) described in paragraph (a) of this section will be in force during active military onloading and/or offloading operations and at any time a vessel loaded with munitions is present at a pier.

(2) When one or more piers are involved in onload or offload operations at the same time, there will be a 500-yard security zone for each involved pier.

(3) Under the general regulations in subpart D of this part, entry into, transiting or anchoring within the security zone(s) described in paragraph (a) of this section is prohibited during times of enforcement unless authorized by the COTP or a designated representative.

(4) Vessel operators desiring to enter or operate within the security zone(s) during times of enforcement must contact the COTP or a designated representative on VHF-16 or through the 24-hour Command Center at telephone (415) 399-3547 to obtain permission to do so. Vessel operators given permission to enter or operate in the security zone(s) must comply with all directions given to them by the COTP or a designated representative.

(5) Upon being hailed by the COTP or designated representative by siren, radio, flashing light, or other means, the operator of a vessel approaching the security zone(s) must proceed as directed to avoid entering the security zone(s).

(d) *Notice of enforcement or suspension of enforcement of security zone(s).* During periods that one or more security zones are enforced, the COTP or a designated representative will issue a Broadcast Notice to Mariners and/or notify mariners via actual notice on-scene. In addition, COTP maintains a telephone line that is maintained 24 hours a day, 7 days a week. The public can contact COTP at (415) 399-3547 to obtain information concerning enforcement of this section. When the

security zones are no longer needed, the COTP or designated representative will cease enforcement of the security zones. Upon suspension of enforcement, all persons and vessels are granted general permissions to enter, move within, and exit the security zones, but should remain cognizant of the applicable restricted area designated in 33 CFR 334.1110.

Dated: May 20, 2016.

**Gregory G. Stump,**

*Captain, U.S. Coast Guard, Captain of the Port San Francisco.*

[FR Doc. 2016-13781 Filed 6-9-16; 8:45 am]

BILLING CODE 9110-04-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R05-OAR-2015-0009; EPA-R05-OAR-2015-0314; FRL-9946-80-Region 5]

### Air Plan Approval; Illinois; NAAQS Updates

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving revised rules submitted by the State of Illinois as State Implementation Plan (SIP) revisions. The submitted rules update Illinois' ambient air quality standards to include the 2012 primary National Ambient Air Quality Standard (NAAQS) for fine particulate matter (PM<sub>2.5</sub>), add EPA-promulgated monitoring methods, and address the "sunset provisions" in our regulations. In addition, the revised rules contain the timing requirements for the "flagging of exceptional events" and the submitting of documentation supporting the determination of exceptional events for the 2012 primary annual PM<sub>2.5</sub> standard.

**DATES:** This direct final rule will be effective August 9, 2016, unless EPA receives adverse comments by July 11, 2016. If adverse comments are received by EPA, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R05-OAR-2015-0009 or EPA-R05-OAR-2015-0314 at <http://www.regulations.gov> or via email to [Aburano.Douglas@epa.gov](mailto:Aburano.Douglas@epa.gov). For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed

from *Regulations.gov*. For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

#### FOR FURTHER INFORMATION CONTACT:

Edward Doty, Attainment Planning and Maintenance Section, Air Programs Branch (AR-18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886-6057, [Doty.Edward@epa.gov](mailto:Doty.Edward@epa.gov).

#### SUPPLEMENTARY INFORMATION:

Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This **SUPPLEMENTARY INFORMATION** section is arranged as follows:

- I. When and why did the State make these submittals?
- II. What are the State rule revisions?
  - A. April 23, 2015, Submittal—Rule Revision Group R14-06
  - B. December 18, 2014, Submittal—Rule Revision Group R14-17
- III. Did the State hold public hearings for these submittals?
- IV. What is EPA's analysis of the State's submittals?
- V. What action is EPA taking?
- VI. Incorporation by Reference
- VII. Statutory and Executive Order Reviews

#### I. When and why did the State make these submittals?

Section 109 of the Clean Air Act (CAA) requires EPA to establish national primary (protective of human health) and secondary (protective of human welfare) air quality standards for pollutants for which air quality criteria have been issued under Section 108 of the CAA (the criteria pollutants<sup>1</sup>).

<sup>1</sup> The criteria pollutants are ozone (O<sub>3</sub>), nitrogen oxides (represented by nitrogen dioxide (NO<sub>2</sub>)), sulfur oxides (represented by sulfur dioxide (SO<sub>2</sub>)), carbon monoxide (CO), particulate matter

Individually and collectively these standards are referred to as NAAQS. Section 109(d)(1) of the CAA requires EPA to review, and if necessary, based on accumulated health and welfare data, to revise each NAAQS every five years. If a NAAQS is revised, states whose rules include state air quality standards may revise their rules to address the revised NAAQS and associated monitoring requirements, and submit them to EPA as SIP revision requests. *See, e.g.*, 415 ILCS 5/10(H).

On December 18, 2014, the Illinois Environmental Protection Agency (IEPA) submitted to EPA for approval as SIP revisions updates to the methods used by Illinois to monitor air quality for several NAAQS. These updates correspond to EPA's revised monitoring methods promulgated during the period of July 1, 2013, through December 31, 2013. The Illinois Pollution Control Board (IPCB) adopted these rule revisions on June 5, 2014, as rule revision group R14-17.

On April 23, 2015, IEPA submitted to EPA for approval as SIP revisions an additional update to include the 2012 primary annual and 24-hour PM<sub>2.5</sub> NAAQS and a provision incorporating by reference EPA-promulgated monitoring methods. These rule updates correspond to the NAAQS and monitoring methods promulgated by EPA during the period of January 1, 2013, through June 30, 2013, and on July 3, 2013, and August 5, 2013. This state submittal also addressed the "sunset provisions" of 40 CFR 50.4(e), finding that the 1971 NAAQS for sulfur dioxide (SO<sub>2</sub>) no longer applies to the Lemont and Pekin areas in Illinois. Finally, the revised rules contain the timing requirements for the "flagging of exceptional events" and the submitting of documentation supporting the determination of exceptional events for the 2012 primary annual PM<sub>2.5</sub> standard. The IPCB adopted these rule revisions on September 5, 2013, as rule revision group R14-6.

#### II. What are the State rule revisions?

##### A. April 23, 2015, Submittal—Rule Revision Group R14-06

The rule revisions contained in the April 23, 2015 submittal are summarized below.

(represented by total suspended particulates (TSP), particulates (PM<sub>10</sub>), and fine particulates (PM<sub>2.5</sub>)), and lead (Pb). Note that Illinois also has air quality standard and monitoring rules for "coarse particulate matter" (PM<sub>2.5-10</sub>), although this is not a criteria pollutant and is generally considered to be included in PM<sub>10</sub>.

## 35 IAC 243.107. Reference Conditions

Illinois amended this section to apply applicable monitoring requirements to the 2012 primary annual and 24-hour PM<sub>2.5</sub> NAAQS, which Illinois codified at 35 IAC 243.120(d). Volume 35 of the Illinois Administrative Code section 243.107 (35 IAC 243.107) sets forth the reference air temperature and reference pressure measurements to determine air quality concentrations of monitored air pollutants, and mirrors the requirements of title 40 of the Code of Federal Regulations (CFR) 50.3. Among other things, this section requires that measurements of PM<sub>2.5</sub> must be reported based on actual ambient air volume measured at actual temperature and pressure at the monitoring site. *See also* the discussion of 35 IAC 243.120(d), below.

## 35 IAC 243.108. Incorporations by Reference

Illinois updated 35 IAC 243.108 to incorporate by reference the 2013 versions of appendices A–1, A–2, B, C, D, F, G, H, I, J, K, L, N, O, P, Q, R, S, and T of 40 CFR part 50. These appendices contain the reference monitoring methods for and the “interpretation” of (*i.e.*, data handling conventions and computations) the ambient standards for the criteria air pollutants.

EPA made two changes in the 2013 versions of these appendices relative to the 2012 versions. First, EPA revised the appendix G reference method for the determination of lead in suspended particulate matter (78 FR 40000, July 3, 2013). Second, EPA revised appendix N for the data handling conventions and computations necessary for determining when the primary and secondary NAAQS for PM<sub>2.5</sub> are met. 78 FR 3086, 3277–3281 (January 15, 2013). Illinois’ rule revisions incorporate by reference these amended CFR appendices.

Additionally, Illinois references an August 5, 2013, (78 FR 47191) EPA **Federal Register** document as revising appendix N of 40 CFR part 50. However, EPA’s August 5, 2013 **Federal Register** document establishes area designations for the 2010 SO<sub>2</sub> primary NAAQS, and does not address or relate to appendix N. Therefore, this rule revision contains an incorrect reference to EPA rulemaking, and is further discussed in Section IV, below.

35 IAC 243.120. PM<sub>10</sub> and PM<sub>2.5</sub>

Illinois added Subsection (d) to incorporate EPA’s 2012 primary annual and 24-hour NAAQS for PM<sub>2.5</sub>. These revised PM<sub>2.5</sub> standards include an annual average level of 12 micrograms

per cubic meter and a 24-hour average level of 35 micrograms per cubic meter. *See* 78 FR 3086 (January 15, 2013).

Consistent with 40 CFR 50.13, this section also requires that the revised PM<sub>2.5</sub> standards be measured by either a Federal Reference Method (FRM) based on appendix L of 40 CFR part 50, incorporated by reference in 35 IAC 243.108, or a Federal Equivalent Method (FEM) designated by EPA in accordance with 40 CFR part 53 and listed in EPA’s “List of Designated Reference and Equivalent Methods,” which is also incorporated by reference in 35 IAC 243.108.<sup>2</sup> *See* <http://www3.epa.gov/ttnamti1/files/ambient/criteria/reference-equivalent-methods-list.pdf>.

## 35 IAC 243.122. Sulfur Oxides (Sulfur Dioxide)

Illinois amended the IPCB Board Note in subsection (a)(5) to address the “sunset provisions” in 40 CFR 50.4(e). Under 40 CFR 50.4(e), the 1971 primary annual and 24-hour NAAQS for SO<sub>2</sub> no longer apply to the Lemont and Pekin areas, effective October 4, 2014, because: (1) One year has passed since EPA designated these areas as nonattainment for the 2010 primary 1-hour SO<sub>2</sub> NAAQS, effective October 3, 2013; (2) these areas were not designated as nonattainment for the 1971 SO<sub>2</sub> NAAQS as of June 22, 2010; and (3) there has not been a SIP call for the 1971 SO<sub>2</sub> NAAQS for these areas. *See* 75 FR 47191 (August 5, 2013). The 1971 SO<sub>2</sub> NAAQS continues to apply for other areas in Illinois until these areas meet the sunset provisions specified in 40 CFR 50.4(e).

## 35 IAC 243. Table A. Schedule of Exceptional Event Flagging and Documentation Submission for New or Revised NAAQS

Illinois has amended Table A to add the flagging deadlines by year for the 2012 annual PM<sub>2.5</sub> standard adopted in 2012 and promulgated on January 15, 2013 (78 FR 3086). For PM<sub>2.5</sub> data collected in 2010 and 2011, the exceptional events were required to be flagged and described by July 1, 2013, and supported by complete documentation by December 12, 2013. For PM<sub>2.5</sub> data collected in 2012, the exceptional events were required to be flagged and described by July 1, 2013, and supported by complete documentation by December 12, 2013.

<sup>2</sup> The “List of Designated Reference and Equivalent Methods” is an EPA Web page that lists all FRMs and FEMs by pollutant and documents the Federal rulemakings that promulgated the monitoring methods. Other than the **Federal Register** notices for these rulemakings, it is the only comprehensive source of FEMS designated by EPA.

For PM<sub>2.5</sub> data collected in 2013, the exceptional events were required to be flagged and described by July 1, 2014, and supported by complete documentation by August 1, 2014. The flagging and demonstration submittal deadlines are the same as the deadlines provided in Table 1 in 40 CFR 50.14.

Table A lists the deadlines for exceptional event flagging and documentation of such flagging by pollutant standard. Under 40 CFR 50.14, a state may request that EPA exclude data showing violations or exceedances of the NAAQS from air quality determinations if the state can demonstrate to EPA’s satisfaction that these violations or exceedances were due to exceptional events unlikely to reoccur and cause additional violations of the NAAQS at any monitoring site. Where such an event has occurred, the state may flag air quality data affected by the event and request that EPA approve the exclusion of these data from further air quality determinations, including designation of nonattainment areas and assessment of air quality data used for purposes of redesignation to attainment. The criteria for approval of exceptional event exclusion are given in 40 CFR 50.14(b) and the schedule and procedures for data flagging by the state are discussed in 40 CFR 50.14(c).

## B. December 18, 2014, Submittal—Rule Revision Group R14–17

The rule revisions contained in the December 18, 2014, submittal are summarized below.

## 35 IAC 243.108. Incorporations by Reference

Illinois revised this section to incorporate by reference EPA’s updated “List of Designated Reference and Equivalent Methods” from June 27, 2013, to December 17, 2013. On December 17, 2013, EPA issued an updated version of the “List of Designated Reference and Equivalent Methods” that includes five new FEMs for monitoring of PM<sub>10</sub>, PM<sub>2.5–10</sub>, PM<sub>2.5</sub>, and oxides of nitrogen (NO<sub>x</sub>) promulgated by EPA. *See* 78 FR 67360 (November 12, 2013). More specifically, EPA promulgated the following FEMs: (1) For PM<sub>2.5–10</sub>, Automated Equivalent Method EQPM–1013–207 (“Thermo Scientific TEOM® 1405-Dichotomous Ambient Particulate Monitor with FDMS”); (2) for PM<sub>10</sub>, Automated Equivalent Method EQPM–1013–208 (“Thermo Scientific TEOM® 1405-Dichotomous Ambient Particulate Monitor with FDMS”); (3) for PM<sub>2.5</sub>, Automated Equivalent Method EQPM–1013–209 (“Met One BAM–1022 Real Time Beta Attenuation Mass Monitor-

Outdoor PM<sub>2.5</sub> FEM Configuration”) and Automated Equivalent Method EQNA–1013–210 (“Environment S.A. Model MP101M PM<sub>2.5</sub> Beta Attenuation Monitor”); and (4) for NO<sub>x</sub>, Automated Equivalent Method EQNA–1013–210 (“Environment S.A. Model AS32M cavity attenuated phase shift spectroscopy Nitrogen Dioxide Analyzer”). Illinois also added a statement to 35 IAC 243.108 that the incorporation by reference of EPA’s promulgated monitoring methods “does not include USEPA methods approvals that occurred after December 17, 2013.”

### III. Did the State hold public hearings for these submittals?

Illinois held a public hearing for the rule changes discussed in the December 18, 2014, submittal (R14–17) on May 7, 2014. Illinois held a public hearing for the rule revisions discussed in the April 23, 2015, submittal (R14–6) on October 31, 2013. The state received one comment for the R14–6 rule revisions in support of adoption of the proposed rule revisions.

### IV. What is EPA’s analysis of the State’s submittals?

EPA finds the state’s requested SIP revisions to be acceptable because the state’s rule revisions make the state’s air quality standards and associated monitoring requirements identical-in-substance to EPA’s promulgated NAAQS and monitoring methods, as revised through December 17, 2013.

Additionally, EPA finds that the specified exceptional event flagging and demonstration submittal deadlines are acceptable because they are consistent with the deadlines in 40 CFR 50.14.

EPA also agrees with Illinois’ application of the “sunset provisions” in 40 CFR 50.4(e) to the Lemont and Pekin areas. EPA has designated the Lemont and Pekin areas as nonattainment for the 2010 SO<sub>2</sub> NAAQS, which means that Illinois must submit a regulation for SIP approval that meets Federal requirements and that provides for attainment of the 2010 SO<sub>2</sub> NAAQS in these areas no later than October 4, 2018. The 1971 SO<sub>2</sub> NAAQS no longer applies to the Lemont and Pekin areas because EPA designated the Lemont and Pekin areas as nonattainment for the 2010 SO<sub>2</sub> NAAQS, these areas were not designated as nonattainment for the 1971 SO<sub>2</sub> NAAQS as of June 22, 2010, and there has not been a SIP call for the 1971 SO<sub>2</sub> NAAQS. *See* 78 FR 47192.

Finally, as discussed above, the state’s rule revisions to 35 IAC 243.108 incorrectly cite an August 5, 2013 EPA rulemaking at 78 FR 47191 as amending

appendix N to 40 CFR part 50. Appendix N sets forth the data handling and computational requirements needed to demonstrate compliance with the 2012 PM<sub>2.5</sub> NAAQS. The August 5, 2013, EPA rulemaking establishes area designations for the 2010 SO<sub>2</sub> NAAQS, but does not amend appendix N to 40 CFR part 50. Although this citation is incorrect, we are still approving the submission because Illinois has also incorporated by reference the 2013 version of appendix N to 40 CFR part 50 at 35 IAC 243.108. Appendix N, as codified in the CFR, contains the reference monitoring methods for SO<sub>2</sub> under the 2010 NAAQS and does not contain a citation to the August 5, 2013, EPA rulemaking. Therefore, it is unlikely that the public would be confused when determining the applicable data handling and computational requirements to demonstrate compliance with the 2012 PM<sub>2.5</sub> NAAQS. Illinois should correct this incorrect citation in a subsequent rule revision, but it does not appear to present any implementation or enforcement issues for the state or EPA.

### V. What action is EPA taking?

EPA is approving the submitted rule revisions as revisions of the Illinois SIP. Specifically, we are approving 35 IAC sections 243.107, 243.108, 243.120, 243.122, and 243. Table A revised as discussed above, and we are incorporating by reference these revised rules into the Illinois SIP.

We are publishing this action without prior proposal because we view this as a noncontroversial amendment and anticipate no adverse comments. However, in the proposed rules section of this **Federal Register** publication, we are publishing a separate document that will serve as the proposal to approve the state plan if relevant adverse written comments are filed. This rule will be effective August 9, 2016 without further notice unless we receive relevant adverse written comments by July 11, 2016. If we receive such comments, we will withdraw this action before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on the proposed action. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that, if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that

are not the subject of an adverse comment. If we do not receive any comments, this action will be effective August 9, 2016.

### VI. Incorporation by Reference

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of the Illinois Regulations described in the amendments to 40 CFR part 52 set forth below. EPA has made, and will continue to make, these documents generally available electronically through [www.regulations.gov](http://www.regulations.gov) and/or in hard copy at the appropriate EPA office (see the **ADDRESSES** section of this preamble for more information).

### VII. Statutory and Executive Order Reviews

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 Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- 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, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

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 August 9, 2016. 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 this **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to

enforce its requirements. (See section 307(b)(2).)

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

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxide.

Dated: May 10, 2016.

**Robert A. Kaplan,**

*Acting Regional Administrator, Region 5.*

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.*

■ 2. Section 52.720 is amended by adding paragraph (c)(208) to read as follows:

#### § 52.720 Identification of plan.

\* \* \* \* \*

(c) \* \* \*

(208) On December 18, 2014, and April 23, 2015, Illinois submitted amendments to its State Implementation Plan at 35 Illinois Administrative Code part 243, which updates Illinois air quality standards to reflect National Ambient Air Quality Standards promulgated by EPA through December 17, 2013, and incorporates Federal test procedures for these pollutants.

(i) *Incorporation by Reference.* (A) Illinois Administrative Code Title 35: Environmental Protection; Subtitle B: Air Pollution; Chapter I: Pollution Control Board; Subchapter I: Air Quality Standards And Episodes; Part 243: Air Quality Standards; Sections 243.107 Reference Conditions, 243.120 p.m.<sub>10</sub> and PM<sub>2.5</sub>, 243.122 Sulfur Oxides (Sulfur Dioxide), and 243.108 Schedule of Exceptional Event Flagging and Documentation Submission for New or Revised NAAQS, effective November 27, 2013.

(B) Illinois Administrative Code Title 35: Environmental Protection; Subtitle B: Air Pollution; Chapter I: Pollution Control Board; Subchapter I: Air Quality Standards And Episodes; Part 243: Air Quality Standards; Section 243.108 Incorporation by Reference, effective June 9, 2014.

[FR Doc. 2016-13700 Filed 6-9-16; 8:45 am]

**BILLING CODE 6560-50-P**

#### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Part 180

[EPA-HQ-OPP-2015-0485; FRL-9946-43]

#### Alpha-2,4,6-Tris[1-(phenyl)ethyl]-Omega-hydroxypoly(oxyethylene) poly(oxypropylene) Copolymer; Tolerance Exemption; Technical Correction

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule; technical correction.

**SUMMARY:** EPA issued a final rule in the **Federal Register** of March 2, 2016, concerning Alpha-2,4,6-Tris[1-(phenyl)ethyl]-Omega-hydroxypoly(oxyethylene) poly(oxypropylene) copolymer; Tolerance Exemption. This document corrects typographical errors.

**DATES:** This final rule correction is effective June 10, 2016.

**ADDRESSES:** The docket for this action, identified by docket identification (ID) number EPA-HQ-OPP-2015-0485, is available at <http://www.regulations.gov> or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460-0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OPP Docket is (703) 305-5805. Please review the visitor instructions and additional information about the docket available at <http://www.epa.gov/dockets>.

**FOR FURTHER INFORMATION CONTACT:** Susan Lewis, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington DC 20460-0001; telephone number: (703) 308-8009; email address: [RDfRNtices@epa.gov](mailto:RDfRNtices@epa.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Does this action apply to me?

The Agency included in the March 2, 2016 final rule a list of those who may be potentially affected by this action.

##### II. What does this technical correction do?

EPA issued a final rule in the **Federal Register** of March 2, 2016 (81 FR 10776) (FRL-9942-48) that increases the poly(oxyethylene) content from 16–30 moles to 16–60 moles. EPA

inadvertently mistyped the final ratio of poly(oxyethylene) ratio as 16–30 moles instead of 16–60 moles.

The preamble for FR Doc. 2016–04599 published in the **Federal Register** issue of Wednesday, March 2, 2016 (81 FR 10776) (FRL–9942–48) is corrected as follows:

1. On page 10776, second column, under the heading Summary, paragraph one, line 9 and line 23, correct 16–30 to read 16–60.

2. On page 10777, first column, paragraph 6, line 17 is corrected to read: 16–60 moles.

3. On page 10778, second column, paragraph two, line 7 is corrected to read: 16–60 moles.

### III. Why is this correction issued as a final rule?

Section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)(3)(B)) provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, the agency may issue a final rule without providing notice and an

opportunity for public comment. EPA has determined that there is good cause for making this technical correction final without prior proposal and opportunity for comment, because it does not affect or change the Agency's original regulatory decision nor does it adversely affect human or environmental health. EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(3)(B).

### IV. Do any of the statutory and executive order reviews apply to this action?

No. For a detailed discussion concerning the statutory and executive order review, refer to Unit X of the March 2, 2016 final rule.

### V. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal**

**Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

### List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: June 1, 2016.

**Susan Lewis**,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR Chapter 1 is corrected as follows:

### PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

**Authority:** 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.960, revise the following entry in the table to read as follows:

**§ 180.960 Polymers; exemptions from the requirement of a tolerance.**

\* \* \* \* \*

Polymer	CAS No.
<p>* * * * *</p> <p>Alpha-[2,4,6-Tris[1-(phenyl)ethyl]phenyl]-Omega-hydroxy poly(oxyethylene) poly(oxypropylene) copolymer, the poly(oxypropylene) content averages 2–8 moles, the poly(oxyethylene) content averages 16–60 moles. Minimum number-average molecular weight (in amu) of 1,500 .....</p> <p>* * * * *</p>	70880–56–7

\* \* \* \* \*

[FR Doc. 2016–13816 Filed 6–9–16; 8:45 am]

BILLING CODE 6560–50–P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

#### 44 CFR Part 64

[Docket ID FEMA–2016–0002; Internal Agency Docket No. FEMA–8435]

### Suspension of Community Eligibility

#### Correction

#### § 64.6 [Corrected]

In rule document 2016–12123, appearing on pages 32660–32664, in the issue of Tuesday, May 24, 2016, make the following correction:

On page 32661, in the first column of the table, the entry “**Region III**” should read “**Region I**”.

[FR Doc. C1–2016–12123 Filed 6–8–16; 8:45 am]

BILLING CODE 1505–01–D

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

#### 49 CFR Part 234

[Docket No. FRA–2011–0007, Notice No. 6]

RIN 2130–AC55

### National Highway-Rail Crossing Inventory Reporting Requirements

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Final rule; response to petition for reconsideration.

**SUMMARY:** This document responds to a petition for reconsideration of FRA's January 6, 2015, final rule addressing U.S. DOT National Highway-Rail Crossing Inventory (Crossing Inventory or Inventory) Reporting Requirements. This document amends and clarifies the final rule in response to the petition for reconsideration and makes certain additional amendments to the rule to address practical implementation

problems that arose after publication of the final rule.

**DATES:** The amendments in this final rule are effective June 10, 2016.

#### FOR FURTHER INFORMATION CONTACT:

Ronald Ries, Staff Director, Highway-Rail Crossing and Trespasser Prevention Programs Division, Office of Railroad Safety, FRA, 1200 New Jersey Avenue SE., Mail Stop 25, Washington, DC 20590 (telephone: 202–493–6299), [ronald.ries@dot.gov](mailto:ronald.ries@dot.gov); or Kathryn Shelton Gresham, Office of Chief Counsel, FRA, 1200 New Jersey Avenue SE., Mail Stop 13, Washington, DC 20590 (telephone: 202–493–6063), [kathryn.gresham@dot.gov](mailto:kathryn.gresham@dot.gov).

#### SUPPLEMENTARY INFORMATION:

#### I. Background

On October 18, 2012, FRA published a notice of proposed rulemaking (NPRM) as a first step towards the agency's promulgation of Crossing Inventory regulations per the Congressional mandate contained in Section 204(a) of the Rail Safety Improvement Act of 2008 (RSIA)

(codified at 49 U.S.C. 20160). *See* 77 FR 64077. After careful consideration of comments received in response to the NPRM and testimony received at a February 19, 2013, public hearing, FRA published a final rule on January 6, 2015, requiring railroads that operate one or more trains through highway-rail or pathway crossings to submit initial reports to the Crossing Inventory, including current information about warning devices and signs for previously unreported and new highway-rail and pathway crossings through which they operate. The final rule also requires railroads to periodically update the data in the Crossing Inventory, including the prompt reporting of a crossing sale, crossing closure, or changes in certain crossing characteristics. *See* 80 FR 746.

The Association of American Railroads (AAR) filed a petition for reconsideration (Petition) of the final rule. In its Petition, AAR asks FRA: (1) For additional time to comply with the final rule; (2) to reconsider the rule's requirement that railroads, in certain instances, submit data to the Crossing Inventory that State agencies have historically submitted voluntarily. Specifically, AAR asks FRA to amend 49 CFR 234.405 and 234.407 to address that issue and issues associated with the assignment of inventory numbers to certain crossings located in private companies', ports', and docks' areas; (3) to amend those same sections, and § 234.409, to remove the requirement that railroads operating trains through highway-rail or pathway crossings, that are not the "primary operating railroad" for those crossings, ensure information the relevant primary operating railroad provides to the Crossing Inventory is submitted and updated; and (4) to revise the Inventory Guide<sup>1</sup> to disallow states from reporting crossing closures to the Crossing Inventory.

The specific issues AAR raised, and FRA's responses to those issues, are discussed in detail in the "Section-by-Section Analysis" below. The Section-by-Section Analysis also contains a discussion of each provision of the final rule which FRA is amending or clarifying in response to practical implementation issues it has discovered since it promulgated the final rule. These amendments also allow greater flexibility in complying with the rule. These amendments are within the scope of the issues and options discussed, considered, or raised in the NPRM.

## II. Section-by-Section Analysis

### A. Amendments to 49 CFR Part 234

#### Section 234.401 Definitions

FRA is adding definitions of "general railroad system of transportation" and "general system railroad" to this section because these terms are used in the revised definition of "primary operating railroad", which is discussed below. For purposes of this subpart, FRA is defining a general railroad system of transportation as the network of standard gage track over which goods may be transported throughout the nation and passengers may travel between cities and within metropolitan and suburban areas. Consistent with the definition of "general railroad system of transportation", FRA is defining general system railroad as a railroad that operates on track, which is part of the general railroad system of transportation. Thus, a general system railroad is not a plant railroad, as defined in § 234.5 of this part.

As applied to highway-rail and pathway crossings located within private companies', ports', or docks' areas, the final rule defines "primary operating railroad" as "each railroad that owns track leading to the private company, port, or dock area." After FRA issued the final rule, at least one regulated entity expressed concern about a private company where a railroad owns track leading into the private company, but does not actually operate on track within the company. Because the railroad does not operate over any crossings within the company's area, the railroad stated it does not have ready access to the information the rule requires it to report to the Crossing Inventory for crossings within the private company.

FRA did not intend to require railroads merely owning track leading to a private company, port, or dock area, where the only railroad that operates through crossings within the area is a plant railroad, as defined in § 234.5, to report to the Crossing Inventory information on the crossings within the private area. Accordingly, FRA is revising the definition of "primary operating railroad" to clarify that mere ownership of track leading to a private company, port, or dock area does not make a railroad a primary operating railroad for crossings within that area, if no general system railroad operates over that track and through at least one crossing within the private area.

If a general system railroad operates over track leading to a private area and through at least one highway-rail or pathway crossing within the private

area, the railroad that owns the track leading to the area and over which the general system railroad operates, is responsible for reporting to the Crossing Inventory information on all the crossings within the private area. The railroad owning the track leading to the private area should be able to obtain access to the information required to be submitted to the Crossing Inventory (e.g., number and speed of train movements through the crossings within the area) through the railroad operating over the track it owns.

For example, if one general system railroad (Railroad A) owns a track leading to a private company, port, or dock area and operates over that track and through at least one crossing within the private area, that Railroad (Railroad A) is the primary operating railroad for all crossings within the private area. Similarly, if Railroad A owns track leading to a private company, port, or dock area, but does not operate over that track or any crossings within the private area but instead allows another general system railroad (Railroad B) to operate over its track leading to the private area and Railroad B also operates through at least one crossing within the private area, Railroad A (the railroad that owns the track leading to the private area) is considered the primary operating railroad for all of the crossings within the private area—even though it does not actually operate over the track.

On the other hand, if two general system railroads (e.g., Railroad C and Railroad D) own separate tracks leading to a private company, port, or dock area, and Railroad C operates over its own track leading to the private area and through at least one crossing within that area (and Railroad D does not operate over its track leading to the private area or through any crossings within the area), Railroad C (the general system railroad that owns and operates over its track leading to the private area and through at least one crossing within that area) is considered the primary operating railroad for all of the crossings within that area.

Likewise, if Railroads C and D each own track leading to a private company, port, or dock area, and Railroad E (another general system railroad) operates over one of their tracks leading to the private area and through at least one crossing within the area, the owner of the track leading to the area over which Railroad E operates is the primary operating railroad for all crossings within the private area. If both Railroads C and D own track leading to a private company, port, or dock area, and they each operate over their owned track into the area and through at least

<sup>1</sup> Federal Railroad Administration, Office of Railroad Safety, "Guide for Preparing U.S. DOT Crossing Inventory Forms" (initially published January 6, 2015).

one crossing within the area, they both will be considered primary operating railroads for all crossings within the private area.

Finally, if in any scenario a general system railroad (or more than one railroad) owns track leading to a private company, port, or dock area, but neither that railroad nor any other general system railroad operates over that track and through at least one crossing within the area, then the crossings in the private area do not need to be reported to the Crossing Inventory. For example, if a general system railroad owns track leading up to the entrance of a private area and operates over that track (or allows another general system railroad to operate over that track), but does not operate over any crossing within the area, that railroad is not considered a primary operating railroad for purposes of the crossings within the private area.

#### Section 234.403 Submission of Data to the Crossing Inventory, Generally

Section 234.403 of the final rule contains the general requirements for submission of information to the Crossing Inventory. Paragraph (e) of that section of the final rule allows a parent corporation to submit crossing data to the Crossing Inventory on behalf of one or more of its subsidiaries, if the parent corporation and subsidiary railroad(s): (1) Provide written notice (signed by the chief executive officer of the parent corporation) to FRA that the parent corporation is assuming the reporting and updating responsibility; and (2) operate as a “single, seamless, integrated” railroad system. Since publication of the final rule, numerous railroads that voluntarily submitted crossing data in the past on behalf of their subsidiaries notified FRA they would like to continue to do so. However, because they do not operate as a “single, seamless, integrated” railroad system they cannot report on behalf of their subsidiaries under the final rule. Railroads also questioned the need for the chief executive officer, as opposed to any railroad official, to sign the written notice the parent corporation submits. After considering these concerns, which could inadvertently prevent parent corporations from reporting crossing data on behalf of their subsidiaries, FRA is amending § 234.403(e) by removing the requirement that parent corporations and their subsidiary railroads operate as a “single, seamless, integrated” railroad system. As a result, all railroad parent corporations can now report on behalf of their subsidiaries under paragraph (e).

This final rule also simplifies the notification process a parent corporation must follow if it wants to submit Crossing Inventory data on behalf of one or more of its subsidiary railroads. At least one regulated entity raised concerns about current paragraph (e)(1) of this section of the final rule that requires the chief executive officer of the parent corporation to sign the required notice to FRA that the parent corporation is assuming reporting and updating responsibility for its subsidiaries. In response to those concerns, FRA is amending paragraph (e)(1) to allow any appropriate management official with authority to bind the company to sign the notice. This notice must include a statement that the parent corporation is agreeing to (1) submit and update crossing data for the named subsidiaries and the parent corporation, and (2) be subject to enforcement action for noncompliance with the final rule. FRA is also amending paragraph (e)(1) to require only the parent corporation, instead of the parent corporation and the named subsidiary, to submit the required written notice to FRA.

#### Section 234.405 Submission of Initial Data to the Crossing Inventory for Previously Unreported Crossings

##### *Assignment of Inventory Numbers to Previously Unreported Crossings Located in a Private Company, Port, or Dock Area*

Current paragraph (a)(1)(ii) of § 234.405 requires each primary operating railroad that operates through at least one previously unreported crossing within a private company, port, or dock area to assign one or more Inventory Numbers to those crossings. AAR asserts that (1) this requirement is contrary to current practice that allows a single Inventory Number to be assigned to all crossings in these areas, and (2) this new requirement could create reporting confusion if an accident were to occur at a crossing within a private company, port, or dock area. AAR requests that FRA amend this requirement to allow multiple primary operating railroads to share an assigned Inventory Number for one or more previously unreported highway-rail and pathway crossings located within a private company, port, or dock area.

After careful consideration, FRA is not adopting AAR's request to modify the language of § 234.405(a)(1)(ii) for two reasons. First, for purposes of enforcement of this rule's reporting requirements, if the railroads share a single Inventory Number, FRA will not know which railroad is responsible for

misreporting or failure to report. Second, if a reportable accident/incident occurs at a previously unreported highway-rail or pathway crossing located within a private company, port, or dock area, it benefits both FRA and the railroads involved for the railroad responsible for reporting the accident/incident under 49 CFR part 225 to have its own unique Inventory Number it can use in the accident/incident report it files with FRA.<sup>2</sup>

FRA disagrees with AAR's argument that assigning multiple Inventory Numbers to the same highway-rail or pathway crossing could create reporting confusion. It is possible that a railroad that operates over its own track into a private company, port, or dock area may not know if another railroad with its own track leading into the area assigned an Inventory Number to the crossings within the area. By requiring each railroad to assign its own Inventory Number to the crossings within a private company, port, or dock area, a railroad involved in a crossing collision inside the area will not have to rely on another railroad to provide the Inventory Number so it can report the accident as required under part 225.

FRA also disagrees with AAR's assertion that requiring each primary operating railroad to assign one or more Inventory Numbers to crossings located within a private company, port, or dock area could result in multiple railroads having multiple signs at each vehicular entrance that provide multiple Inventory Numbers and emergency notification information for the same crossings. However, FRA regulations do not require railroads to post emergency notification signs (ENS signs) at crossings located within a private company. As for port and dock areas, subpart E of 49 CFR part 234 (subpart E) requires railroads to post at least one ENS sign only at each vehicular entrance if any highway-rail and/or pathway crossings are located within that area (and provided the port or dock area does not meet the definition of “plant railroad” in § 234.5.) See 49 CFR 234.311(a)(2)(ii). Subpart E does not require railroads to post signs at each crossing within such an area. The track owner or lessee that maintains the highway-rail or pathway grade crossing (the “maintaining railroad” under 49 CFR 234.301) is responsible for the placement and maintenance of ENS

<sup>2</sup> FRA is aware that some primary operating railroads already share a single Inventory Number for highway-rail and pathway crossings located within a private company, port, or dock area that have already been reported to the Crossing Inventory. See discussion of § 234.409 below for how to submit periodic updates in such situations.

signs at each vehicular entrance. *See* 49 CFR 234.311(a)(2)(ii). Under subpart E, if the primary dispatching railroad under 49 CFR 234.306 and the maintaining railroad are not the same entity, the primary dispatching railroad must provide the emergency telephone number to display on the ENS sign to the maintaining railroad. *See* 49 CFR 234.309(a).

If there is more than one primary operating railroad that operates through highway-rail or pathway crossings in a port or dock area, subpart E does not require multiple signs at each vehicular entrance with multiple Inventory Numbers and emergency notification information for the crossings. Instead, under subpart E, the maintaining railroad (not the primary operating railroad under this final rule) is responsible for posting ENS signs that display the emergency telephone number and the Inventory Number assigned to the crossings in the port or dock area by the primary dispatching railroad.

#### *Submission of Completed Inventory Forms for Previously Unreported Highway-Rail and Pathway Crossings*

Paragraph (a)(3) of § 234.405 of the final rule requires primary operating railroads to submit to the Crossing Inventory “accurate and complete [U.S. DOT Crossing] Inventory Forms, or their electronic equivalent,” for previously unreported highway-rail and pathway crossings through which the railroads operate. AAR requests that FRA amend this provision (and the corresponding provision in § 234.407(a)(3) addressing new highway-rail and pathway crossings) by removing the requirement that primary operating railroads submit “completed” U.S. DOT Crossing Inventory Forms (Inventory Forms) for such crossings.

AAR also objects to the voluntary process in paragraph 234.405(d) (and the corresponding provision in § 234.407(d) (addressing new highway-rail and pathway crossings). Section 234.405(d) provides that if a railroad requests data necessary to complete an Inventory Form from a State agency, but does not timely receive that information from the State agency, the railroad may notify FRA in writing of the State’s non-responsiveness. AAR asserts that railroads should not be held responsible for supplying state-controlled information not maintained by the railroads. AAR urges FRA to revise this requirement to limit primary operating railroads’ reporting responsibilities to crossing data within their control.

FRA acknowledges that State agencies generally maintain the crossing data in

Parts III, IV, and V of the Inventory Form. However, the RSIA, as amended by sec. 11316(g) of the Fixing America’s Surface Transportation Act (FAST Act), specifically requires railroads to report “[n]ot later than 1 year after the date of enactment of the RSIA or 6 months after a new crossing becomes operational, whichever occurs later . . . current information, including information about warning devices and signage, as specified by the Secretary, concerning each previously unreported crossing through which it operates with respect to the trackage over which it operates.” 49 U.S.C. 20160. Crossing data about warning devices and signage is primarily in Part III of the Inventory Form, under the heading “Highway or Pathway Traffic Control Device Information.” Thus, in addition to the crossing data in Parts I and II of the Inventory Form, which railroads have historically collected and maintained in the Crossing Inventory, the RSIA specifically requires railroad carriers to submit additional crossing data “about warning devices and signage” for previously unreported and new crossings.

The RSIA also contains language granting the Secretary of Transportation (and by delegation, FRA) the authority to exercise discretion in determining the scope of the crossing data railroads must submit to the Crossing Inventory. In the final rule, FRA determined that submission of complete Inventory Forms for previously unreported and new public highway-rail grade crossings is needed to increase the accuracy and utility of the Crossing Inventory. FRA continues to maintain that position. Railroads generally work closely with the State agency responsible for grade crossing safety before any new public highway-rail grade crossings become operational. Therefore, any burden associated with obtaining State-maintained crossing data for new public highway-rail grade crossings should be minimal.

Nevertheless, to clarify this requirement, FRA is revising § 234.405(a)(3) (and the corresponding provision in § 234.407(a)(3) on new highway-rail and pathway crossings) to require primary operating railroads to submit “accurate Inventory Forms, or their electronic equivalent,” (as opposed to “accurate and complete” Inventory Forms) to the Crossing Inventory for previously unreported highway-rail and pathway crossings through which they operate. Primary operating railroads must fill out these accurate Inventory Forms as the Inventory Guide requires. In other words, primary operating railroads are only required to complete

the entire Inventory Form for new and previously unreported public highway-rail grade crossings. The Inventory Guide only requires primary operating railroads to complete Parts I and II of the Inventory Form for new and previously unreported pathway grade crossings and new and previously unreported private highway-rail grade crossings.

#### *State-Maintained Crossing Data*

Since the final rule requires primary operating railroads to complete Inventory Forms (or their electronic equivalent) for new and previously unreported public highway-rail grade crossings, those railroads may need to obtain crossing data from the State agency responsible for maintaining highway-rail and pathway crossing data to complete the Inventory Form (or its electronic equivalent). Current § 234.405(d) of the final rule explains how a primary operating railroad that requests State-maintained crossing data from the appropriate State agency responsible for maintaining the data, but does not timely receive the requested data, may notify FRA in writing that the railroad requested the required data, but did not receive the data. Under the final rule, if a railroad properly submits such notification, FRA would not hold the primary operating railroad responsible for failing to complete and submit accurate Inventory Forms (or their electronic equivalent) for previously unreported public highway-rail grade crossings.

In its Petition, AAR asserts that “FRA has taken a relatively straightforward process, whereby primary operating railroads could provide the data which they possess and state agencies could provide the remaining highway traffic and other non-railroad data, and has made it burdensome and complex.” Noting that a primary operating railroad may operate in dozens of states, AAR further asserts that contacting each relevant State agency, tracking the responses of those agencies, and creating a certification process would be an unmerited burden on the industry.

As noted previously, FRA continues to maintain its position that submission of complete Inventory Forms for previously unreported and new public highway-rail grade crossings is needed to increase the accuracy and utility of the Crossing Inventory. To achieve this goal, FRA is requiring primary operating railroads to provide the crossing data they possess and to request any additional required crossing data from the State agency responsible for maintaining that data. FRA anticipates that State agencies will generally

respond promptly to railroad requests for State-maintained crossing data. However, primary operating railroads may submit copies of their written requests for State-maintained crossing data to FRA and to each operating railroad that operates through the crossing. This is not mandatory, but, if FRA audits the Crossing Inventory, FRA would know the primary operating railroad made an effort to obtain State data for one or more previously unreported public highway-rail grade crossings.

After considering AAR's request, FRA is simplifying the written notification process in § 234.405(d). Instead of providing written notice to FRA certifying that State-maintained crossing data was requested at least 60 days earlier and has not yet been received, a primary operating railroad can send a copy of its written request for State-maintained crossing data to FRA and to each operating railroad that operates through the crossing. As long as the primary operating railroad submits the State-maintained crossing data within 60 days of receipt, FRA will consider the written request for State-maintained crossing data to be an affirmative defense to potential liability for failure to timely submit an Inventory Form (or its electronic equivalent) to the Crossing Inventory for a previously unreported public highway-rail grade crossing.

#### *Deadline for the Submission of Crossing Data for Previously Unreported Highway-Rail and Pathway Crossings*

Paragraphs (a)(3) and (b) of § 234.405 of the final rule provide a deadline of March 7, 2016, for operating railroads and primary operating railroads to submit the required Inventory Forms, or their electronic equivalent, for previously unreported highway-rail and pathway crossings. AAR requests that FRA extend the deadline to three years from the final rule's effective date (*i.e.*, until March 9, 2018). AAR asserts this additional time will allow railroads to hire and train additional staff to physically locate and inspect tens of thousands of previously unreported private crossings. AAR also asserts that railroads need this additional time to add newly acquired information to the Crossing Inventory and to modify their IT systems to meet the new requirements.

After careful consideration, FRA is not adopting AAR's request to extend the reporting deadline for new and previously unreported highway-rail and pathway crossings to three years from the final rule's effective date. However, FRA acknowledges that railroads may need additional time to incorporate the

changes that FRA is making in this amendment to the final rule as a result of AAR's Petition. Therefore, FRA is revising § 234.405(a)(3) to extend the deadline for primary operating railroads to submit crossing data to the Crossing Inventory for previously unreported highway-rail and pathway crossings to August 9, 2016. Consistent with this extension of time, FRA is also extending the deadline for operating railroads that operate on separate tracks to submit crossing data to the Crossing Inventory to August 9, 2016. FRA is not adjusting any other deadlines in § 234.405(a) and (b).

#### *Duty of Operating Railroads To Ensure New and Previously Unreported Highway-Rail and Pathway Crossings Are Reported to the Crossing Inventory*

Paragraph (c) of § 234.405 requires operating railroads (railroads other than the primary operating railroad that operate through a crossing) to notify FRA if a primary operating railroad has not submitted a completed Inventory Form, or its electronic equivalent, to the Crossing Inventory consistent with the rule for a new or previously unreported crossing the railroad operates through. AAR requests that FRA amend this requirement (along with the corresponding requirement in § 234.407(c) related to new crossings) so operating railroads will not be liable for a primary operating railroad's failure to submit the required crossing data. AAR asserts this provision imposes a significant burden on operating railroads and constitutes an inappropriate shift of regulatory compliance policing responsibility to a private business. AAR asserts that the final rule requires operating railroads to include and validate data for other railroads' crossings in their databases on an ongoing basis to ensure the primary operating railroad properly submitted required crossing data to the Crossing Inventory. AAR further asserts it is unrealistic to require railroads to audit the crossing data of other railroads, in addition to their own crossing data, all within 14 months.

After careful consideration of AAR's request, with respect to the initial reporting of new and previously unreported highway-rail and pathway crossings, FRA cannot legally adopt AAR's request. Paragraph (c) of § 234.405 (and paragraph (c) of § 234.407 related to new crossings) implements the RSIA mandate that *each railroad carrier* ensure current information about each previously unreported highway-rail or pathway crossing is reported to the Crossing Inventory. *See* 49 U.S.C. 20160(a).

Congress left FRA no discretion to ignore this mandate. Clearly, Congress thought operating railroads that operate over new and unreported highway-rail and pathway crossings are in the best position to identify crossings that have not been reported to the Crossing Inventory.

#### *Section 234.407 Submission of Initial Data to the Crossing Inventory for new Crossings*

Paragraph (b) of this section of the final rule requires operating railroads that operate on separate tracks through a new highway-rail or pathway crossing to submit crossing data to the Crossing Inventory by March 7, 2016, but erroneously fails to provide a future deadline for highway-rail and pathway crossings that become operational after the final rule's effective date. This document corrects this technical error by amending § 234.407(b) to require operating railroads that operate on separate tracks through a new highway-rail or pathway crossing to submit crossing data no later than six months after the crossing becomes operational or August 9, 2016, whichever occurs later.

FRA is also making a technical amendment to correct a typographical error in the second sentence of paragraph (d)(1)(i) of this section in this final rule. The original version of this sentence in the final rule contained an erroneous reference to § 234.405(a)(3).

#### *Assignment of Inventory Numbers to New Crossings Located in a Private Company, Port, or Dock Area*

Paragraph (a)(1)(ii) of § 234.407 of the final rule requires each primary operating railroad to assign one or more Inventory Numbers to new highway-rail and pathway crossings within a private company, port, or dock area and through which the railroad operates. *See* discussion of § 234.405 above. AAR requests that FRA amend this requirement to allow multiple primary operating railroads to assign a shared Inventory Number to new highway-rail and pathway crossings that are located within a private company, port, or dock area. AAR asserts that as drafted, § 234.407(a)(1)(ii) is contrary to current practice. AAR also asserts that this new requirement could create reporting confusion if an accident were to occur at a crossing within a private company, port, or dock area. After careful consideration, FRA is not adopting AAR's request to modify § 234.407(a)(1)(ii) for the reasons explained in the Section-by-Section analysis of § 234.405(a)(1)(ii) above.

*Submission of Completed Inventory Forms for New Highway-Rail and Pathway Crossings*

Paragraph (a)(3) of § 234.407 requires primary operating railroads to submit to the Crossing Inventory “accurate and complete [U.S. DOT Crossing] Inventory Forms, or their electronic equivalent,” for new highway-rail and pathway crossings through which railroads operate. As discussed in the Section-by-Section Analysis of § 234.405 above, under the heading “Submission of Completed Inventory Forms for Previously Unreported Highway-Rail Grade Crossings”, AAR requests that FRA amend § 234.407(a)(3) to remove the requirement that primary operating railroads submit “completed” Inventory Forms for new highway-rail and pathway crossings. AAR also objects to the voluntary process in paragraph (d) of this section which provides that if a railroad requests data necessary to complete an Inventory Form from a State agency and that agency does not timely respond, the railroad may notify FRA in writing of the State’s non-responsiveness.

After careful consideration, FRA is revising § 234.407(a)(3) consistent with the revisions to § 234.405(a)(3), to clarify that primary operating railroads must submit “accurate Inventory Forms, or their electronic equivalent,” (as opposed to “accurate and complete” Inventory Forms) to the Crossing Inventory for new highway-rail and pathway crossings through which they operate. The primary operating railroad must fill out these accurate Inventory Forms consistent with the Inventory Guide, which requires completion of the entire Inventory Form only for new public highway-rail grade crossings.

*Deadline for the Submission of Crossing Data for New Highway-Rail and Pathway Crossings*

The final rule provides that “[e]ach primary operating railroad shall submit accurate and complete Inventory Forms, or their electronic equivalent, to the Crossing Inventory for new highway-rail and pathway crossings through which it operates, no later than six (6) months after the crossing becomes operational or March 7, 2016, whichever occurs later.” 49 CFR 234.407(a)(3). The final rule also provides that “[f]or each new highway-rail and pathway crossing where operating railroads operate trains on separate tracks through the crossing, each operating railroad (other than the primary operating railroad) shall submit accurate crossing data specified in the Inventory Guide to the Crossing

Inventory no later than March 7, 2016.” 49 CFR 234.407(b).

AAR requests that FRA amend § 234.407(a)(3) to establish a deadline three years from the final rule effective date for operating railroads and primary operating railroads to submit crossing data for new highway-rail and pathway crossings to the Crossing Inventory. AAR asserts that railroads need this additional time to add newly acquired information to the Inventory and to modify their IT systems to meet the new requirements. For the reasons explained in the Section-by-Section analysis of § 234.405(a)(3) above, FRA is not adopting the AAR’s request to extend the reporting deadline for new highway-rail and pathway crossings to March 9, 2018 (three years from the final rule effective date). However, with respect to new crossings (highway-rail and pathway crossings that become operational on or after June 10, 2016), primary operating railroads will have six (6) months from the date on which the highway-rail or pathway crossing becomes operational to report the new crossing to the Crossing Inventory, consistent with § 234.403 and the Inventory Guide. Similarly, operating railroads that operate on separate tracks through a new highway-rail or pathway crossing will have six (6) months from the date on which the highway-rail or pathway crossing becomes operational to submit crossing data to the Crossing Inventory, consistent with § 234.403 and the Inventory Guide.

*Duty of Operating Railroads To Ensure New Highway-Rail and Pathway Crossings Are Reported to the Crossing Inventory*

Paragraph (c) of § 234.407 requires operating railroads (railroads other than the primary operating railroad that operate through a crossing) to notify FRA if a completed Inventory Form, or its electronic equivalent, has not been submitted to the Crossing Inventory consistent with the final rule for a new crossing that the railroad operates through. Consistent with its request to amend § 234.405(c) regarding previously unreported crossings, AAR requests that FRA amend § 234.407(c), so operating railroads will not be held liable for the primary operating railroad’s failure to timely report a new highway-rail or pathway crossing to the Crossing Inventory. For the reasons discussed in the Section-by-Section analysis of § 234.405(c), FRA is not adopting AAR’s request to amend § 234.407(c).

*State-Maintained Crossing Data*

As explained in the Section-by-Section analysis of § 234.405(d),

primary operating railroads are required to complete Inventory Forms (or their electronic equivalent) for new public highway-rail grade crossings. Therefore, primary operating railroads may need to obtain crossing data from the State agency responsible for maintaining highway-rail and pathway crossing data to complete the Inventory Form (or its electronic equivalent). Like paragraph (d) of § 234.405, current paragraph (d) of § 234.407 of the final rule explains how a primary operating railroad may submit written notification to the FRA Associate Administrator that they requested certain crossing data from the appropriate State agency responsible for maintaining highway-rail and pathway crossing data, which the State has not yet provided. As long as the primary operating railroad submits the State-maintained crossing data within 60 days of receipt, FRA will consider a properly filed written notification to be an affirmative defense to potential violations for failure to timely submit an Inventory Form (or its electronic equivalent) to the Crossing Inventory for a new public highway-rail grade crossing.

FRA is revising the written notification process in § 234.407(d). FRA is no longer asking primary operating railroads to provide their written notifications by certified mail, return receipt requested. Instead, a primary operating railroad can send copies of its request for State-maintained crossing data to the FRA Associate Administrator and to each operating railroad that operates through the new public highway-rail grade crossing. As long as the primary operating railroad: (1) Sends copies of its written request for State-maintained crossing data to the FRA Associate Administrator and to each operating railroad that operates through the new public highway-rail grade crossing no later than six (6) months after the crossing becomes operational; and (2) submits the State-maintained crossing data within 60 days of receipt, FRA will consider the written request for State-maintained crossing data to be an affirmative defense to potential liability for failure to timely submit an Inventory Form (or its electronic equivalent) to the Crossing Inventory for a new public highway-rail grade crossing.

*Section 234.409 Submission of Periodic Updates to the Crossing Inventory.*

AAR’s Petition states that some primary operating railroads share a single Inventory Number for highway-rail and pathway crossings located within a private company, port, or dock

area that have already been reported to the Crossing Inventory. (As explained in the definition of “primary operating railroad” in § 234.401 above, each railroad that owns track leading to a private company, port, or dock area is considered a primary operating railroad for the crossings within that area, if a general system railroad operates over the track owned by that railroad and through at least one crossing within that private area.)

Paragraph (a) of § 234.409 requires each primary operating railroad to submit periodic updates to the Crossing Inventory. To comply with this requirement, primary operating railroads that currently share Inventory Numbers for highway-rail and pathway crossings located within a private company, port, or dock area must exercise one of two options.

First, each primary operating railroad that operates through the crossing(s) may choose to assign a new unique Inventory Number (or set of Inventory Numbers) to the crossing(s) located within a private company, port, or dock area through which it operates. Each primary operating railroad (except the primary operating railroad that assigned the original Inventory Number to the crossing(s)) would then use its new Inventory Number(s) to submit crossing data to the Crossing Inventory as a new crossing record. After the new crossing record is established, each primary operating railroad can submit periodic updates to the Crossing Inventory for the highway-rail and pathway crossing(s) located within a private company, port, or dock area using the Inventory Number(s) it assigned to the crossing(s).

Second, FRA will accommodate primary operating railroads that wish to continue sharing a single Inventory Number which has already been used to report highway-rail and pathway crossings located within a private company, port, or dock area to the Crossing Inventory. As explained in Frequently Asked Question (FAQ) number 37 in Appendix E to the Inventory Guide, the primary operating railroad of record in the Crossing Inventory can submit an up-to-date and accurate periodic update to the Crossing Inventory for all of the railroad-assigned data fields in Appendix B to the Inventory Guide (“Responsibility Table for Periodic Updates to the Crossing Inventory”). As part of this update, the primary operating railroad of record must check the “Yes” box in Part I, item 7 (“Do Other Railroads Operate a Separate Track at Crossing”) of the Inventory Form (or its electronic equivalent) and provide railroad codes

for all of the other primary operating railroads.

The other primary operating railroads that share the Inventory Number can satisfy the periodic updating requirement in § 234.409 by using the shared Inventory Number to submit up-to-date and accurate crossing data for the data fields specified in Appendix C to the Inventory Guide (“Reporting Crossings that have Multiple Operating Railroads”). This method for submitting periodic updates is identical to the method operating railroads that operate on separate tracks through a crossing use, under paragraph (b) of § 234.409.

This second option is only available for new or previously unreported highway-rail and pathway crossings located within a private company, port, or dock area that have already been reported to the Crossing Inventory and assigned one or more Inventory Numbers that are shared by multiple primary operating railroads.

#### *Submission of Periodic Updates*

The final rule requires primary operating railroads to submit, consistent with the Inventory Guide, “up-to-date and accurate crossing data” to the Crossing Inventory for each highway-rail and pathway crossing through which it operates. Paragraph (a) of § 234.409 of the final rule requires primary operating railroads to submit updated data at least every three (3) years from the date of the primary operating railroad’s most recent submission of data (or most recent submission on behalf of the primary operating railroad) for the crossing or by March 7, 2016. Paragraph (b) requires operating railroads that operate trains on separate tracks through a crossing to similarly update the data required by the Inventory Guide.

As it did for §§ 234.405 and 234.407, AAR requests that FRA amend the compliance deadlines in paragraphs (a) and (b) of § 234.409 for three years from the final rule’s effective date. This would allow railroads to submit updated crossing data for highway-rail and pathway grade crossings at least every three (3) years from the date of the most recent submission of data by that railroad for the crossing or by March 7, 2018, whichever occurs later.

Consistent with FRA’s responses to AAR’s requests to amend the compliance deadlines in §§ 234.405 and 234.407 discussed above, FRA is not adopting AAR’s request to extend the compliance deadlines for railroads in paragraphs (a) and (b) of § 234.409 by three years. As with the compliance deadlines in §§ 234.405 and 234.407, however, FRA acknowledges that

railroads may need additional time to incorporate the changes that are being made in these amendments to the final rule being made as a result of AAR’s Petition. Therefore, FRA is revising § 234.409(a) and (b) to extend the deadline for primary operating railroads and operating railroads to submit updated crossing data to the Crossing Inventory for highway-rail and pathway crossings over which they operate to every three (3) years from the date of the most recent submission of data by the railroad (or on behalf of the railroad) for the crossing or August 9, 2016, whichever occurs later.

#### *Duty of Operating Railroads To Ensure Up-to-Date Crossing Data Is Reported to the Crossing Inventory*

Paragraph (c) of § 234.409 requires operating railroads (other than primary operating railroads), that operate through a highway-rail or pathway crossing for which up-to-date information has not been timely submitted to the Crossing Inventory to notify FRA of this oversight. Written notification the operating railroad provides must include, at a minimum, the Inventory Number for each highway-rail or pathway crossing that has not been updated.

AAR requests that FRA amend § 234.409(c), so that operating railroads will not be held liable for the primary operating railroad’s failure to timely submit updated crossing data to the Crossing Inventory. AAR asserts that this provision imposes a significant burden on operating railroads, which will need to include and validate data for other railroads’ crossings in their databases on an ongoing basis to ensure that the primary operating railroad has properly submitted required crossing data to the Crossing Inventory. AAR further asserts that this language constitutes an inappropriate shift of regulatory compliance policing responsibility to a private business and that it is unrealistic to require railroads to audit the crossing data of other railroads, in addition to their own crossing data, within 14 months.

After considering AAR’s request, FRA is removing § 234.409(c). The RSIA requires each railroad carrier to ensure that periodic updates are submitted to the Crossing Inventory for each highway-rail and pathway crossing through which it operates. See 49 U.S.C. 20160(b). However, unlike previously unreported and new crossings that have not yet been reported to the Crossing Inventory, FRA can use the Grade Crossing Inventory System (GCIS) to generate reports that identify out-of-date highway-rail and pathway crossing data.

FRA can use these reports to verify that primary operating railroads (and any operating railroads that operate on separate tracks through the crossing) are timely submitting periodic updates to the Crossing Inventory, as required by § 234.409(a) and (b). Therefore, FRA is revising the final rule to remove the requirement that operating railroads monitor the Crossing Inventory and provide the agency written notification if a primary operating railroad fails to timely submit updates to the highway-rail and pathway crossing data for which it is responsible.

#### Section 234.411 Changes Requiring Submission of Updated Information to the Crossing Inventory

Consistent with the extended deadline by which railroads are required to report new and previously unreported highway-rail and pathway crossings to the Crossing Inventory, this final rule revises § 234.411 to clarify the primary operating railroad is required to report the following events to the Crossing Inventory within three (3) months, if they occur on or after June 10, 2016: (1) The sale of all or part of a crossing; (2) the closure of a highway-rail or pathway crossings; or (3) a change in crossing surface or warning device at a public highway-rail grade crossing.

Current paragraph (a) of § 234.411 requires any railroad that sells all or part of a highway-rail or pathway crossing to report the crossing sale to the Crossing Inventory within three (3) months of the date of sale or March 7, 2016, whichever occurs later. However, with respect to railroads, GCIS is primarily designed to accept crossing data from the primary operating railroad, unless other operating railroads operate on separate tracks through the crossing (or the primary operating railroad delegates reporting and updating responsibility to another entity). (As stated in the Inventory Guide, GCIS will accept partial data submissions from other operating railroads once the primary operating railroad submits an Inventory Form, or its electronic equivalent, which indicates that one or more operating railroads operate on separate tracks through the crossing.) Therefore, FRA is also amending § 234.411(a)(1) to require a selling railroad that is not the primary operating railroad to notify the primary operating railroad of the sale of all or part of a highway-rail or pathway crossing within three (3) months of the date of sale.

Under new § 234.411(a)(2)(i), if the primary operating railroad sells all or part of a highway-rail or pathway

crossing for which it has reporting and updating responsibility under this subpart, it would be required to submit an Inventory Form, or its electronic equivalent, which reflects the crossing sale to the Crossing Inventory consistent with § 234.403 and the Inventory Guide within three (3) months of the date of sale. However, under new § 234.411(a)(2)(ii), if a primary operating railroad is notified of the sale of all or part of a highway-rail or pathway crossing under paragraph (a)(1) of this section, then it would be required to submit an Inventory Form, or its electronic equivalent, which reflects the crossing sale to the Crossing Inventory consistent with § 234.403 and the Inventory Guide within three (3) months of the date of notification.

#### Section 234.413 Recordkeeping

This document makes a technical amendment to the heading of this section to correct a typographical error.

#### Appendix A to Part 234—Schedule of Civil Penalties

This document revises the civil penalty schedule in appendix A to this part to reflect changes that were made to individual sections in these final rule amendments. FRA is revising the civil penalty schedule to reflect violations may be assessed under §§ 234.405(a) and 234.407(a) if the primary operating railroad fails to timely submit an accurate Inventory Form (or electronic equivalent) to the Crossing Inventory for a new or previously unreported crossing. (Previously, the civil penalty schedule indicated that violations may be assessed under these sections if the primary operating railroad fails to timely submit an accurate and complete Inventory Form or the electronic equivalent to the Crossing Inventory for a new or previously unreported crossing. However, as discussed above, primary operating railroads are only required to submit complete Inventory Forms or their electronic equivalent for public highway-rail grade crossings.) FRA is also revising the civil penalty schedule to remove the recommended civil penalty associated with § 234.409(c) because this provision has been removed.

#### B. Amendments to Inventory Guide

##### Instructions for Completing the U.S. DOT Crossing Inventory Form

FRA is clarifying a statement made in the final rule preamble discussion of the “Crossing Type” data field in Part I of the Inventory Form. Specifically, in the preamble to the final rule, FRA stated that it

will defer to the determination of the relevant State agency for the public/private classification of highway-rail (and pathway) crossings. Accordingly, we are asking State agencies to submit voluntary updates to the Crossing Type data field in Part I of the Inventory Form, as stated in Appendix B to the Inventory Guide.

80 FR at 767. FRA intended to ask State agencies to submit voluntary updates to the “Crossing Type” data field only for public highway-rail and pathway crossings. Appendix B to the Inventory Guide states that primary operating railroads are required to submit updates to the “Crossing Type” data field for private highway-rail and pathway crossings.

##### Appendix E to the Inventory Guide, Frequently Asked Questions (FAQs)

##### *Who Can Report Closed Crossing Status in the Crossing Inventory*

FAQ number 22 in Appendix E to the Inventory Guide states that “[t]he primary operating railroad must report the closure of a highway-rail or pathway crossing to the Crossing Inventory, but the State may also report the closure of a public crossing.” AAR requests that FRA amend this FAQ to state that only railroads can report the closure of a crossing to the Crossing Inventory. AAR asserts that allowing dual reporting is problematic because a State may close crossings in the Crossing Inventory on the basis of inaccurate information and without informing the operating railroad, which causes railroads to incur additional research and effort to address and resolve the discrepancy.

FRA declines to adopt AAR’s recommendation to modify FAQ number 22 in Appendix E to the Inventory Guide. While the primary operating railroad is the only entity that can report the closure of a private highway-rail or pathway crossing to the Inventory, both railroads and States collect and maintain data related to public highway-rail and pathway crossings. Both entities have an interest in ensuring that the Crossing Inventory reflects up-to-date and accurate data related to crossing status. By allowing States to report the closure of public highway-rail and pathway crossings to the Crossing Inventory, States can provide needed updates to crossing status in the event that the primary operating railroad ceases to operate.

##### *Reporting Crossing Sales That Result in a New Primary Operating Railroad*

FRA is revising FAQ number 24 in Appendix E to the Inventory Guide to incorporate an FRA recommendation when railroads report crossing sales that result in a new primary operating

railroad. As stated in revised FAQ number 24, if the sale of a highway-rail or pathway crossing results in a new primary operating railroad, FRA strongly recommends that the new primary operating railroad submit updated crossing data to the Crossing Inventory for all of the railroad-assigned data fields on the Inventory Form (or its electronic equivalent) within six (6) months of the date of sale.

### III. Regulatory Impact and Notices

#### A. Executive Order 12866 and 13563 and DOT Regulatory Policies and Procedures

FRA analyzed the potential costs and benefits of the amendments to the final rule adopted in this document. FRA estimates that the amendments will not materially impact the findings of the previously published regulatory evaluation. The extension of time for compliance with changes that are being made in these final rule amendments will grant some relief to railroads. However, the twenty-year analysis is still valid.

FRA evaluated both the final rule and these amendments under existing policies and procedures and determined both to be non-significant under both Executive Order 12866 and 13563 and DOT policies and procedures. *See* 44 FR 11034, Feb. 26, 1979. FRA previously placed in the docket a regulatory evaluation addressing the economic impact of the final rule. The primary purpose of the Crossing Inventory is to provide a uniform inventory database that can be merged with highway-rail crossing collision files and used to analyze information for planning and implementation of crossing improvement programs by public and private agencies responsible for highway-rail crossing safety, as well as the railroad industry and academia.

FRA has determined these amendments to the final rule do not change FRA's position that the anticipated benefits justify the costs.

#### B. Regulatory Flexibility Act and Executive Order 13272

To ensure the impact of this rulemaking on small entities is properly

considered, FRA developed these final rule amendments consistent with Executive Order 13272 ("Proper Consideration of Small Entities in Agency Rulemaking") and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*).

The Regulatory Flexibility Act requires an agency to review regulations to assess their impact on small entities. FRA certified that this final rule will not have a significant economic impact on a substantial number of small entities. Although a substantial number of small railroads will be affected by the final rule, none of these entities will be significantly impacted. The amendments to this final rule will grant some relief to small entities by granting them additional time to comply with changes that are being made in these the final rule amendments. However, the amendments to the final rule will not change the overall impact on small entities. Therefore, FRA is confident that its previous certification for the final rule is still valid.

#### C. Federalism

Executive Order 13132, "Federalism" (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive Order to include regulations 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." Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or the agency consults with State and local government

officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

FRA analyzed this amended final rule in accordance with the principles and criteria contained in Executive Order 13132. Based on this analysis, FRA concluded that this rule will not have a substantial effect on the States or their political subdivisions; it will not impose any compliance costs; and it will not affect the relationships between the Federal government and the States or their political subdivisions, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply and FRA determined that preparation of a federalism summary impact statement for this amended final rule is not required. This amended final rule could have preemptive effect by operation of law under a provision of the former Federal Railroad Safety Act of 1970 (repealed and recodified at 49 U.S.C. 20106). Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the "essentially local safety or security hazard" exception to sec. 20106.

#### D. Paperwork Reduction Act

The information collection requirements in this amended final rule are being submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections that contain new information collection requirements and the estimated time to fulfill each requirement are as follows:

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
234.403(a-c)—Submission of Data to the U.S. DOT Highway-Rail Crossing Inventory: Completion of Inventory Form.	51 States/entities & 618 railroads.	4,212 forms .....	30 minutes .....	2,106 hours
—Mass Update Lists of Designated Data Submitted by Railroads/States.	51 States/entities & 618 railroads.	257 lists .....	30 minutes .....	129 hours
—Excel Lists of Submitted Data .....	51 States/entities & 618 railroads.	1,234 lists .....	30 minutes .....	617 hours

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
—Changes/Corrections to Crossing Inventory Data Submitted via GX 32 Computer Program.	51 States/entities & 618 railroads.	35,845 records .....	6 minutes .....	3,585 hours
—Written Requests by States/Railroads for FRA Crossing Inventory Guide.	51 States/entities & 618 railroads.	10 requests .....	15 minutes .....	3 hours
(d)—Reporting Crossing Inventory Data by State Agencies on Behalf of Railroads: Written Notices to FRA.	51 States/entities & 618 railroads.	20 notices .....	30 minutes .....	10 hours
—(e)(1)—Consolidated Reporting by Parent Corporation on Behalf of Its Subsidiary Railroads: Written Notice to FRA.	51 States/entities & 618 railroads.	250 notices .....	30 minutes .....	125 hours
—(e)(2)—Immediate Notification to FRA by Parent Corporation of Any Changes in the List of Subsidiary Railroads for Which It Reports.	51 States/entities & 618 railroads.	75 notices .....	30 minutes .....	38 hours
234.405(a)(1)—Initial Submission of <i>Previously Unreported Highway-Rail and Pathway Crossings</i> through which They Operate by Primary Operating Railroads: Providing Assigned Crossing Inventory Number to Each Railroad that Operates One or More Trains Through Crossing + Assignee Inventory Numbers for Highway-Rail and Pathway Crossing Located in Rail Yard, Passenger Station, within Private Company, Port, or Dock Area.	51 States/entities & 618 railroads.	5,300 assigned numbers + 10,600 provided assigned numbers.	5 minutes + ..... 5 minutes .....	1,325 hours
(a)(2)(i)—Completed Inventory Forms for Each Previously Unreported Crossing.	51 States/entities & 618 railroads.	5,300 forms .....	30 minutes .....	2,650 hours
(c)—Duty of All Operating Railroads: Notification to FRA of Previously Unreported Crossing through Which It Operates.	51 States/entities & 618 railroads.	450 notices/Notifications.	30 minutes .....	225 hours
(d)—State-maintained Crossing Data: Written Copy of Request for Such Data to FRA (Revised Requirement).	51 States/entities & 618 railroads.	35 copies of written request.	2 minutes .....	1 hour
—Copies of Written Request for State-maintained Data to Each Operating Railroad Transiting Crossing (Revised Requirement).	51 States/entities & 618 railroads.	105 copies of written request.	2 minutes .....	4 hours
234.407(a)—Submission of Initial Data to the Crossing Inventory for New Crossings: Providing Assigned Inventory Numbers for New Highway-Rail and Pathway Crossings through which They Operate by Primary Operating Railroads to Each Railroad that Operates One or More Trains Through the Crossing.	51 States/entities & 618 railroads.	100 assigned numbers + 100 provided assigned numbers.	5 minutes + 5 minutes.	16 hours
(a)(2)(i)—Completed Inventory Forms for Each New Highway-Rail and Pathway Crossing.	51 States/entities & 618 railroads.	100 forms .....	90 minutes .....	150 hours
234.409(a)—Submission of Periodic Updates to the Crossing Inventory.	51 States/entities & 618 railroads.	80,775 crossing inventory updates.	2.5025 minutes .....	3,369 hours
(c) Duty of All Operating Railroads: Written Notification to FRA of that Up-to-date and Accurate Information has <i>Not</i> Been Timely Submitted to the Crossing Inventory.	51 States/entities & 618 railroads.	950 written notices	20 minutes .....	317 hours
234.411(a)—Crossing Sale: Submission of Crossing Inventory Form by Any Operating Railroad that Sells All or Part of Highway-Rail and Pathway Crossing.	51 States/entities & 618 railroads.	650 reports/updated crossing inventory form.	2 hours .....	1,300 hours
(b)—Crossing Closure: Submission of Crossing Inventory Form by Primary Operating Railroad that Closes Highway-Rail and Pathway Crossing.	51 States/entities & 618 railroads.	85 crossing inventory forms (closures).	5 minutes .....	7 hours

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
(c)—Primary Operating RR Submission of Inventory form for Any Surface/Warning Device Changes at Crossing.	51 States/entities & 618 railroads.	650 forms .....	30 minutes .....	325 hours
234.413(a&b)(1)—Recordkeeping: Duplicate Copy of Each Inventory Form Submitted in Hard Copy.	51 States/entities & 618 railroads.	5,901 duplicate copies.	1 minute .....	98 hours
(a&b)(2)—Railroad Copy of FRA Confirmation after Electronic Submission of Crossing Data to the Crossing Inventory.	51 States/entities & 618 railroads.	80,775 copies .....	1 minute .....	1,346 hours
(c)—Railroad List of Establishment Locations Where Any Required Records are Kept.	51 States/entities & 618 railroads.	618 lists .....	5 minutes .....	52 hours

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503, Attention: FRA Desk Officer. Comments may also be sent via email to OMB at the following address: [oirq\\_submissions@omb.eop.gov](mailto:oirq_submissions@omb.eop.gov).

OMB is required to make a decision concerning the collection of information requirements contained in this amended final rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

FRA cannot impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action on the effective date of this amended final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

#### E. Environmental Impact

FRA has evaluated this rule under its “Procedures for Considering Environmental Impacts” (FRA’s Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this amended final rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review under

section 4(c)(20) of FRA’s Procedures. See 64 FR 28547, May 26, 1999.

Under section 4(c) and (e) of FRA’s Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this amended final rule is not a major Federal action significantly affecting the quality of the human environment.

#### F. Unfunded Mandates Reform Act of 1995

Under Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency “shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).” Section 202 of the Act (2 U.S.C. 1532) further requires that before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement detailing the effect on State, local, and tribal governments and the private sector. This amended final rule will not result in the expenditure, in the aggregate, of \$155,000,000 or more (as adjusted annually for inflation) in any one year, and thus preparation of such a statement is not required.

#### G. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.” 66 FR 28355, May 22, 2001. Under the Executive Order, a “significant energy action” is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA evaluated this amended final rule consistent with Executive Order 13211. FRA determined that this amended final rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA determined that this regulatory action is not a “significant energy action” within the meaning of Executive Order 13211.

#### H. Trade Impact

The Trade Agreements Act of 1979 (TAA) (Pub. L. 96–39, 19 U.S.C. 2501 *et seq.*) prohibits Federal agencies from engaging in any standards setting or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. FRA assessed the potential effect of this amended final rule on foreign commerce and believes that its requirements are consistent with

the TAA. The requirements imposed are safety standards which, as noted, are not considered unnecessary obstacles to trade.

#### I. Privacy Act

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). See <http://www.regulations.gov/#/privacyNotice> for the privacy notice of regulations.gov or interested parties may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at [www.dot.gov/privacy](http://www.dot.gov/privacy).

#### List of Subjects in 49 CFR Part 234

Highway safety, Penalties, Railroad safety, Reporting and recordkeeping requirements, State and local governments.

For the reasons discussed in the preamble, FRA amends part 234 of chapter II, subtitle B of title 49, Code of Federal Regulations as follows:

#### PART 234—[AMENDED]

■ 1. The authority citation for part 234 continues to read as follows:

**Authority:** 49 U.S.C. 20103, 20107, 20152, 20160, 21301, 21304, 21311, 22501 note; Pub. L. 110-432, Div. A., Sec. 202, 28 U.S.C. 2461, note; and 49 CFR 1.89.

■ 2. Section 234.401 is amended by adding definitions of “General railroad system of transportation” and “General system railroad” in alphabetical order and revising the definition of “Primary operating railroad” to read as follows:

#### § 234.401 Definitions.

\* \* \* \* \*

*General railroad system of transportation* means the network of standard gage track over which goods may be transported throughout the nation and passengers may travel between cities and within metropolitan and suburban areas.

*General system railroad* means a railroad that operates on track which is part of the general railroad system of transportation.

\* \* \* \* \*

*Primary operating railroad* means the operating railroad that either owns or maintains the track through the highway-rail or pathway crossing, unless the crossing is located within a private company, port, or dock area. If more than one operating railroad either owns or maintains the track through the highway-rail or pathway crossing, or if no operating railroad owns or maintains the track through the highway-rail or pathway crossing, then the operating railroad that operates the highest number of trains through the crossing is the primary operating railroad. In the event that there is only one operating railroad that operates one or more trains through a highway-rail or pathway crossing, that operating railroad is the primary operating railroad. For highway-rail and pathway crossings that are located within a private company, port, or dock area (“private area”), each railroad that owns track leading to the private company, port, or dock area will be considered a primary operating railroad for all crossings within the private area if a general system railroad operates over the railroad’s track leading to the private area and through at least one crossing within that area.

\* \* \* \* \*

■ 3. Revise § 234.403(e) to read as follows:

#### § 234.403 Submission of data to the Crossing Inventory, generally.

\* \* \* \* \*

(e) *Reporting by the parent corporation on behalf of subsidiary railroads.* (1) To satisfy the reporting requirements of this section, a parent corporation may submit crossing data to the Crossing Inventory on behalf of one or more of its subsidiary railroads. The parent corporation shall provide written notice to the FRA Associate Administrator that it has assumed reporting and updating responsibility for all of the subsidiary railroad’s highway-rail and pathway crossings. The written notification shall include the following:

(i) A list of all subsidiary railroads for which the parent corporation will submit and update highway-rail and pathway crossing data;

(ii) A statement signed by an official of the parent corporation affirming that the parent corporation agrees to submit and update all of the highway-rail and pathway crossing data for the named subsidiary railroad(s); and

(iii) A statement that the parent corporation agrees to be subject to enforcement action for noncompliance with the reporting or updating requirements of this subpart.

(2) The parent corporation shall provide immediate written notification to the FRA Associate Administrator of any change in the list of subsidiary operating railroads for which it has assumed reporting and updating responsibility.

(3) The parent corporation shall submit the data required by paragraph (a) of this section to the Crossing Inventory electronically.

■ 4. In § 234.405, revise paragraphs (a)(1) and (3), (b), and (d) to read as follows:

#### § 234.405 Submission of initial data to the Crossing Inventory for previously unreported crossings.

(a) *Duty of primary operating railroad.* (1)(i) With the exception of highway-rail and pathway crossings located in a railroad yard, passenger station, or within a private company, port, or dock area, each primary operating railroad shall assign an Inventory Number to each previously unreported highway-rail and pathway crossing through which it operates.

(ii) A primary operating railroad shall assign one or more Inventory Numbers to previously unreported highway-rail and pathway crossings through which it operates, which are located in a railroad yard, passenger station, or within a private company, port, or dock area.

\* \* \* \* \*

(3) Each primary operating railroad shall submit accurate Inventory Forms, or their electronic equivalent, to the Crossing Inventory for the previously unreported highway-rail and pathway crossings through which it operates, no later than August 9, 2016. The Inventory Form, or its electronic equivalent, shall reference the assigned Inventory Number for the crossing(s) and shall be completed and submitted consistent with § 234.403 and the Inventory Guide.

(b) *Duty of operating railroad when operating railroads operate on separate tracks.* For each previously unreported highway-rail and pathway crossing where operating railroads operate trains on separate tracks through the crossing, each operating railroad (other than the primary operating railroad) shall submit accurate crossing data specified in the Inventory Guide to the Crossing Inventory no later than August 9, 2016. The Inventory Form, or its electronic equivalent, which contains this crossing data shall reference the Inventory Number assigned to the crossing by the primary operating railroad and shall be completed and submitted in accordance with § 234.403.

\* \* \* \* \*

(d) *State-maintained crossing data.* If a primary operating railroad requests

State-maintained crossing data from the appropriate State agency responsible for maintaining highway-rail and pathway crossing data, the primary operating railroad may send a copy of its written request for State-maintained crossing data to the FRA Associate Administrator and to each operating railroad that operates through the crossing. FRA will consider the written request to be an affirmative defense to potential liability for failure to timely submit an accurate Inventory Form, or its electronic equivalent, as required by paragraph (a)(3) of this section if the primary operating railroad:

(1) Provides a copy of its written request for State-maintained crossing data to the FRA Associate Administrator and to each operating railroad that operates through the crossing; and

(2) Submits the requested State-maintained crossing data to the Crossing Inventory within 60 days of receipt.

■ 5. In § 234.407, revise paragraphs (a)(3), (b) and (d) to read as follows:

**§ 234.407 Submission of initial data to the Crossing Inventory for new crossings.**

(a) \* \* \*

(3) Each primary operating railroad shall submit accurate Inventory Forms, or their electronic equivalent, to the Crossing Inventory for new highway-rail and pathway crossings through which it operates, no later than six (6) months after the crossing becomes operational. The Inventory Form, or its electronic equivalent, shall reference the assigned Inventory Number for the crossing(s) and shall be completed and submitted in accordance with § 234.403.

(b) *Duty of Operating Railroad when operating railroads operate on separate tracks.* For each new highway-rail and pathway crossing where operating railroads operate trains on separate tracks through the crossing, each operating railroad shall submit accurate crossing data specified in the Inventory Guide to the Crossing Inventory no later than six (6) months after the crossing becomes operational. The Inventory Form, or its electronic equivalent, which contains this crossing data shall reference the Inventory Number assigned to the crossing by the primary operating railroad and shall be completed and submitted consistent with § 234.403 and the Inventory Guide.

\* \* \* \* \*

(d) *State-maintained crossing data.* If a primary operating railroad requests State-maintained crossing data from the appropriate State agency responsible for maintaining highway-rail and pathway crossing data, the primary operating railroad may send a copy of its written request for State-maintained crossing

data to the FRA Associate Administrator and to each operating railroad that operates through the crossing. FRA will consider the written request to be an affirmative defense to potential liability for failure to timely submit an accurate Inventory Form, or its electronic equivalent, as required by paragraph (a)(3) of this section if the primary operating railroad:

(1) Provides a copy of its written request for State-maintained crossing data to the FRA Associate Administrator and to each operating railroad that operates through the crossing no later than six (6) months after the crossing becomes operational; and

(2) Submits the requested State-maintained crossing data to the Crossing Inventory within 60 days of receipt.

■ 6. Revise § 234.409 to read as follows:

**§ 234.409 Submission of periodic updates to the Crossing Inventory.**

(a) *Duty of primary operating railroad.* Each primary operating railroad shall submit up-to-date and accurate crossing data to the Crossing Inventory for each highway-rail and pathway crossing (except for a grade-separated or closed highway-rail or pathway crossing) through which it operates, consistent with the Inventory Guide. Updated crossing data shall be submitted to the Crossing Inventory at least every three (3) years from the date of the most recent submission of data by the primary operating railroad (or on behalf of the primary operating railroad) for the crossing or August 9, 2016, whichever occurs later. For hard-copy submissions to Crossing Inventory, this three-year period shall be measured from mailing date of the most recent submission of data by the primary operating railroad (or on behalf of the primary operating railroad).

(b) *Duty of operating railroad when operating railroads operate on separate tracks.* For each highway-rail and pathway crossing where operating railroads operate trains on separate tracks through the crossing, each operating railroad shall submit up-to-date and accurate crossing data for certain specified data fields on the Inventory Form, or its electronic equivalent, to the Crossing Inventory at least every three (3) years from the date of the most recent submission of data by that operating railroad (or on behalf of that operating railroad) for the crossing or August 9, 2016, whichever occurs later. For hard-copy submissions to Crossing Inventory, this three-year period shall be measured from mailing date of the most recent submission of data by the operating railroad (or on behalf of the operating railroad). The

Inventory Form, or its electronic equivalent, shall be completed and submitted consistent with § 234.403 and the Inventory Guide.

■ 7. Revise § 234.411 to read as follows:

**§ 234.411 Changes requiring submission of updated information to the Crossing Inventory.**

(a) *Crossing sale.* (1) If a railroad that is not a primary operating railroad sells all or part of a highway-rail or pathway crossing on or after June 10, 2016, it shall report the crossing sale to the primary operating railroad within three (3) months of the date of sale.

(2) If the primary operating railroad:

(i) Sells all or part of a highway-rail or pathway crossing on or after June 10, 2016 for which it has reporting and updating responsibility under this subpart; or

(ii) Is notified of the sale of all or part of a highway-rail or pathway crossing on or after June 10, 2016 under paragraph (a)(1) of this section, then the primary operating railroad shall submit an Inventory Form, or its electronic equivalent, which reflects the crossing sale to the Crossing Inventory consistent with § 234.403 and the Inventory Guide within three (3) months of the date of sale or three months of notification, respectively.

(b) *Crossing closure.* The primary operating railroad shall report the closure of any highway-rail or pathway crossing that occurs on or after June 10, 2016 to the Crossing Inventory within three (3) months of the date on which the crossing is closed. The primary operating railroad shall submit an Inventory Form, or its electronic equivalent, that reflects closure of the crossing to the Crossing Inventory consistent with § 234.403 and the Inventory Guide.

(c) *Changes in crossing characteristics.* (1) The primary operating railroad shall report any change in crossing surface or change in warning device at a public highway-rail grade crossing that occurs on or after June 10, 2016 to the Crossing Inventory within three (3) months of the date of the change. The primary operating railroad shall submit an Inventory Form, or its electronic equivalent, that reflects up-to-date and accurate crossing data for the crossing (including the change in crossing surface or change in warning device) to the Crossing Inventory consistent with § 234.403 and the Inventory Guide.

(2) For purposes of this subpart, a “change in warning device” means the addition or removal of a crossbuck, yield or stop sign, flashing lights, or gates at a public highway-rail grade

crossing. The installation of a crossbuck, yield or stop sign, flashing lights, or gates that will be in place for less than six months does not constitute a “change in warning device” for purposes of this subpart.

■ 8. The heading of § 234.413 is revised to read as follows:

**§ 234.413 Recordkeeping.**

\* \* \* \* \*

■ 9. In Appendix A to Part 234, place the entry for subpart F in alphabetical order, and revise the entries under subpart F to read as follows:

**APPENDIX A TO PART 234—SCHEDULE OF CIVIL PENALTIES <sup>1</sup>**

Section	Violation	Willful violation
* * * * *		
<b>Subpart F—Highway-Rail and Pathway Crossing Inventory Reporting</b>		
§ 234.403 Submission of data to the Crossing Inventory:		
(b) Failure to complete Inventory Form (or electronic equivalent) in accordance with the Inventory Guide ...	\$1,000	\$2,000
(c) Class I railroad failure to submit crossing data to the Crossing Inventory electronically .....	1,000	2,000
§ 234.405 Submission of initial data to the Crossing Inventory for previously unreported crossings		
(a) Primary operating railroad failure to timely submit an accurate Inventory Form (or electronic equivalent) to the Crossing Inventory for previously unreported crossing .....	2,500	5,000
(b) Operating railroad failure to timely submit accurate partial crossing data to the Crossing Inventory for previously unreported crossing .....	2,500	5,000
(c) Operating railroad failure to provide written notification to FRA that the primary operating railroad failed to timely report previously unreported crossing .....	1,000	2,000
§ 234.407 Submission of initial data to the Crossing Inventory for new crossings:		
(a) Primary operating railroad failure to timely submit an accurate Inventory Form (or electronic equivalent) to the Crossing Inventory for new crossing .....	2,500	5,000
(b) Operating railroad failure to timely submit accurate partial crossing data to the Crossing Inventory for new crossing .....	2,500	5,000
(c) Operating railroad failure to provide written notification to FRA that the primary operating railroad failed to timely report new crossing .....	1,000	2,000
§ 234.409 Submission of periodic updates to the Crossing Inventory:		
(a) Primary operating railroad failure to timely submit up-to-date and accurate crossing data to the Crossing Inventory for highway-rail or pathway crossing .....	2,500	5,000
(b) Operating railroad failure to timely submit up-to-date and accurate partial crossing data to the Crossing Inventory for highway-rail or pathway crossing .....	2,500	5,000
§ 234.411 Changes requiring submission of updated information to the Crossing Inventory:		
(a) Failure to timely report crossing sale to the Crossing Inventory .....	2,500	5,000
(b) Primary operating railroad failure to timely report crossing closure to the Crossing Inventory .....	2,500	5,000
(c) Primary operating railroad failure to timely submit up-to-date and accurate crossing data to the Crossing Inventory after change in crossing characteristics .....	2,500	5,000
§ 234.413 Recordkeeping .....	1,000	2,000
§ 234.415 Electronic Recordkeeping .....	1,000	2,000

<sup>1</sup> A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$105,000 for any violation where circumstances warrant. See 49 CFR part 209, appendix A. To facilitate the assessment of penalty amounts, the specific types of violations of a given section are sometimes designated by the paragraph of the section (e.g., “(a)”) and a code not corresponding to the legal citation for the violation (e.g., “(1)”), so that the complete citation in the penalty schedule is e.g., “(a)(1).” FRA reserves the right to revise the citation of the violation in the Summary of Alleged Violations issued by FRA in the event of litigation.

Issued in Washington, DC, on May 20, 2016, under the authority set forth in 49 CFR 1.89(b).

**Sarah E. Feinberg,**  
Administrator.

[FR Doc. 2016-13516 Filed 6-9-16; 8:45 am]

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 679**

**[Docket No. 150629562-6447-02]**

**RIN 0648-BF25**

**Fisheries of the Exclusive Economic Zone Off Alaska; Bycatch Management in the Bering Sea Pollock Fishery**

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues this final rule to implement Amendment 110 to the

Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands management area (FMP). Amendment 110 and this final rule improve the management of Chinook and chum salmon bycatch in the Bering Sea pollock fishery by creating a comprehensive salmon bycatch avoidance program. This action is necessary to minimize Chinook and chum salmon bycatch in the Bering Sea pollock fishery to the extent practicable while maintaining the potential for the full harvest of the pollock total allowable catch (TAC) within specified prohibited species catch (PSC) limits. Amendment 110 is intended to promote the goals and objectives of the Magnuson-Stevens Fishery

Conservation and Management Act, the FMP, and other applicable laws.

**DATES:** Effective July 11, 2016.

**ADDRESSES:** Electronic copies of Amendment 110 and the Environmental Assessment (EA)/Regulatory Impact Review (RIR) prepared for this action (collectively the “Analysis”), and the Environmental Impact Statement (EIS) prepared for Amendment 91 to the FMP may be obtained from [www.regulations.gov](http://www.regulations.gov) or from the NMFS Alaska Region Web site at <http://alaskafisheries.noaa.gov>. All public comments submitted during the comment periods may be obtained from [www.regulations.gov](http://www.regulations.gov).

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this rule may be submitted by mail to NMFS Alaska Region, P.O. Box 21668, Juneau, AK 99802–1668, Attn: Ellen Sebastian, Records Officer; in person at NMFS Alaska Region, 709 West 9th Street, Room 420A, Juneau, AK; by email to [OIRA\\_Submission@omb.eop.gov](mailto:OIRA_Submission@omb.eop.gov); or by fax to 202–395–5806.

**FOR FURTHER INFORMATION CONTACT:** Gretchen Harrington or Alicia Miller, 907–586–7228.

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fisheries in the exclusive economic zone of the Bering Sea and Aleutian Islands Management Area (BSAI) under the FMP. The North Pacific Fishery Management Council (Council) prepared the FMP under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1801 *et seq.* Regulations governing U.S. fisheries and implementing the FMP appear at 50 CFR parts 600 and 679.

NMFS published the Notice of Availability for Amendment 110 in the **Federal Register** on January 8, 2016 (81 FR 897), with comments invited through March 8, 2016. NMFS published the proposed rule to implement Amendment 110 on February 3, 2016 (81 FR 5681), with comments invited through March 4, 2016. The Secretary of Commerce approved Amendment 110 on March 29, 2016. NMFS received 15 comment letters containing 27 unique substantive comments on the FMP amendment and proposed rule. A summary of these comments and the responses by NMFS are provided under the heading Response to Comments below.

A detailed review of the provisions of Amendment 110, the proposed regulations to implement Amendment 110, and the rationale for these regulations is provided in the preamble

to the proposed rule (81 FR 5681, February 3, 2016) and is briefly summarized in this final rule. The preamble to the proposed rule describes 1) the Bering Sea pollock fishery, 2) salmon bycatch in the Bering Sea pollock fishery, 3) the importance of salmon in western Alaska, 4) management of salmon bycatch in the BSAI, 5) objectives of and rationale for Amendment 110 and the implementing regulations, 6) proposed salmon bycatch management measures, 7) proposed changes to monitoring and enforcement requirements, and 8) other regulatory changes in the proposed rule.

Amendment 110 and this final rule apply to owners and operators of catcher vessels, catcher/processors, motherships, inshore processors, and the six Western Alaska Community Development Quota (CDQ) Program groups participating in the pollock (*Gadus chalcogrammus*) fishery in the Bering Sea. The Bering Sea pollock fishery is managed under the American Fisheries Act (AFA) (16 U.S.C. 1851 note) and the Magnuson-Stevens Act. The AFA defines the sectors of the Bering Sea pollock fishery, determines which vessels and processors are eligible to participate in each sector, establishes allocations of Bering Sea pollock total TAC to each sector as directed fishing allowances, and establishes excessive share limits for harvesting pollock. As required by section 206(b) of the AFA, NMFS allocates a specified percentage of the Bering Sea pollock TAC to each of the three AFA fishery sectors: 1) 50 percent to catcher vessels delivering to inshore processors, called the “inshore sector”; 2) 40 percent to catcher/processors and catcher vessels delivering to those catcher/processors, called the “catcher/processor sector”; and 3) 10 percent to catcher vessels harvesting pollock for processing by motherships, called the “motherhip sector.”

Pollock is harvested with trawl vessels that tow large nets through the water. Pollock can occur in the same locations as Chinook salmon and chum salmon. Consequently, Chinook salmon and chum salmon are incidentally caught in the nets as fishermen target pollock.

Section 3 of the Magnuson-Stevens Act defines bycatch as fish that are harvested in a fishery, which are not sold or kept for personal use. Therefore, Chinook salmon and chum salmon caught in the pollock fishery are considered bycatch under the Magnuson-Stevens Act, the FMP, and NMFS regulations at 50 CFR part 679. Bycatch of any species, including discard or other mortality caused by

fishing, is a concern of the Council and NMFS. National Standard 9 and section 303(a)(11) of the Magnuson-Stevens Act require the Council to recommend, and NMFS to implement, conservation and management measures that, to the extent practicable, minimize bycatch and bycatch mortality.

The bycatch of culturally and economically valuable species like Chinook salmon and chum salmon, which are fully allocated and, in some cases, facing conservation concerns, are categorized as prohibited species under the FMP. They are the most regulated and closely managed category of bycatch in the groundfish fisheries off Alaska, and specifically in the pollock fishery. In addition to Pacific salmon, other species including steelhead trout, Pacific halibut, king crab, Tanner crab, and Pacific herring are also classified as prohibited species in the groundfish fisheries off Alaska. Fishermen must avoid salmon bycatch and any salmon caught must either be donated to the Prohibited Species Donation (PSD) Program (see § 679.26), or returned to Federal waters as soon as practicable, with a minimum of injury, after an observer has determined the amount of salmon bycatch and collected any scientific data or biological samples.

The Council and NMFS have been concerned about the potential impact of Chinook and chum salmon bycatch on returns to western Alaska given the relatively large proportion of bycatch from western Alaska that occurs in the pollock fishery. Chinook salmon and chum salmon destined for western Alaska support commercial, subsistence, sport, and personal use fisheries. The State of Alaska (State) manages the salmon commercial, subsistence, sport, and personal use fisheries. The Alaska Board of Fisheries adopts regulations through a public process to conserve salmon and to allocate salmon to the various users. The first management priority is to meet spawning escapement goals to sustain salmon resources for future generations. The next priority is for subsistence use under both State and Federal law. Salmon is a primary subsistence food in some areas. Subsistence fisheries management includes coordination with U.S. Federal agencies where Federal rules apply under the Alaska National Interest Lands Conservation Act. Section 3.4 of the Analysis describes the State and Federal management process. Appendix A–4 of the Analysis provides an overview of the importance of subsistence salmon harvests and commercial salmon harvests.

Over the last 20 years, the Council and NMFS have adopted and

implemented several management measures to limit salmon bycatch in the BSAI trawl fisheries, and particularly in the pollock fishery. Most recently, NMFS implemented Amendment 84 to the FMP to enhance the effectiveness of salmon bycatch measures (72 FR 61070, October 29, 2007) and Amendment 91 to the FMP to provide incentives to minimize Chinook salmon bycatch to the extent practicable (75 FR 53026, August 30, 2010).

Amendment 84 exempted pollock vessels from Chinook Salmon Savings Area and Chum Salmon Savings Area closures in the Bering Sea if they participate in an intercooperative agreement (ICA) to reduce salmon bycatch. Amendment 84 also exempted vessels participating in non-pollock trawl fisheries in the Bering Sea from area closures because these fisheries intercept minimal amounts of salmon. Additional information on the provisions of Amendment 84 is provided in the final rule prepared for that action (72 FR 61070, October 29, 2007).

Amendment 91 was implemented to manage Chinook salmon bycatch in the pollock fishery. Amendment 91 combined a limit on the amount of Chinook salmon that may be caught incidentally with a novel approach designed to minimize bycatch to the extent practicable in all years and prevent bycatch from reaching the limit in most years, while providing the fleet the flexibility to harvest the total allowable catch (TAC) of Bering Sea pollock. Amendment 91 removed Chinook salmon from the Amendment 84 regulations, and established two Chinook salmon PSC limits for the pollock fishery—60,000 and 47,591 Chinook salmon. Under Amendment 91, the PSC limit is 60,000 Chinook salmon if some, or all, of the pollock fishery participates in an industry-developed contractual arrangement, called an incentive plan agreement (IPA). An IPA establishes a program to minimize bycatch at all levels of Chinook salmon abundance. Participation in an IPA is voluntary; however, any vessel or CDQ group that chooses not to participate in an IPA is subject to a restrictive opt-out allocation (also called a backstop cap). Since Amendment 91 was implemented, all AFA vessels (*i.e.*, vessels authorized to directed fish for Bering Sea pollock) have participated in an IPA. Additional information on the provisions of Amendment 91 is provided in the final rule prepared for that action (75 FR 53026, August 30, 2010).

The following sections describe 1) the salmon bycatch management measures implemented with Amendment 110 and

this final rule, 2) the changes from proposed to final rule, and 3) response to comments.

#### **Amendment 110 and This Final Rule**

The objective of Amendment 110 and this final rule is to create a comprehensive salmon bycatch avoidance program that works more effectively than current management to avoid Chinook salmon bycatch and Alaska-origin chum salmon bycatch in the pollock fishery. The Council and NMFS recognize that salmon are an extremely important resource to Alaskans who depend on local fisheries for their sustenance and livelihood.

Amendment 110 and this final rule adjust the existing Chinook salmon bycatch program to incorporate revised chum salmon bycatch measures into the existing IPAs. Amendment 110 and this final rule are designed to consider the importance of continued production of critical chum salmon runs in western Alaska by focusing on bycatch avoidance of Alaskan chum salmon runs. Historically, western Alaska chum salmon run strength has varied substantially and chum salmon are important to the subsistence lifestyle of Alaskans. Amendment 110 and this final rule also provide additional protections to chum salmon stocks other than those from western Alaska, recognizing that most of the non-western Alaska chum salmon are likely from Asian hatcheries.

In addition, the Council and NMFS sought to provide greater incentives to avoid Chinook salmon by strengthening existing incentives during times of historically low Chinook salmon abundance in western Alaska. Thus, the management measures included in Amendment 110 focus on retaining the incentives to avoid Chinook salmon bycatch at all levels of abundance as intended by Amendment 91. Multiple years of historically low Chinook salmon abundance have resulted in significant restrictions for subsistence users in western Alaska and failure to achieve conservation objectives. While Chinook salmon bycatch impact rates have been low under Amendment 91, the Council and NMFS determined that there is evidence that improvements could be made to ensure the program is reducing Chinook salmon bycatch at low levels of salmon abundance. An analysis of the possible improvements is provided in Section 3.5.3 of the Analysis.

Amendment 110 and this final rule—

- incorporate chum salmon avoidance into the IPAs established under Amendment 91 to the FMP, and remove the non-Chinook salmon

bycatch reduction ICA previously established under Amendment 84 to the FMP;

- modify the requirements for the content of the IPAs to increase the incentives for fishermen to avoid Chinook salmon;
- change the seasonal apportionments of the pollock TAC to allow more pollock to be harvested earlier in the year when Chinook salmon PSC use tends to be lower;
- reduce the Chinook salmon PSC limit and performance standard in years with low Chinook salmon abundance in western Alaska; and
- improve the monitoring of salmon bycatch in the pollock fishery.

#### *Incorporate Chum Salmon Avoidance Into the Incentive Plan Agreements (IPAs)*

Amendment 110 and this final rule incorporate chum salmon avoidance, and the important chum salmon avoidance features of the Amendment 84 ICAs, into the IPAs established under Amendment 91. This final rule removes the Amendment 84 implementing regulations at § 679.21(g). However, Amendment 110 and this final rule maintain the current non-Chinook salmon PSC limit of 42,000 fish and the closure of the Chum Salmon Savings Area to the pollock fishery when the 42,000 non-Chinook salmon PSC limit has been reached. Vessels that participate in an IPA are exempt from the Chum Salmon Savings Area closure. The purpose of maintaining the non-Chinook salmon PSC limit and the Chum Salmon Savings Area closure is to provide additional incentives for vessels to join an IPA, and to serve as back-stop chum salmon bycatch management measures for those vessels that choose not to participate in an IPA.

To incorporate chum salmon into the IPAs, this final rule modifies the required contents of the IPAs at § 679.21(f)(12), to include the following eight provisions.

- Incentives for the operator of each vessel to avoid Chinook salmon and chum salmon bycatch under any condition of pollock and Chinook salmon abundance in all years.
- An explanation of how the incentives to avoid chum salmon do not increase Chinook salmon bycatch.
- Rewards for avoiding Chinook salmon, penalties for failure to avoid Chinook salmon at the vessel level, or both.
- An explanation of how the incentive measures in the IPA are expected to promote reductions in a vessel's Chinook salmon and chum salmon bycatch rates relative to what

might have occurred in absence of the incentive program.

- An explanation of how the incentive measures in the IPA promote Chinook salmon savings and chum salmon savings in any condition of pollock abundance or Chinook salmon abundance and influence the vessel operator's decisions to avoid Chinook salmon and chum salmon.
- An explanation of how the IPA ensures that the operator of each vessel governed by the IPA will manage that vessel's Chinook salmon bycatch to keep total bycatch below the performance standard for the sector in which the vessel participates.
- An explanation of how the IPA ensures that the operator of each vessel governed by the IPA will manage that vessel's chum salmon bycatch to avoid areas and times where the chum salmon are likely to return to western Alaska.
- The rolling hot spot program for salmon bycatch avoidance and the agreement to provide notifications of closure areas and any violations of the rolling hot spot program to at least one third party group representing western Alaskans who depend on salmon and do not directly fish in a groundfish fishery.

This final rule also adds reporting requirements to the IPA Annual Report at § 679.21(f)(13) to require the IPA representative to describe how the IPA addresses the goals and objectives in the IPA provisions related to chum salmon. Section 3.5.2 of the Analysis provides more detail on adding elements of chum salmon bycatch management.

#### *Modify the IPAs To Increase the Incentives To Avoid Chinook Salmon*

Amendment 110 and this final rule modify the IPAs to increase the incentives to reduce Chinook salmon bycatch within the IPAs. To incorporate additional incentives for Chinook salmon savings into the IPAs, this final rule modifies the required contents of the IPAs at § 679.21(f)(12) to include the following six provisions.

- Restrictions or penalties targeted at vessels that consistently have significantly higher Chinook salmon PSC rates relative to other vessels fishing at the same time.
- Requirement that vessels enter a fishery-wide in-season salmon PSC data sharing agreement.
- Requirement for a rolling hotspot program that operates throughout the entire pollock A season (January 20 through June 10) and B season (June 10 through November 1).
- Requirement for the use of salmon excluder devices, with recognition of contingencies, from January 20 through

March 31 and from September 1 until the end of the B season.

- For savings-credit-based IPAs, limitation on the salmon savings credits to maximum of three years.
- Restrictions or performance criteria to ensure that Chinook salmon PSC rates in October are not significantly higher than those achieved in the preceding months, thereby avoiding late-season spikes in salmon PSC.

#### *Revise the Bering Sea Pollock Seasonal Allocations*

This final rule changes the allocation of the Bering Sea pollock TAC between the A and B seasons at § 679.20(a)(5)(i)(B)(1). This final rule allocates five percent of the pollock allocation from the B season to the A season, resulting in new seasonal apportionments of 45 percent of the TAC in the A season and 55 percent of the TAC in the B season. This final rule maintains the rollover of any remaining pollock from the A season to the B season. The revised season allocation works in conjunction with the new IPA requirements to shift effort out of the late B season and provide fishery participants more flexibility to avoid Chinook salmon PSC when it tends to be higher in the late B season.

#### *Reduce the Chinook Salmon Performance Standard and PSC Limit in Years of Low Chinook Salmon Abundance in Western Alaska*

Amendment 110 and this final rule add a new lower Chinook salmon performance standard and PSC limit for the pollock fishery in years of low Chinook salmon abundance in western Alaska. The Council and NMFS determined that a lower performance standard and PSC limit would be appropriate at low levels of Chinook salmon abundance in western Alaska because most of the Chinook salmon bycatch comes from western Alaska. These provisions work in conjunction with the changes to the IPA requirements to ensure that Chinook salmon bycatch is avoided at all times, particularly at low abundance levels.

Each year, NMFS will determine whether Chinook salmon is at low abundance based on information provided by the State. By October 1 of each year, the State will provide a Chinook salmon abundance using the 3-System Index for western Alaska based on the post-season in-river Chinook salmon run size for the Kuskokwim, Unalakleet, and Upper Yukon aggregate stock grouping. When this index is less than or equal to 250,000 Chinook salmon, NMFS will apply the new lower

performance standard and low PSC limit for the following year.

If NMFS determines it is a low Chinook salmon abundance year, NMFS will set the performance standard at 33,318 Chinook salmon and the PSC limit at 45,000 Chinook salmon for the following fishing year. NMFS will publish the lower PSC limit and performance standard in the annual harvest specifications. In years with no determination of a low Chinook salmon abundance, NMFS will manage under the current 47,591 Chinook salmon performance standard and 60,000 Chinook salmon PSC limit.

The inclusion of a lower PSC limit and performance standard is based on the need to reduce bycatch when these Chinook salmon stocks are low in order to minimize the impact of the pollock fishery on the stocks. Any additional Chinook salmon returning to Alaska rivers improves the ability to meet the State's spawning escapement goals, which is necessary for long-term sustainability of Chinook salmon and the people reliant on salmon fisheries. While the performance standard is the functional limit in the IPAs, the Council and NMFS determined that the 60,000 PSC limit should also be reduced given the potential for decreased bycatch reduction incentives should a sector exceed its performance standard before the PSC limit is reached. The reduced PSC limit is intended to encourage vessels to avoid bycatch to a greater degree in years of low abundance, and to set a maximum permissible PSC limit that reduces the risk of adverse impact on stocks in western Alaska during periods of low abundance.

#### *Changes to Monitoring and Enforcement Requirements*

This final rule amends the monitoring and enforcement regulations to clarify and strengthen those implemented under Amendment 91. These changes—

- revise salmon retention and handling requirements on catcher vessels;
- improve observer data entry and transmission requirements aboard catcher vessels;
- clarify the requirements applicable to viewing salmon in a storage container; and
- clarify the requirements for the removal of salmon from an observer sampling station at the end of a haul or delivery.

This final rule also makes a number of other revisions to the regulations for clarity and efficiency. All of these regulatory changes are detailed in the preamble to the proposed rule (81 FR 5681, February 3, 2016).

### Change From Proposed to Final Rule

NMFS made no changes to the final rule in response to comments received on the proposed rule.

NMFS made three minor changes in this final rule to reflect final rules published after NMFS published the proposed rule for Amendment 110. First, this final rule removed the definition of prohibited species quota (PSQ) reserve because that definition was corrected in the final rule to implement halibut PSC limit reductions under Amendment 111 to the FMP (81 FR 24714, April 27, 2016). Second, this final rule revises the heading for § 679.21(e) that was modified under regulations that implemented Amendment 111 to the FMP to clarify that paragraph (e) applies to PSC limits for BSAI crab and herring. Third, this final rule adds the parenthetical phrase “(except for a catcher/processor placed in the partial observer coverage category under paragraph (a)(3) of this section)” to § 679.51(e)(1)(iii)(B) to be consistent with the final rule to allow qualifying small catcher/processors to be in the partial observer coverage category under the North Pacific Groundfish and Halibut Observer Program (81 FR 17403, March 29, 2016).

Additionally, this final rule makes a minor editorial clarification to revise § 679.21(f)(2) to clarify that the State will provide to NMFS an estimate of Chinook salmon abundance using a the 3-System Index for western Alaska based on the Kuskokwim, Unalakleet, and Upper Yukon aggregate stock grouping.

### Response to Comments

NMFS received 15 comment letters containing 27 specific comments, which are summarized and responded to below. The commenters consisted of individuals, representatives of the pollock fishery participants, a representative of groundfish fishery participants, Alaska Native organizations, and the State.

*Comment 1:* We support the comprehensive salmon bycatch avoidance program outlined in the proposed rule for Amendment 110 and believe it will be more effective in meeting the Council's objectives, including minimizing salmon bycatch, responding to changing conditions of abundance, and avoiding Alaska-origin salmon stocks.

*Response:* NMFS acknowledges the comment.

*Comment 2:* Consistent genetic stock composition data show that Alaska-origin stocks continue to comprise a majority of the Chinook salmon bycatch

and almost a quarter of the chum salmon bycatch in the Bering Sea pollock fishery. Recognizing the importance of these stocks to western Alaska commercial and subsistence users, and our increased understanding of the areas and times of year in which Alaska Chinook and chum salmon stocks are more predominate in the bycatch, Amendment 110 provides the necessary flexibility to respond to and incorporate new information in the bycatch avoidance program.

*Response:* NMFS acknowledges the comment.

*Comment 3:* Reducing salmon bycatch in the Bering Sea pollock fishery is critical to the future of Chinook salmon runs. Amendment 110 is urgently needed because of the dire status of Chinook salmon stocks in western Alaska. Amendment 110 and the proposed regulations are an important step in further reducing salmon bycatch in the pollock fishery. Amendment 110 will continue to lower Chinook salmon bycatch, however, constant vigilance is required to ensure that the Chinook salmon PSC limits established in regulation are never actually met.

*Response:* NMFS acknowledges the comment.

*Comment 4:* It is essential to integrate chum salmon bycatch measures into the IPAs and include the accountability and transparency measures.

*Response:* Amendment 110 and this final rule incorporate chum salmon avoidance measures into the IPAs established for Chinook salmon bycatch management under Amendment 91. Incorporating chum salmon into the IPAs provides measures to prevent high chum salmon bycatch, while also giving participants in the pollock fishery the flexibility to use coordinated management under the IPAs to adapt quickly to changing conditions. The Council determined and NMFS agreed that Amendment 110 and this final rule strike an appropriate balance between regulatory requirements and adaptive management necessary for chum salmon bycatch management.

*Comment 5:* Make sure the theoretical salmon avoidance schemes proposed do not make matters worse for Chinook salmon in the attempt to avoid chum salmon.

*Response:* The chum salmon-specific requirements in the Amendment 84 implementing regulations sometimes prevented fishery participants from making decisions to avoid Chinook salmon when vessels encountered both chum salmon and Chinook salmon. Adding chum salmon measures to the IPAs provides vessel operators with the flexibility to respond to changing

conditions and provides greater incentives to reduce bycatch of both salmon species, thereby making salmon bycatch management more effective, comprehensive, and efficient.

*Comment 6:* The measures designed to reduce Chinook salmon bycatch in the proposed rule provide useful tools to fine-tune the IPAs to mandate greater bycatch reduction.

*Response:* NMFS agrees. Amendment 110 and this final rule modify the IPAs to increase the incentives for fishermen to avoid Chinook salmon. The Council and NMFS recognize that the IPAs were effective at providing incentives for each vessel operator to avoid Chinook salmon, but that additional measures were necessary to address higher Chinook salmon PSC rates observed in October (the last month when the pollock fishery is authorized to operate). Amendment 110 and this final rule also address concerns with individual vessels that consistently have significantly higher Chinook salmon PSC rates relative to other vessels fishing at the same time. The Council and NMFS want to ensure the use of salmon excluder devices (*i.e.*, gear modifications that are designed to exclude salmon bycatch while retaining pollock) and a rolling hotspot program. These new provisions increase the incentives to reduce Chinook salmon bycatch within the IPAs, provide an opportunity for IPAs to increase vessels' responsiveness in October, and improve performance of individual vessels.

*Comment 7:* The entire history of the Bering Sea pollock fishery and its impacts on western Alaska salmon has been a disaster and it is within this context that we remain opposed to the allowance of any salmon bycatch during the pollock fishery. Driving bycatch continuously lower, with an ultimate goal of zero, is essential. NMFS should prioritize its responsibilities based on moral and ethical obligations, in addition to its legal obligations, to those tribal communities whose very survival depends on a future of salmon returning in sufficient numbers to their rivers.

*Response:* The Council recommended and NMFS approved Amendment 110 because it best balances the need to minimize salmon bycatch to the extent practicable while providing the pollock fleet the flexibility to harvest the pollock TAC. NMFS has complied with all applicable laws, executive orders, and international obligations in approving and implementing Amendment 110. Preventing all salmon bycatch would not meet the purpose and need for this action and would not meet NMFS' obligations under the Magnuson-Stevens Act.

While salmon bycatch in the pollock fishery may be a contributing factor in the decline of salmon, NMFS expects the numbers of the ocean bycatch that would have returned to western Alaska would be relatively small due to ocean mortality and the large number of other river systems contributing to the total Chinook or chum salmon bycatch. For Chinook salmon, Section 3.5.1 of the Analysis explains that the Chinook salmon bycatch expected to have returned to western Alaska rivers is approximately 2.3 percent of coastal western Alaska run size in recent years. For chum salmon, Section 3.5.1 of the Analysis explains that the chum salmon bycatch expected to have returned to western Alaska rivers is approximately 0.5 percent of the coastal western Alaska run size in recent years. Under Amendment 110 and this final rule, these impact rates are anticipated to be further reduced as the pollock fleet improves its ability to avoid salmon at all times.

Although the reasons for the decline of Chinook salmon and some runs of chum salmon are not completely understood, scientists believe they are predominately natural. Changes in ocean and river conditions, including unfavorable shifts in temperatures and food sources, likely cause poor survival of Chinook salmon and some runs of chum salmon. The EIS prepared for Amendment 91 provides more detail on the decline of salmon in western Alaska (see **ADDRESSES**). Section 3.4 of the Analysis describes the stocks status of Chinook and chum salmon.

*Comment 8:* A key component of Amendment 110 and the proposed rule is to reduce the performance standard and PSC limit in years of low Chinook salmon abundance in western Alaska. The limits set in Amendment 91 were far too high to ensure a healthy future for western Alaska salmon runs. The mechanism to lower these limits in times of low Chinook salmon abundance is the minimum step NMFS must take at this time to fulfill numerous legal responsibilities to reduce the allowable salmon bycatch in the pollock fishery. Taking action now to lower the PSC limit and performance standard in years of extremely low abundance is a critical step to ensure that bycatch is reduced in the years when every source of mortality must be reduced.

*Response:* Amendment 110 and this final rule add a new lower Chinook salmon performance standard and PSC limit for the pollock fishery in years of low Chinook salmon abundance in western Alaska. These provisions work in conjunction with the changes to the

IPA requirements to ensure that Chinook salmon bycatch is avoided at all times, particularly at low abundance levels.

Each year, NMFS will determine whether Chinook salmon is at low abundance based on information provided by the State using the 3-System Index. When this index is less than or equal to 250,000 Chinook salmon, NMFS will apply the new lower performance standard and reduced PSC limit for the following year. If NMFS determines it is a low Chinook salmon abundance year, NMFS will set the performance standard at 33,318 Chinook salmon and the PSC limit at 45,000 Chinook salmon for the following fishing year. The reduced PSC limit is intended to encourage vessels to avoid bycatch to a greater degree in years of low abundance, and to set a maximum permissible PSC limit that reduces the risk of adverse impact on stocks in western Alaska during periods of low abundance.

In years with no determination of low Chinook salmon abundance, NMFS will manage under the current 47,591 Chinook salmon performance standard and 60,000 Chinook salmon PSC limit. The Council determined, and NMFS agrees, that these limits are appropriate given that the IPAs maintain bycatch well below these limits. Average Chinook salmon bycatch has been approximately 16,647 Chinook salmon per year since implementation of Amendment 91 in 2011.

*Comment 9:* Amendment 110 reduces the number of Chinook salmon that can be taken as bycatch in years of very low Chinook salmon abundance in western Alaska, which is critical to maintaining objectives under National Standard 9. In years of very low Chinook salmon abundance, the State struggles to meet salmon escapement goals in important western Alaska systems, and only does so by prohibiting any directed Chinook salmon harvest for subsistence, as well as restricting subsistence harvest of other species, such as chum salmon, to minimize Chinook salmon mortalities.

*Response:* NMFS acknowledges the comment.

*Comment 10:* Amendment 110 links bycatch limits to a broad index of Chinook salmon abundance based on the Kuskokwim, Unalakleet, and Upper Yukon aggregate stock grouping — the 3-System Index. The 3-System Index includes significant river systems for subsistence fisheries in Alaska and provides a broad regional representation of western Alaska Chinook salmon stocks. Any additional fish returning to these rivers in years of very low

abundance improves the State's ability to meet escapement goals.

The Analysis clearly outlined the objectives that proposed indices were evaluated against, and the 3-System Index was identified as the most robust and appropriate index for this purpose. The primary component of the 3-System Index is preliminary escapement information from total run reconstruction using methods outlined in State publications. The State will provide the 3-System Index estimate to NMFS annually by October 1 and is committed to maintaining a transparent and accessible process for stakeholders as the State improves its understanding of these systems. The State will present any substantive changes to the methods used in developing the 3-System Index to the Council and its Scientific and Statistical Committee (SSC).

*Response:* NMFS acknowledges the comment.

*Comment 11:* The provision to reduce the PSC limit and performance standard in years of low Chinook salmon abundance based on the State's 3-System Index is unwarranted, unnecessary, not sound science, and not responsible management. It unfairly targets and penalizes the pollock fishery for circumstances beyond its control. Science has shown that there is not a relationship between Chinook salmon bycatch in the pollock fishery and the size of the runs in coastal western Alaska.

*Response:* NMFS disagrees. The provisions to reduce the Chinook salmon PSC limit and performance standard in years of low abundance are necessary to achieve the program goals. The Council and NMFS determined that a lower performance standard and PSC limit are appropriate at low levels of Chinook salmon abundance in western Alaska because most of the Chinook salmon bycatch in the pollock fishery comes from western Alaska. These provisions work in conjunction with the changes to the IPA requirements to ensure that Chinook salmon bycatch is avoided at all times, particularly at low abundance levels.

The Council and State conducted an extensive analysis about the appropriate index to use to indicate a low Chinook salmon abundance year. Low Chinook salmon abundance years are characterized by difficulty meeting escapement goals and severely restricted or fully closed in-river salmon fisheries. Section 2.6 of the Analysis evaluates various indices and shows that the 3-System Index (Unalakleet, Upper Yukon, and Kuskokwim river systems) meets the objectives. The Analysis also shows a clear natural break in the data

analyzed indicating that when the index is less than 250,000 Chinook salmon, the index is strongly correlated to years with historically low run sizes. These river systems provide a broad regional representation of stocks and signify very important river systems and subsistence fisheries in western Alaska. Subsistence harvests from these three river systems account for up to 87 percent of the statewide subsistence harvest of Chinook salmon. As shown in the Analysis, having more than one system in the index and having broad regional representation makes the index more robust and able to account for changing environmental conditions.

The inclusion of a lower PSC limit and performance standard is based on the need to reduce bycatch when the abundance of Chinook salmon stocks in western Alaska is low, in order to minimize the impact of the pollock fishery on the stocks. Any additional Chinook salmon returning to Alaska rivers improves the ability to meet the State's spawning escapement goals, which is necessary for long-term sustainability of Chinook salmon, and to meet subsistence management objectives for the people reliant on salmon fisheries. While the performance standard is the functional limit in the IPAs, the Council and NMFS determined that the 60,000 PSC limit should also be reduced given the potential for decreased bycatch reduction incentives if a sector exceeds its performance standard before the PSC limit is reached. The reduced PSC limit is intended to encourage vessels to avoid bycatch to a greater degree in years of low Chinook salmon abundance, and to set a maximum permissible PSC limit that reduces the risk of adverse impact on stocks in western Alaska during periods of low abundance.

See the response to Comment 7 for a discussion of the relationship between Chinook salmon bycatch in the pollock fishery and the size of the runs in coastal western Alaska.

*Comment 12:* The dramatic changes the Council made to the Chinook salmon abundance index, Chinook salmon PSC limit, and the performance standard between initial review in December 2014 and final action in April 2015 are hard to track and are not well documented in the final Analysis.

*Response:* Sections 2.6.3 and 2.6.4 of the Analysis discuss the management measures to reduce the PSC limit and performance standard in years of low Chinook salmon abundance (see **ADDRESSES**). Section 2.6.4 explains the history of the 3-System Index and the analysis the State undertook to develop

the appropriate Chinook salmon abundance index for determining low Chinook salmon abundance in western Alaska.

*Comment 13:* There is no discussion in the EA about the methods used to determine a "natural break." The EA identifies 250,000 Chinook as a natural break in the "data". However, the data presented is actually the output of a model used to assess Chinook salmon run size. A formal definition for this threshold is required, as there is no guarantee that future models, or revisions to input data, will result in the same natural break in the model output. Instead of the 250,000 Chinook salmon threshold, NMFS should define (in probabilistic terms) a threshold to set the performance standard and PSC limit, rather than identifying an arbitrary natural break in future model output.

*Response:* Section 2.6.4 of the Analysis provides a description of the methods for use of in-river run reconstructions with the 3-System Index and rationale for this choice of index and for the 250,000 Chinook salmon threshold. The evaluation of the estimated Chinook salmon run size by year is included in the Analysis and represents the best available scientific information.

In-river run reconstructions represent an estimate of all fish harvested in the river and respective coastal areas plus escapement. The relationship upon which the threshold was determined is the relationship between final in-river run abundance of the 3-System Index and the bycatch of adult equivalent Chinook salmon attributed to all western Alaska stocks. In Section 2.6.4.2 of the Analysis, each point in Figure 8 represents a single year showing this relationship during the years analyzed. The years were referred to in the Analysis as data points for purposes of describing the clustering of these years below a breakpoint which falls above 200,486 Chinook salmon and below 286,692 Chinook salmon (see Table 6 in Section 2.6.4.5 of the Analysis).

The clustering of years below 200,486 Chinook salmon also matches years which have been categorized as low abundance years for all three systems due to documented failures to meet escapement goals, restrictions on subsistence harvests, or declarations of Federal fishery resource disasters under the provisions of section 312 of the Magnuson-Stevens Act (Section 2.6.4 of the Analysis). Based on this information, the Council determined that a threshold of 250,000 Chinook salmon was an appropriate value within this range to represent a year when

Chinook salmon were in a low abundance and as a threshold to determine that the lower PSC limit and lower performance standard would be in place for the subsequent year.

This information was also used by the Council to select the 3-System Index. As explained in Section 2.6.4 of the Analysis, the 3-System index is a transparent and annually updated index that relies on easily accessible information from reports published by the State.

The management measure to reduce the PSC limit and performance standard is tied to the selected threshold of 250,000 Chinook salmon based on the 3-System Index. No re-estimation of the threshold is planned on an annual basis or in subsequent years.

*Comment 14:* Many comments expressed concern over a letter the State had sent to NMFS on September 17, 2015, before Amendment 110 was approved and implemented. In this letter, the State provided an index estimate of 252,000 Chinook salmon to provide NMFS, the Council, and the public with a preview of Chinook salmon abundance using the 3-System Index for 2016. Commenters are concerned that this estimate reflected changes the State made in how it modeled abundance from the methods outlined in the Analysis. The State subsequently sent another letter on March 3, 2016, revising the index estimate to 279,000 Chinook salmon. The State made this revision to the index estimate based largely on the public review of the 3-System Index used to inform the State's September 17, 2015, letter.

*Response:* In their March 3, 2016, letter, the State explains that the September 2015 letter's post-season run size estimate for the 3-System Index used a Kuskokwim River run reconstruction estimate that employed a modification to the model that had not yet been reviewed by the Council. As such, the State amended the 2015 post-season run size estimate to reflect the original version of the model and has committed to using the original model in the 3-System Index until the Council determines the modification is appropriate to use.

Further, the State explains in their comment letter submitted on the proposed rule (see **ADDRESSES**) that the primary components of the post-season run index are preliminary escapement information and the total run reconstruction methods outlined in State publications. The State is committed to maintaining a transparent and accessible process for stakeholders, and the State will present any

substantive changes to the methods used in developing the 3-System Index to the Council and its SSC.

*Comment 15:* Clarify in the final rule a transparent public process for ensuring that the State provides the data, assumptions, and methods it uses to generate the 3-System Index to NMFS, the public, and the Council.

*Response:* NMFS agrees that a transparent public process is necessary for ensuring that the 3-System Index represents the best available scientific information. NMFS is committed to working with the Council and the State to define a transparent process to ensure that the data, assumptions, and methods used in the 3-System Index continue to incorporate the best available scientific information and provide a reliable indicator of Chinook salmon abundance necessary to reduce the PSC limit and performance standard. NMFS will work with the State and the Council to refine this process before the State provides the index for the 2017 fishing year on October 1, 2016.

*Comment 16:* The State must use the 3-System Index and associated methods and models described the Analysis and recommended by the Council in April 2015. Any changes to the 3-System Index and associated methods and models should be vetted through the Council and its SSC. Other models and methods may produce different run size estimates and a different threshold of low abundance. Structural changes to the run-reconstruction model would have resulted in a different “natural break” in the data that was used to determine the threshold for the 3-System Index. There are no provisions in the proposed rule to accommodate changes in the threshold that are associated with future changes to the run-reconstruction model, or revisions to the historical input data.

*Response:* The Council and State conducted an extensive analysis about the appropriate index to indicate a low Chinook salmon abundance year. Low Chinook salmon abundance years are characterized by difficulty meeting escapement goals and in-river salmon fisheries being severely restricted or fully closed. Section 2.6 of the Analysis evaluates various indices and shows that the 3-System Index (Unalakleet, Upper Yukon, and Kuskokwim river systems) meets the objectives. These river systems provide a broad regional representation of stocks and signify very important river systems and subsistence fisheries in western Alaska. Subsistence harvests from these three river systems account for up to 87 percent of the statewide subsistence harvest of Chinook salmon. As shown in the

Analysis, having more than one system in the index and having broad regional representation makes the index more robust. The Analysis also shows a clear natural break in the data such that index sizes less than 250,000 Chinook salmon correspond to years with historically low run sizes.

NMFS agrees that any changes to the 3-System Index or the methods used should have a transparent review process by the Council and its SSC. Scientific methods change over time based on the best available scientific information. NMFS is committed to working with the State and the Council to define a transparent process for review of the State's 3-System Index and associated scientific methods. However, neither Amendment 110 nor the proposed rule prescribes the process to review the State's scientific methods on an ongoing basis, or that the State must use the same scientific methods that were used to develop the 3-System Index. NMFS does not prescribe scientific methods for stock assessments in Federal regulations. To do so would preclude NMFS, the Council, and the State from incorporating the best scientific information available into the stock assessment.

In recommending Amendment 110, the Council chose a threshold of 250,000 Chinook salmon on which to determine when Chinook salmon are at low abundance. In order to change that threshold amount, the Council would need to amend the FMP and NMFS would need to amend the regulations. The process for changing the 250,000 Chinook salmon threshold would be the same as for any FMP amendment with implementing regulations.

*Comment 17:* NMFS does not have the latitude to just receive and apply the State's estimate of Chinook salmon abundance from the 3-System Index without analysis to independently verify the estimates. Applying the State's estimate would constitute delegation of management to the State of vessels fishing for pollock in the exclusive economic zone, which cannot occur because the FMP does not authorize delegation to the State. The proposed rule grants the State sole authority over the annual run size estimate and does not contemplate independent verification of the estimate by NMFS. NMFS compares the estimate to the low abundance threshold fixed in the regulations to determine whether or not a year is one of low Chinook salmon abundance, which in turn determines the following year's Chinook salmon PSC limit and performance standard applicable to vessels participating in the Federal pollock fishery. That

determination does not involve any discretion on the part of NMFS.

*Response:* Each year, NMFS will rely on a Chinook salmon abundance estimate from the State using the established 3-System Index as the best available scientific information on Chinook salmon abundance in western Alaska. The 3-System Index was reviewed by the Council's SSC and recommended by the Council. NMFS relies on the State for this abundance estimate because the State has management authority over salmon in western Alaska and collects and analyzes the scientific data necessary to estimate Chinook salmon abundance. Relying on the State to provide this type of scientific information is not the same as delegating management authority of the pollock fishery to the State. NMFS manages, and will continue to manage, the pollock fishery. In furtherance of that effort, NMFS will use information collected by the State. Specifically, NMFS will use the 3-System Index for Chinook salmon abundance to apply the appropriate PSC limit and performance standard. The PSC limit and performance standard are the measures the Council and NMFS determined were required in low Chinook salmon abundance years to achieve the program goals. NMFS will publish the PSC limit and performance standard in the annual harvest specifications. That is clearly a management action undertaken by NMFS, and not the State.

Under Amendment 110, it is each pollock vessel's responsibility to avoid salmon bycatch at all times. If fishery participants maintain their bycatch below their PSC limit, then these measures achieve their purpose without closing the pollock fishery. Alternatively, the Council could have recommended to permanently reduce the performance standard and PSC limit in order to achieve the goals of encouraging vessels to avoid bycatch to a greater degree in years of low abundance and reducing the risk of adverse impact on stocks in western Alaska during periods of low abundance. Instead, by using the 3-System Index, the Council recommended a reduced PSC limit and performance standard only during years of low Chinook salmon abundance.

*Comment 18:* To avoid unauthorized delegation, the proposed rule should be revised to require that NMFS annually confirm that the State estimate was calculated using the Council-approved index and models from April 2015 and reproduce the estimate using the data provided by the State. These standards would address the requirement that, when a core agency function—such as

PSC management—is involved, there must be Federal standards in place and a process for NMFS to review the application of those standards.

*Response:* NMFS did not change this final rule in response to this comment. The Council designed, and this final rule implements, a program where the State provides NMFS an estimate of Chinook salmon abundance using the 3-System Index for western Alaska. Neither Amendment 110 nor the proposed rule constrains the State to use the methods, data sources, and models developed for Council final action in April 2015. To do so would be inconsistent with the manner in which science develops generally, and would result in an index that may fail to incorporate the best scientific information available.

NMFS relies on the State to produce the 3-System Index annually because the State has management authority over salmon and collects and analyzes the scientific data necessary to estimate Chinook salmon abundance. While NMFS will review the 3-System Index provided each October 1, NMFS will not recalculate the State's Chinook salmon abundance estimate each year.

*Comment 19:* What action would NMFS take if the State is unable to provide an estimate of Chinook salmon abundance by October 1? NMFS should not determine low abundance if the State does not timely deliver an estimate, whether because of difficulty obtaining relevant data, budget restrictions, or other reason. The final rule should specify that NMFS will not determine it is a year of low Chinook salmon abundance if the State does not provide a Chinook salmon abundance estimate by October 1. If no such determination is made, the 60,000 Chinook salmon PSC limit and 47,591 Chinook salmon performance standard would apply.

*Response:* Absent a letter from the State showing Chinook salmon abundance under the 3-System Index is equal to or below the 250,000 Chinook salmon threshold, the 60,000 PSC limit and 45,591 performance standard will remain in effect. The State's reporting of the 3-System Index by October 1 is necessary to determine if it is a low Chinook salmon abundance year and to reduce the PSC limit and performance standard in the next fishing year. A change to this final rule is not necessary.

*Comment 20:* Change the text of Amendment 110 to state that NMFS will verify the State's estimate of abundance and that the State must use the index approved by the Council at its April 2015 meeting.

*Response:* NMFS cannot change amendment text after it has been transmitted by the Council and NMFS as published in the Notice of Availability. Under section 304(a) of the Magnuson-Stevens Act, NMFS is limited to approval, disapproval, or partial approval of a fishery management plan amendment. If NMFS disapproves or partially approves an amendment, NMFS has to notify the Council and specify the applicable law with which the amendment is inconsistent, the nature of such inconsistencies, and make recommendations to conform to applicable law. The Council may then submit a revised amendment to the Secretary of Commerce. Amendment 110 and the provision to reduce the PSC limit and performance standard are consistent with applicable law, and the commenter did not recommend disapproval or partial disapproval of Amendment 110.

NMFS responds to the issue of verifying the State's Chinook salmon abundance index in the response to Comment 17. NMFS responds to the issue of requiring the State to use the index approved by the Council at its April 2015 meeting in the response to Comment 16.

*Comment 21:* Commenters made a number of technical comments on the State's 3-System Index and the methods and models that the State used to develop the index and to generate the September 17, 2015, index estimate of 252,000 Chinook salmon.

*Response:* The State can modify the 3-System Index over time to represent the best available scientific information. These comments concerning the intricacies of the State's scientific methods are important for that process. However, they are outside of the scope of Amendment 110 and this final rule.

*Comment 22:* Good fisheries management calls for a reduction in salmon bycatch. The pollock fishery should be managed in a way that rewards those fishermen that successfully avoid salmon and other bycatch and reduces quota and opportunity for those fishermen that have significant salmon or other bycatch.

*Response:* Amendment 110 and this final rule improve the IPAs implemented under Amendment 91 to include chum salmon avoidance measures and to increase the ability for each vessel to avoid Chinook salmon. The IPA component is an innovative approach that is designed to provide incentives for each vessel to avoid bycatch at all times with the goal of bringing bycatch to minimum

achievable levels. The requirements for an IPA are performance based (*i.e.*, they address what an IPA should accomplish); any number of different incentive plans could meet these objectives. The requirements for the IPA are performance based because fishery participants have more tools available to them to create incentives to minimize bycatch at the vessel level than could be prescribed through Federal regulation. As designed, an IPA can be more responsive and adaptive than Federal regulations. IPAs are flexible in allowing the pollock fleet to modify the IPAs as performance information becomes available to ensure that the IPAs meet the goal to provide incentives for each vessel to avoid bycatch at all times in Amendment 91 and Amendment 110.

Additionally, this final rule requires the IPA representative to submit an annual report to the Council that is the primary tool through which the Council will evaluate whether the IPAs meet the goal for each vessel to avoid salmon bycatch at all times.

*Comment 23:* Include a well thought-out plan for this Chinook salmon bycatch avoidance program and outline the possible increased incentives to achieve maximum effectiveness. Without this, the program could have little to no impact on Chinook salmon bycatch. It is ideal to have the IPA incentives visible to the public in order to have complete transparency of industry.

*Response:* The Council analyzed a number of specific incentive measures in Section 3.5.3 of the Analysis. The Analysis describes the new IPA requirements implemented with this final rule and provides examples of ways the fishery participants could modify their IPAs to meet those requirements. Regulations establish the performance based requirements that each IPA must accomplish. Any number of different incentive plans could meet these regulatory requirements. The requirements for the IPA are performance based because fishery participants have more tools available to them to create incentives to minimize bycatch at the vessel level than could be prescribed through Federal regulation. As designed, an IPA can be more responsive and adaptive than Federal regulations and can use tools not available to managers, such as fees and penalties.

Additionally, Federal regulations include a number of provisions to ensure transparency of the IPAs. First, regulations require the IPA representative to submit an annual report so the Council can evaluate

whether its goals for the IPAs are being met (§ 679.21(f)(13)). Second, existing regulations require vessel owners to submit an annual economic data report to provide quantitative information so the Council can evaluate how the IPA influences a vessel's operational decisions to avoid Chinook salmon bycatch (§ 679.65). Third, this final rule adds additional requirements for IPA transparency, including a requirement that IPA representatives notify at least one third party group representing western Alaskans of closure areas and any violations of the rolling hot spot program. Finally, the final rule requires the IPA representative to describe in the IPA annual report how the IPA addresses the goals and objectives in the IPA provisions related to chum salmon (§ 679.21(f)).

*Comment 24:* Research should be done on Chinook salmon bycatch in the pollock fishery to determine which stock they are from since there are some stocks where the State has limited commercial and subsistence harvests. If Chinook salmon from those stocks are being taken by the pollock fishery, then the pollock fishery should have to wait to fish until those Chinook salmon leave the areas in which pollock are taken.

*Response:* NMFS conducts research on the Chinook salmon caught in the pollock fishery. Amendment 91 improved the collection of Chinook salmon information by increasing observer coverage to full coverage for all vessels and shoreside processing facilities and by requiring a census of Chinook salmon in every haul or fishing trip. NMFS also collects and analyzes scientific data and biological samples from the Chinook salmon bycatch. NMFS conducts a genetic analysis of samples from the Chinook salmon bycatch in the pollock fishery to determine the overall stock composition of the bycatch. The most recent analysis is available from the NMFS Alaska Fisheries Science Center (<http://www.afsc.noaa.gov/Publications/AFSC-TM/NOAA-TM-AFSC-310.pdf>).

However, this genetic analysis takes time and the results are not available in time to delay or move the pollock fishery. Instead, the IPAs use a rolling hotspot program to provide real-time Chinook salmon bycatch information so that the fleet can avoid areas of high Chinook salmon bycatch rates. A Chinook salmon rolling hotspot program is a component of the current IPAs, however, it is not a mandatory requirement. The catcher/processor IPA and the mothership IPA have a rolling hotspot program in place throughout the year. The inshore IPA has a rolling hotspot program that can be suspended

during the season. Amendment 110 and this final rule require all IPAs to have a rolling hot spot program throughout the A and B seasons. This provision also requires notifications of closure areas and any violations of the rolling hot spot program to at least one third-party group representing western Alaskans, consistent with the requirement for the chum salmon rolling hotspot program. Section 3.5.3.3 of the Analysis provides more detail on this addition to the IPA requirements (see **ADDRESSES**).

*Comment 25:* The over allocation of pollock has ruined the livelihoods of all that depend on it for a living. A two-thirds reduction in the Bering Sea pollock TAC would increase escapement to the Yukon River system and raise the price of the pollock products. We have been giving pollock away at the expense of traditional Alaskan salmon fisheries. Everything that swims in the Bering Sea eats pollock and every fishery and northern fur seals have declined due to the over allocation of pollock.

*Response:* The process for assessing and specifying the Bering Sea pollock TAC is outside the scope of this action. There is no evidence that a two-thirds reduction in the pollock TAC would measurably increase salmon escapement to the Yukon River system. While salmon bycatch in the pollock fishery may be a contributing factor in the decline of salmon, NMFS expects the numbers of the ocean bycatch that would have returned to western Alaska would be relatively small due to ocean mortality and the large number of other river systems contributing to the total Chinook or chum salmon bycatch. For Chinook salmon, Section 3.5.1 of the Analysis explains that the Chinook salmon bycatch expected to have returned to western Alaska rivers is approximately 2.3 percent of coastal western Alaska run size in recent years. For chum salmon, Section 3.5.1 of the Analysis explains that the chum salmon bycatch expected to have returned to western Alaska rivers is approximately 0.5 percent of the coastal western Alaska run size in recent years. Under Amendment 110 and this final rule, these impact rates will be reduced further as the pollock fleet improves its ability to avoid salmon at all times.

NMFS is actively pursuing research on northern fur seals to help us understand the reasons for the decline and potential threats to the population. A description of past and ongoing research is available on the National Marine Mammal Laboratory's Web site ([http://www.afsc.noaa.gov/nmml/species/species\\_nfs.php](http://www.afsc.noaa.gov/nmml/species/species_nfs.php)). The research projects investigate a broad range of

topics related to fisheries interactions around the Pribilof Islands, including studies to quantify area-specific food habits and animal conditions, describe foraging behavior in different environments, delineate foraging habitats, and model habitat suitability in relation to fur seals and commercial fisheries.

*Comment 25:* The Analysis did not fully describe the potential impacts to the pollock fishery under the lower PSC performance standard and limits in years of low Chinook salmon abundance. The Analysis compared the impacts only to current Chinook salmon bycatch levels and not to potential or historical levels. Little to no forgone pollock harvest was noted under any scenario. Amendment 110 and the proposed rule are a potential threat that could suspend fishing operations in one of the largest fisheries in the world. Large juvenile Chinook salmon year classes persist in the marine environment for multiple years before returning as mature fish to the river systems. Recent unpredictability in the BSAI ecosystem likely only increases the probability of constraining the pollock fishery in future years based on management decisions made today. The Analysis should have attempted to quantify the probability of the limit shutting the fishery down in a given year.

*Response:* The purpose of a RIR is to analyze the potential costs and benefits associated with a regulatory change. To do so, the RIR must compare potential effects of the alternatives being considered with the regulatory status quo condition. In this case, the status quo is defined by the incentive-based Chinook salmon PSC avoidance structure established under Amendment 91. Since Amendment 91, Chinook salmon PSC has been much lower than the "potential or historical" levels the commenter presumably is referring to and these lower levels, as properly considered in the analysis, represent the regulatory status quo condition. Historically higher levels of bycatch occurred under differing regulatory conditions, do not represent status quo conditions, and are not appropriate to consider in the Analysis. Note that historical bycatch was considered in the EIS prepared for Amendment 91 (see **ADDRESSES**).

Amendment 110 and this final rule provide further incentives for industry to avoid Chinook salmon PSC, particularly in years of low Chinook salmon abundance. As explained in Section 4.8.2 of the Analysis, economic analysis has demonstrated the ability of a catcher-processor fleet to adapt their

behavior to reduce PSC when faced with individual vessel caps. The reduced individual vessel caps that could result under this final rule during times of low Chinook abundance in western Alaska are not intended to close the pollock fishery. They are intended to alter fishing behavior to further avoid Chinook PSC. The flexibility given to industry to self-regulate PSC avoidance, provided in Amendment 91, remains and is augmented by this rule. Thus, the probability of the limit shutting down the fishery in a given year is dependent on changes in fishing activity that are not presently known and are dependent on the actions of the fishing fleet.

*Comment 26:* Revise the Regulatory Flexibility Act (RFA) analysis to determine the number of directly regulated entities that are defined as small entities without applying affiliations among directly regulated entities based on their participation in a pollock harvesting cooperative. NMFS considers a vessel owner's membership in a harvesting cooperative to be an affiliation; this shows a misunderstanding of the nature of harvesting cooperatives. Harvesting cooperatives in Alaska are not large vertically or horizontally integrated businesses. Cooperative members are joined by simple rules to help remove the race for fish by coordinating selected fishing activities, but each catcher vessel (or collection of commonly owned catcher vessels) is a distinct business unit. The fact that cooperatives coordinate harvests in a manner that allows for more complete harvest of the quota should not be interpreted as creating a single business unit in the manner intended for defining a small business that is appropriate for protection by the RFA.

*Response:* When NMFS calculates the size of an entity to determine if it is a small entity, NMFS must include the annual receipts and the employees of affiliates. Affiliation is determined by the ability to control. Control may arise through ownership, management, or other relationships or interactions between the parties. When the ability to control exists, even if it is not exercised, affiliation exists. The Small Business Administration (SBA) has a specific set of rules that explain when another person, business, or entity is considered an affiliate for size purposes in its Small Business Size Regulations (13 CFR 121.103). NMFS has applied these rules in the evaluation it conducted in this RFA analysis.

Harvesting cooperatives meet the definition of affiliation because cooperatives have the ability to control member vessels. Cooperatives are

predicated on collective agreements among their members, to abide by the terms and practices set out for membership. That is, the entity formed by creation of the cooperative is, by definition, a third party that controls or has the power to control its members. Cooperatives coordinate harvests, which is operational control of the input side of the business. The small entity standard is "independently owned and operated." Cooperative members may be independently owned but still not be considered small entities because the cooperative has enough operational control that its members are not considered to be independently operated for purposes of the definition of affiliation.

Cooperative membership does not automatically mean an entity is large (not small). A cooperative may be a small entity if the combined annual gross receipts of all cooperative members meet the size standard used by the SBA or, after July 1, 2016, NMFS' small business size standard for RFA compliance at 50 CFR 200.2(a). For more information on NMFS' small business size standard for RFA compliance, see 80 FR 81194 (December 29, 2015). NMFS's RFA analysis to estimate the number of small entities directly regulated by this action is correct.

*Comment 27:* NMFS' aggregation of cooperative member's gross earnings eliminates a fishing business's access to the benefits of SBA review and runs against the intent of the RFA.

*Response:* The RFA is primarily concerned with ensuring that Federal agency decision-makers seriously and systematically consider disproportionate economic impacts on small entities that may result from their actions. To comply with the RFA, NMFS has prepared an IRFA and a FRFA following the required contents specified in the RFA. The IRFA was prepared and summarized in the "Classification" section of the preamble to the proposed rule (81 FR 5681, February 3, 2016). The FRFA is in the "Classification" section of the preamble to this final rule.

If a specific business applies to the SBA to participate in an SBA program, the SBA conducts an independent review of that business to determine if that business qualifies as a small business for purposes of participating in an SBA program. That business must satisfy SBA's definition of a business concern, along with SBA's size standards for small businesses. The SBA does not rely on the analysis conducted by NMFS under the RFA to determine whether a particular entity satisfies

SBA's definition of a small business. See <https://www.sba.gov/> for more information on SBA's assessment of a small business.

### Classification

The NMFS Assistant Administrator has determined that Amendment 110 to the FMP and this rule are necessary for the conservation and management of the groundfish fishery and that they are consistent with the Magnuson-Stevens Act and other applicable law.

This rule has been determined to be not significant for the purposes of Executive Order (E.O.) 12866.

### Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as "small entity compliance guides." The preambles to the proposed rule and this final rule serve as the small entity compliance guide. This action does not require any additional compliance from small entities that is not described in the preambles. Copies of the proposed rule and this final rule are available from the NMFS Web site at <http://alaskafisheries.noaa.gov>.

### Final Regulatory Flexibility Analysis

This FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments, NMFS' responses to those comments, and a summary of the analyses completed to support the action.

Section 604 of the Regulatory Flexibility Act requires that, when an agency promulgates a final rule under section 553 of Title 5 of the U.S. Code, after being required by that section or any other law to publish a general notice of proposed rulemaking, the agency shall prepare a FRFA. Section 604 describes the required contents of a FRFA: (1) A statement of the need for, and objectives of, the rule; (2) a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments; (3) the response of the agency to any comments filed by the Chief Counsel for Advocacy of the SBA in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the

comments; (4) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available; (5) a description of the projected reporting, recordkeeping and other compliance requirements of the 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; and (6) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

#### Need for, and Objectives of, This Rule

A statement of the need for, and objectives of, this rule is contained earlier in this preamble and is not repeated here.

#### Public and Chief Counsel for Advocacy Comments on the Proposed Rule

NMFS published a proposed rule on February 3, 2016 (81 FR 5681). An IRFA was prepared and summarized in the “Classification” section of the preamble to the proposed rule. The comment period closed on March 4, 2016. NMFS received 15 letters of public comment on the proposed rule and Amendment 110. The Chief Counsel for Advocacy of the SBA did not file any comments on the proposed rule.

#### Summary of Significant Issues Raised During Public Comment

One comment letter was received with two comments on the IRFA. These are Comment 26 and Comment 27 under Response to Comments, above. No changes were made to this rule or the RFA analysis as a result of these comments on the IRFA.

Comment 26 disagrees with NMFS using affiliation to determine whether a member of a fishery cooperative is a small entity in the IRFA. The comment requests NMFS to revise the analysis to determine whether the vessels that are directly regulated entities under this action are small entities without applying the cooperative affiliations. We disagree because when we calculate the size of an entity to determine if it is a small entity, we must include the annual receipts and the employees of affiliates, per the Small Business Size Regulations (13 CFR 121.103).

Comment 27 is concerned that NMFS’ aggregation of a cooperative member’s gross earnings eliminates a fishing business’s access to the benefits of SBA review and runs against the intent of the RFA. To comply with the RFA, agencies prepare an IRFA and a FRFA following the required contents specified in the RFA. NMFS has complied with the RFA for this action. NMFS has prepared an IRFA and a FRFA following the required contents specified in the RFA. If a specific business applies to the SBA to participate in an SBA program, the SBA conducts an independent review of that business to determine if that business qualifies as a small business for purposes of participating in an SBA program. That business must satisfy SBA’s definition of a business concern, along with SBA’s size standards for small businesses. The SBA does not rely on the analysis conducted by NMFS under the RFA to determine whether a particular entity satisfies SBA’s definition of a small business.

#### Number and Description of Directly Regulated Small Entities

The action directly regulates those entities that participate in the directed pollock trawl fishery in the Bering Sea. These entities include vessels harvesting pollock under the AFA and the six CDQ groups that receive allocations of pollock.

The SBA requires consideration of affiliations among entities for the purpose of assessing if an entity is small. The AFA pollock cooperatives are a type of affiliation. All the non-CDQ entities directly regulated by this action are members of AFA cooperatives and, therefore, NMFS considers them “affiliated” large (non-small) entities for RFA purposes. AFA cooperatives have gross annual revenues that are substantially greater than \$20.5 million, the standard used by the SBA to define the annual gross revenue of a large (non-small) business engaged in finfish harvesting, such as pollock. Therefore, all the non-CDQ pollock fishery participants are defined as large (non-small) entities.

Due to their status as non-profit corporations, the six CDQ groups are identified as “small” entities for RFA purposes. This action directly regulates the six CDQ groups. As described in regulations implementing the RFA (13 CFR 121.103), the CDQ groups’ affiliations with other large entities do not define them as large entities.

The six CDQ groups, formed to manage and administer the CDQ allocations, investments, and economic development projects, are the Aleutian Pribilof Island Community Development

Association, the Bristol Bay Economic Development Corporation, the Central Bering Sea Fishermen’s Association, the Coastal Villages Region Fund, the Norton Sound Economic Development Corporation, and the Yukon Delta Fisheries Development Association. The 65 communities, with approximately 27,000 total residents, that benefit from participation in the CDQ Program are not directly regulated by this action.

#### Recordkeeping, Reporting, and Other Compliance Requirements

This final rule revises some existing requirements and removes some requirements. The revised requirements are those related to—

- Development and submission of proposed IPAs and amendments to approved IPAs;
- An annual report from the participants in each IPA, documenting information and data relevant to the Bering Sea Chinook salmon bycatch management program; and
- Salmon handling and storage on board a vessel, and obligations to facilitate observer data reporting.

This final rule removes the requirements for an application form for a proposed IPA or amended IPA.

#### Description of Significant Alternatives Considered to the Final Action That Minimize Adverse Impacts on Small Entities

This action is a comprehensive program to minimize Chinook salmon and chum salmon bycatch in a manner that accomplishes the stated objectives and is consistent with applicable statutes. No alternatives were identified in addition to those analyzed in the IRFA that had the potential to further reduce the economic burden on small entities, while achieving the objectives of this action. Section 2.10 of the Analysis discusses alternatives considered and eliminated from detailed analysis (see **ADDRESSES**).

This final rule includes performance standards to minimize Chinook salmon and chum salmon bycatch, while limiting the burden on CDQ groups. A system of transferable PSC allocations and a performance standard, even in years of low Chinook salmon abundance, will allow CDQ groups to decide how best to comply with the requirements of this action, given the other constraints imposed on the pollock fishery (e.g., pollock TAC, market conditions, area closures associated with other rules, gear restrictions, climate and oceanographic change).

Based on the best available scientific data and information, none of the

alternatives except the preferred alternative have the potential to accomplish the stated objectives of the Magnuson-Stevens Act and other applicable statutes (as reflected in this action), while minimizing any significant adverse economic impact on small entities.

*Tribal Summary Impact Statement (E.O. 13175)*

E.O. 13175 of November 6, 2000 (25 U.S.C. 450 note), the Executive Memorandum of April 29, 1994 (25 U.S.C. 450 note), the American Indian and Alaska Native Policy of the U.S. Department of Commerce (March 30, 1995), and the Tribal Consultation and Coordination Policy of the U.S. Department of Commerce (May 21, 2013), outline the responsibilities of NMFS in matters affecting tribal interests. Section 161 of Public Law 108–199 (188 Stat. 452), as amended by section 518 of Public Law 108–447 (118 Stat. 3267), extends the consultation requirements of E.O. 13175 to Alaska Native corporations. Under the E.O. and agency policies, NMFS must ensure meaningful and timely input by tribal officials and representatives of Alaska Native corporations in the development of regulatory policies that have tribal implications.

Section 5(b)(2)(B) of E.O. 13175 requires NMFS to prepare a tribal summary impact statement as part of the final rule. This statement must contain (1) a description of the extent of the agency's prior consultation with tribal officials, (2) a summary of the nature of their concerns, (3) the agency's position supporting the need to issue the regulation, and (4) a statement of the extent to which the concerns of tribal officials have been met.

*A Description of the Extent of the Agency's Prior Consultation With Tribal Officials*

The consultation process for this action began during the Council process when the Council started developing Amendment 110 in 2012. A number of tribal representatives and tribal organizations provided written public comments and oral public testimony to the Council during Council outreach meetings on Amendment 110 and at the numerous Council meetings at which Amendment 110 was discussed.

NMFS conducted two tribal consultations, one in December 2014 and one in April 2015, with representatives from the Tanana Chiefs Conference; the Association of Village Council Presidents; the Yukon River Drainage Fisheries Association; the Kawerak, Inc.; and the Bering Sea

Fishermen's Association. These organizations prepared letters for the Council and requested the consultations to discuss the salmon bycatch management measures under consideration by the Council. NMFS posted reports from these consultations on the NMFS Alaska Region Web site at <https://alaskafisheries.noaa.gov/tribal-consultations>.

NMFS continued the consultation process by sending a letter to Alaska tribal governments, Alaska Native corporations, and related organizations ("Alaska Native representatives") when the Notice of Availability for Amendment 110 published in the **Federal Register** in March 2016. The letter included a copy of the Notice of Availability and notified representatives of the opportunity to comment and consult. NMFS received 4 letters of comment on Amendment 110 and the proposed rule from tribal members and representatives of tribal governments, tribal organizations, or Alaska Native corporations. The comment summaries and NMFS' responses are provided in this preamble under Response to Comments and are summarized below.

*A Summary of the Nature of Tribal Concerns*

The concerns expressed in consultations and reflected in written comments from tribal representatives and members center on four themes. First, Chinook salmon is vitally important to tribal members, and they suffer great hardships when Chinook salmon abundance is low. Second, tribal representatives attribute low Chinook salmon in-river returns directly to bycatch in the Bering Sea pollock fishery. Third, tribal members want Chinook salmon bycatch greatly curtailed. Fourth, NMFS should exercise its trust responsibilities by advocating for Alaska native interests on the Council.

The comment letter from Tanana Chiefs Conference; the Association of Village Council Presidents; the Yukon River Drainage Fisheries Association; the Kawerak, Inc.; and the Bering Sea Fishermen's Association supported Amendment 110 and the implementing regulations as an important step in further reducing salmon bycatch but urged NMFS and the pollock industry to continue working towards greater bycatch reduction, with an ultimate goal of zero bycatch. In particular, these comments support the provision to reduce the PSC limit and performance standard in years of low Chinook salmon abundance in western Alaska as critical to ensuring Chinook salmon bycatch is reduced in the years when

every source of mortality must be reduced.

The comment from the Native Village of Kotzebue expressed concern that although Amendment 110 is going in the right direction towards zero salmon bycatch, the bycatch limits are still too high.

The comment from Ahtna, Incorporated, encourages the Secretary of Commerce to take all reasonable measures to reduce Chinook salmon bycatch in the Bering Sea and Gulf of Alaska.

The comment from the Aleut Corporation supports Amendment 110, but is strongly opposed to the provision to reduce the PSC limit and performance standard in low Chinook salmon abundance years because it is unwarranted, unnecessary, not sound science, and not responsible management. The Aleut Corporation believes this provision unfairly restricts the pollock fishery when science has shown that there is not a relationship between salmon bycatch and the size of the salmon runs in coastal western Alaska.

*NMFS' Position Supporting the Need To Issue the Regulation*

This final rule is needed to implement Amendment 110, a complex and innovative program to minimize salmon bycatch to the extent practicable in the pollock fishery. This final rule is also needed to create a comprehensive salmon bycatch avoidance program that works more effectively than the current salmon bycatch programs to avoid Chinook salmon bycatch and Alaska-origin chum salmon bycatch. The Council and NMFS recognize that salmon are an extremely important resource to Native Alaskans who depend on local fisheries for their sustenance and livelihood.

Amendment 110 and this final rule adjust the existing Chinook salmon bycatch program to, among other things, incorporate revised chum salmon bycatch measures into the existing IPAs. Amendment 110 and this final rule are designed to consider the importance of continued production of critical chum salmon runs in western Alaska by focusing on bycatch avoidance of Alaskan chum salmon runs. These runs have substantial variation in run sizes over time, and are of historic importance in the subsistence lifestyle of Native Alaskans. Additional protections to other chum stocks from outside of Alaska are embedded in the objective to avoid the high bycatch of chum salmon overall, recognizing that most non-Alaska chum salmon are likely from Asian hatcheries.

In addition, the Council and NMFS sought to provide greater incentives to avoid Chinook salmon by strengthening incentives during times of historically low Chinook salmon abundance in western Alaska. Thus, the management measures included in Amendment 110 focus on retaining the incentives to avoid Chinook salmon bycatch at all levels of abundance as intended by Amendment 91. Multiple years of historically low Chinook salmon abundance have resulted in significant restrictions for subsistence users in western Alaska and failure to achieve conservation objectives. While Chinook salmon bycatch impact rates have been low under Amendment 91, the Council and NMFS have determined that there is evidence that improvements could be made to ensure the program is reducing Chinook salmon bycatch at low levels of salmon abundance.

#### A Statement of the Extent to Which the Concerns of Tribal Officials Have Been Met

One of the primary factors in initiating this action was concern over the potential impacts of Chinook salmon and chum salmon bycatch in the Bering Sea pollock fishery on the return of these salmon to western Alaska river systems and the recognition of the importance of salmon to the people in western Alaska. While the final program is not as restrictive on the pollock fishery as advocated by some Alaska Native representatives, it will minimize salmon bycatch to the extent practicable.

#### Collection-of-Information Requirements

This rule contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA) and which have been approved by OMB. The collections are listed below by OMB control number.

##### OMB Control Number 0648–0731

Public reporting burden is estimated to average 5 minutes per individual response for use of a vessel's computer, software, and data transmission; 5 minutes per individual response for notification of observer before handling the vessel's Bering Sea pollock catch; and 5 minutes for notification of crew person responsible for ensuring all sorting, retention, and storage of salmon.

##### OMB Control Number 0648–0393

Public reporting burden is estimated to average 8 hours per individual response for the Application to Receive Transferable Chinook Salmon PSC Allocations, including the contract; 4

hours for the amendment to the contract; and 15 minutes for the Application for the Transfer of Chinook Salmon PSC Allocations.

##### OMB Control Number 0648–0401

Public reporting burden is estimated to average 40 hours per individual response for the Salmon Bycatch IPA; and 8 hours for the IPA Annual Report.

Public reporting burden includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments on this data collection, including suggestions for reducing the burden, to NMFS Alaska Region (see **ADDRESSES**), or by email to *OIRA\_Submission@omb.eop.gov*, or fax to (202) 395–5806.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number. All currently approved NOAA collections of information may be viewed at: [http://www.cio.noaa.gov/services\\_programs/prasubs.html](http://www.cio.noaa.gov/services_programs/prasubs.html).

#### List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Recordkeeping and reporting requirements.

Dated: June 2, 2016.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

For the reasons set out in the preamble, NMFS amends 50 CFR part 679 as follows:

#### PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 1. The authority citation for 50 CFR part 679 continues to read as follows:

**Authority:** 16 U.S.C. 773 *et seq.*; 1801 *et seq.*; 3631 *et seq.*; Public Law 108–447; Public Law 111–281.

■ 2. In § 679.2:

- a. Remove the definitions for “Chinook salmon bycatch incentive plan agreement (IPA)”;
- b. Revise the definitions for “Chum Salmon Savings Area of the BSAI CVOA”, and paragraph (6) of “Fishing trip”;
- c. Remove the definition for “Non-Chinook salmon bycatch reduction intercooperative agreement (ICA)”;

■ d. Add a definition for “Salmon bycatch incentive plan agreement (IPA)” in alphabetical order to read as follows:

##### § 679.2 Definitions.

\* \* \* \* \*

*Chum Salmon Savings Area of the BSAI CVOA* (See § 679.21(f)(14) and Figure 9 to this part).

\* \* \* \* \*

*Fishing trip* means: \* \* \*

(6) For purposes of § 679.7(d)(5)(ii)(C)(2) for CDQ groups and § 679.7(k)(8)(ii) for AFA entities, the period beginning when a vessel operator commences harvesting any pollock that will accrue against a directed fishing allowance for pollock in the BS or against a pollock CDQ allocation harvested in the BS and ending when the vessel operator offloads or transfers any processed or unprocessed pollock from that vessel.

\* \* \* \* \*

*Salmon bycatch incentive plan agreement (IPA)* is a voluntary private contract, approved by NMFS under § 679.21(f)(12), that establishes incentives for participants to avoid Chinook salmon and chum salmon bycatch while directed fishing for pollock in the BS.

\* \* \* \* \*

■ 3. In § 679.7:

■ a. Revise paragraphs (d)(5)(ii)(B), (d)(5)(ii)(C)(5), and the paragraph (k)(8) heading;

■ b. Redesignate paragraph (k)(8)(iv) as (k)(8)(v); and

■ c. Add new paragraph (k)(8)(iv).

The revisions and addition read as follows:

##### § 679.7 Prohibitions.

\* \* \* \* \*

(d) \* \* \*

(5) \* \* \*

(ii) \* \* \*

(B) *Non-Chinook salmon*. For the operator of a vessel, to use trawl gear to harvest pollock CDQ in the Chum Salmon Savings Area between September 1 and October 14 after the CDQ group's non-Chinook salmon PSQ is attained, unless the vessel is participating in an approved IPA under § 679.21(f)(12).

(C) \* \* \*

(5) For the operator of a catcher vessel delivering pollock CDQ catch to a shoreside processor or stationary floating processor to:

(i) Deliver pollock CDQ to a processor that does not have a catch monitoring and control plan approved under § 679.28(g).

(ii) Handle, sort, or discard catch without notifying the observer 15

minutes prior to handling, sorting, or discarding catch as described in § 679.21(f)(15)(ii)(B)(2).

(iii) Fail to secure catch after the completion of catch handling and the collection of scientific data and biological samples as described in § 679.21(f)(15)(ii)(B)(3).

\* \* \* \* \*

(k) \* \* \*

(8) *Salmon PSC.*

\* \* \* \* \*

(iv) *Catcher vessels.* (A) For the operator of a catcher vessel, to handle, sort, or discard catch without notifying the observer 15 minutes prior to handling, sorting, or discarding catch as described in § 679.21(f)(15)(ii)(B)(2).

(B) For the operator of a catcher vessel to fail to secure catch after the completion of catch handling and the collection of scientific data and biological samples as described in § 679.21(f)(15)(ii)(B)(3).

\* \* \* \* \*

■ 4. In § 679.20, revise paragraph (a)(5)(i)(B)(1) to read as follows:

**§ 679.20 General limitations.**

\* \* \* \* \*

(a) \* \* \*

(5) \* \* \*

(i) \* \* \*

(B) \* \* \*

(1) *Inshore, catcher/processor, mothership, and CDQ sectors.* The portions of the BS subarea pollock directed fishing allowances allocated to each sector under sections 206(a) and 206(b) of the AFA and the CDQ allowance in the BSAI will be divided

into two seasonal allowances corresponding to the two fishing seasons set out at § 679.23(e)(2), as follows:

(i) A Season, 45 percent;

(ii) B Season, 55 percent.

\* \* \* \* \*

■ 5. In § 679.21:

■ a. Remove and reserve paragraph (c);

■ b. Revise the paragraph (e) heading;

■ c. Remove paragraphs (e)(1)(vi) through (viii), (e)(3)(i)(A)(3), and (e)(7)(vii) through (ix); and

■ d. Revise paragraphs (f) and (g).

The revisions read as follows:

**§ 679.21 Prohibited species bycatch management.**

\* \* \* \* \*

(e) *BSAI PSC limits for crab and herring.* \* \* \*

\* \* \* \* \*

(f) *Salmon Bycatch Management in the BS Pollock Fishery—(1)*

*Applicability.* This paragraph contains regulations governing the bycatch of salmon in the BS pollock fishery.

(2) *Chinook salmon prohibited species catch (PSC) limit.* Each year, NMFS will allocate to AFA sectors listed in paragraph (f)(3)(ii) of this section a portion of the applicable Chinook salmon PSC limit. NMFS will publish the applicable Chinook salmon PSC limit in the annual harvest specifications after determining if it is a low Chinook salmon abundance year. NMFS will determine that it is a low Chinook salmon abundance year when abundance of Chinook salmon in western Alaska is less than or equal to 250,000 Chinook salmon. By October 1

of each year, the State of Alaska will provide to NMFS an estimate of Chinook salmon abundance using the 3-System Index for western Alaska based on the Kuskokwim, Unalakleet, and Upper Yukon aggregate stock grouping.

(i) An AFA sector will receive a portion of the 47,591 Chinook salmon PSC limit, or, in a low Chinook salmon abundance year, the 33,318 Chinook salmon PSC limit, if—

(A) No Chinook salmon bycatch incentive plan agreement (IPA) is approved by NMFS under paragraph (f)(12) of this section; or

(B) That AFA sector has exceeded its performance standard under paragraph (f)(6) of this section.

(ii) An AFA sector will receive a portion of the 60,000 Chinook salmon PSC limit, or, in a low Chinook salmon abundance year, the 45,000 Chinook salmon PSC limit, if—

(A) At least one IPA is approved by NMFS under paragraph (f)(12) of this section; and

(B) That AFA sector has not exceeded its performance standard under paragraph (f)(6) of this section.

(3) *Allocations of the Chinook salmon PSC limits—(i) Seasonal apportionment.* NMFS will apportion the Chinook salmon PSC limits annually 70 percent to the A season and 30 percent to the B season, which are described in § 679.23(e)(2).

(ii) *AFA sectors.* Each year, NMFS will make allocations of the applicable Chinook salmon PSC limit to the following four AFA sectors:

AFA Sector:	Eligible participants are:
(A) Catcher/processor .....	AFA catcher/processors and AFA catcher vessels delivering to AFA catcher/processors, all of which are permitted under § 679.4(l)(2) and (l)(3)(i)(A), respectively.
(B) Mothership .....	AFA catcher vessels harvesting pollock for processing by AFA motherships, all of which are permitted under § 679.4(l)(3)(i)(B) and (l)(4), respectively.
(C) Inshore .....	AFA catcher vessels harvesting pollock for processing by AFA inshore processors, all of which are permitted under § 679.4(l)(3)(i)(C).
(D) CDQ Program .....	The six CDQ groups authorized under section 305(i)(1)(D) of the Magnuson-Stevens Act to participate in the CDQ Program.

(iii) *Allocations to each AFA sector.* NMFS will allocate the Chinook salmon

PSC limits to each AFA sector as follows:

(A) If a sector is managed under the 60,000 Chinook salmon PSC limit, the

maximum amount of Chinook salmon PSC allocated to each sector in each season and annually is—

AFA sector	A season		B season		Annual total	
	% Allocation	# of Chinook	% Allocation	# of Chinook	% Allocation	# of Chinook
(1) Catcher/processor .....	32.9	13,818	17.9	3,222	28.4	17,040
(2) Mothership .....	8.0	3,360	7.3	1,314	7.8	4,674
(3) Inshore .....	49.8	20,916	69.3	12,474	55.6	33,390
(4) CDQ Program .....	9.3	3,906	5.5	990	8.2	4,896

(B) If the sector is managed under the 45,000 Chinook salmon PSC limit, the sector will be allocated the following amount of Chinook salmon PSC in each season and annually:

AFA sector	A season		B season		Annual total	
	% Allocation	# of Chinook	% Allocation	# of Chinook	% Allocation	# of Chinook
(1) Catcher/processor .....	32.9	10,363	17.9	2,415	28.4	12,780
(2) Mothership .....	8.0	2,520	7.3	987	7.8	3,510
(3) Inshore .....	49.8	15,687	69.3	9,355	55.6	25,020
(4) CDQ Program .....	9.3	2,930	5.5	743	8.2	3,690

(C) If the sector is managed under the 47,591 Chinook salmon PSC limit, the sector will be allocated the following amount of Chinook salmon PSC in each season and annually:

AFA sector	A season		B season		Annual total	
	% Allocation	# of Chinook	% Allocation	# of Chinook	% Allocation	# of Chinook
(1) Catcher/processor .....	32.9	10,906	17.9	2,556	28.4	13,516
(2) Mothership .....	8.0	2,665	7.3	1,042	7.8	3,707
(3) Inshore .....	49.8	16,591	69.3	9,894	55.6	26,485
(4) CDQ Program .....	9.3	3,098	5.5	785	8.2	3,883

(D) If the sector is managed under the 33,318 Chinook salmon PSC limit, the sector will be allocated the following amount of Chinook salmon PSC in each season and annually:

AFA sector	A season		B season		Annual total	
	% Allocation	# of Chinook	% Allocation	# of Chinook	% Allocation	# of Chinook
(1) Catcher/processor .....	32.9	7,673	17.9	1,789	28.4	9,462
(2) Mothership .....	8.0	1,866	7.3	730	7.8	2,599
(3) Inshore .....	49.8	11,615	69.3	6,926	55.6	18,525
(4) CDQ Program .....	9.3	2,169	5.5	550	8.2	2,732

(iv) *Allocations to the AFA catcher/processor and mothership sectors.* (A) NMFS will issue transferable Chinook salmon PSC allocations under paragraph (f)(3)(iii) of this section to entities representing the AFA catcher/processor sector and the AFA mothership sector if these sectors meet the requirements of paragraph (f)(8) of this section.

(B) If no entity is approved by NMFS to represent the AFA catcher/processor sector or the AFA mothership sector, then NMFS will manage that sector under a non-transferable Chinook salmon PSC allocation under paragraph (f)(10) of this section.

(v) *Allocations to inshore cooperatives and the AFA inshore open access fishery.* NMFS will further allocate the inshore sector's Chinook salmon PSC allocation under paragraph (f)(3)(iii) of this section among the inshore cooperatives and the inshore open access fishery based on the percentage allocations of pollock to each inshore cooperative under § 679.62(a). NMFS will issue transferable Chinook salmon PSC allocations to inshore cooperatives. Any Chinook salmon PSC allocated to the inshore open access fishery will be as a non-transferable allocation

managed by NMFS under the requirements of paragraph (f)(10) of this section.

(vi) *Allocations to the CDQ Program.* NMFS will further allocate the Chinook salmon PSC allocation to the CDQ Program under paragraph (f)(3)(iii) of this section among the six CDQ groups based on each CDQ group's percentage of the CDQ Program pollock allocation. NMFS will issue transferable Chinook salmon PSC allocations to CDQ groups.

(vii) *Accrual of Chinook salmon bycatch to specific PSC allocations.*

If a Chinook salmon PSC allocation is:	Then all Chinook salmon bycatch:
(A) A transferable allocation to a sector-level entity, inshore cooperative, or CDQ group under paragraph (f)(8) of this section.	By any vessel fishing under a transferable allocation will accrue against the allocation to the entity representing that vessel.
(B) A non-transferable allocation to a sector or the inshore open access fishery under paragraph (f)(10) of this section.	By any vessel fishing under a non-transferable allocation will accrue against the allocation established for the sector or inshore open access fishery, whichever is applicable.
(C) The opt-out allocation under paragraph (f)(5) of this section.	By any vessel fishing under the opt-out allocation will accrue against the opt-out allocation.

(viii) *Public release of Chinook salmon PSC information.* For each year, NMFS will release to the public and publish on the NMFS Alaska Region Web site (<http://alaskafisheries.noaa.gov/>):

(A) The Chinook salmon PSC allocations for each entity receiving a transferable allocation;

(B) The non-transferable Chinook salmon PSC allocations;

(C) The vessels fishing under each transferable or non-transferable allocation;

(D) The amount of Chinook salmon bycatch that accrues towards each transferable or non-transferable allocation;

(E) Any changes to these allocations due to transfers under paragraph (f)(9) of this section, rollovers under paragraph (f)(11) of this section, and deductions from the B season non-transferable allocations under paragraphs (f)(5)(v) or (f)(10)(iii) of this section; and

(F) Tables for each sector that provide the percent of the sector's pollock allocation, numbers of Chinook salmon associated with each vessel in the sector used to calculate the opt-out allocation and annual threshold amounts, and the percent of the pollock allocation associated with each vessel that NMFS will use to calculate IPA minimum participation assigned to each vessel.

(4) *Reduction in allocations of the Chinook salmon PSC limit—(i) Reduction in sector allocations.* NMFS will reduce the seasonal allocation of the Chinook salmon PSC limit to the catcher/processor sector, the mothership sector, the inshore sector, or the CDQ Program under paragraph (f)(3)(iii)(A) or (B) of this section, if the owner of any permitted AFA vessel in that sector, or any CDQ group, does not participate in an approved IPA under paragraph (f)(12) of this section. NMFS will subtract the amount of Chinook salmon from each sector's allocation associated with each vessel not participating in an approved IPA.

(ii) *Adjustments to the inshore sector and inshore cooperative allocations.* (A) If some members of an inshore cooperative do not participate in an approved IPA, NMFS will reduce the allocation to the cooperative to which those vessels belong, or the inshore open access fishery.

(B) If all members of an inshore cooperative do not participate in an approved IPA, the amount of Chinook salmon that remains in the inshore sector's allocation, after subtracting the amount of Chinook salmon associated with the non-participating inshore cooperative, will be reallocated among the inshore cooperatives participating in an approved IPA based on the

proportion each participating cooperative represents of the Chinook salmon PSC initially allocated among the participating inshore cooperatives that year.

(iii) *Adjustment to CDQ group allocations.* If a CDQ group does not participate in an approved IPA, the amount of Chinook salmon that remains in the CDQ Program's allocation, after subtracting the amount of Chinook salmon associated with the non-participating CDQ group, will be reallocated among the CDQ groups participating in an approved IPA based on the proportion each participating CDQ group represents of the Chinook salmon PSC initially allocated among the participating CDQ groups that year.

(iv) *All members of a sector do not participate in an approved IPA.* If all members of a sector do not participate in an approved IPA, the amount of Chinook salmon that remains after subtracting the amount of Chinook salmon associated with the non-participating sector will not be reallocated among the sectors that have members participating in an approved IPA. This portion of the PSC limit will remain unallocated for that year.

(5) *Chinook salmon PSC opt-out allocation.* The following table describes requirements for the opt-out allocation:

(i) What is the amount of Chinook salmon PSC that will be allocated to the opt-out allocation in the A season and the B season?	The opt-out allocation will equal the sum of the Chinook salmon PSC deducted under paragraph (f)(4)(i) of this section from the seasonal allocations of each sector with members not participating in an approved IPA.
(ii) Which participants will be managed under the opt-out allocation?	Any AFA-permitted vessel or any CDQ group that is a member of a sector eligible under paragraph (f)(2)(ii) of this section to receive allocations of the 60,000 PSC limit or the 45,000 PSC limit, but that is not participating in an approved IPA.
(iii) What Chinook salmon bycatch will accrue against the opt-out allocation?	All Chinook salmon bycatch by participants under paragraph (f)(5)(ii) of this section.
(iv) How will the opt-out allocation be managed?	All participants under paragraph (f)(5)(ii) of this section will be managed as a group under the seasonal opt-out allocations. If the Regional Administrator determines that the seasonal opt-out allocation will be reached, NMFS will publish a notice in the <b>Federal Register</b> closing directed fishing for pollock in the BS, for the remainder of the season, for all vessels fishing under the opt-out allocation.
(v) What will happen if Chinook salmon bycatch by vessels fishing under the opt-out allocation exceeds the amount allocated to the A season opt-out allocation?	NMFS will deduct from the B season opt-out allocation any Chinook salmon bycatch in the A season that exceeds the A season opt-out allocation.
(vi) What will happen if Chinook salmon bycatch by vessels fishing under the opt-out allocation is less than the amount allocated to the A season opt-out allocation?	If Chinook salmon bycatch by vessels fishing under the opt-out allocation in the A season is less than the amount allocated to the opt-out allocation in the A season, this amount of Chinook salmon will not be added to the B season opt-out allocation.
(vii) Is Chinook salmon PSC allocated to the opt-out allocation transferable?	No. Chinook salmon PSC allocated to the opt-out allocation is not transferable.

(6) *Chinook salmon bycatch performance standard.* If the total annual Chinook salmon bycatch by the members of a sector participating in an approved IPA is greater than that sector's annual threshold amount of

Chinook salmon in any three of seven consecutive years, that sector will receive an allocation of Chinook salmon under the 47,591 PSC limit in all future years, except in low Chinook salmon abundance years when that sector will

receive an allocation under the 33,318 Chinook salmon PSC limit.

(i) *Annual threshold amount.* Prior to each year, NMFS will calculate each sector's annual threshold amount. NMFS will post the annual threshold

amount for each sector on the NMFS Alaska Region Web site (<http://alaskafisheries.noaa.gov/>). At the end of each year, NMFS will evaluate the Chinook salmon bycatch by all IPA participants in each sector against that sector's annual threshold amount.

(ii) *Calculation of the annual threshold amount.* A sector's annual threshold amount is the annual number of Chinook salmon that would be allocated to that sector under the 47,591 Chinook salmon PSC limit, as shown in the table in paragraph (f)(3)(iii)(C) of this section, or the 33,318 Chinook salmon PSC limit in low Chinook salmon abundance years, as shown in the table in paragraph (f)(3)(iii)(D) of this section. If any vessels in a sector do not participate in an approved IPA, NMFS will reduce that sector's annual threshold amount by the number of Chinook salmon associated with each vessel not participating in an approved IPA. If any CDQ groups do not participate in an approved IPA, NMFS will reduce the CDQ Program's annual threshold amount by the number of Chinook salmon associated with each CDQ group not participating in an approved IPA.

(iii) *Exceeding the performance standard.* If NMFS determines that a sector has exceeded its performance standard by exceeding its annual threshold amount in any three of seven consecutive years, NMFS will issue a notification in the **Federal Register** that the sector has exceeded its performance standard. In all subsequent years, NMFS will allocate to that sector either the amount of Chinook salmon in the table in paragraph (f)(3)(iii)(C) of this section or, in low Chinook salmon abundance years, the amount of Chinook salmon in the table in paragraph (f)(3)(iii)(D) of this section. All members of the affected sector will fish under this lower PSC allocation regardless of whether a vessel or CDQ group within that sector participates in an approved IPA.

(7) *Replacement vessels.* If an AFA-permitted vessel is no longer eligible to participate in the BS pollock fishery or if a vessel replaces a currently eligible vessel, NMFS will assign the portion and number of Chinook salmon associated with that vessel to the replacement vessel or distribute it among other eligible vessels in the sector based on the procedures in the law, regulation, or private contract that accomplishes the vessel removal or replacement action.

(8) *Entities eligible to receive transferable Chinook salmon PSC allocations.* (i) NMFS will issue transferable Chinook salmon PSC allocations to the following entities, if

these entities meet all the applicable requirements of this section.

(A) *Inshore cooperatives.* NMFS will issue transferable Chinook salmon PSC allocations to the inshore cooperatives permitted annually under § 679.4(l)(6). The representative and agent for service of process (see definition at § 679.2) for an inshore cooperative is the cooperative representative identified in the application for an inshore cooperative fishing permit issued under § 679.4(l)(6), unless the inshore cooperative representative notifies NMFS in writing that a different person will act as its agent for service of process for purposes of this paragraph (f). An inshore cooperative is not required to submit an application under paragraph (f)(8)(ii) of this section to receive a transferable Chinook salmon PSC allocation.

(B) *CDQ groups.* NMFS will issue transferable Chinook salmon PSC allocations to the CDQ groups. The representative and agent for service of process for a CDQ group is the chief executive officer of the CDQ group, unless the chief executive officer notifies NMFS in writing that a different person will act as its agent for service of process. A CDQ group is not required to submit an application under paragraph (f)(8)(ii) of this section to receive a transferable Chinook salmon PSC allocation.

(C) *Entity representing the AFA catcher/processor sector.* NMFS will authorize only one entity to represent the catcher/processor sector for purposes of receiving and managing transferable Chinook salmon PSC allocations on behalf of the catcher/processors eligible to fish under transferable Chinook salmon PSC allocations. NMFS will issue transferable Chinook salmon allocations under the Chinook salmon PSC limit to the entity representing the catcher/processor sector if that entity represents all the owners of AFA-permitted vessels in this sector that are participants in an approved IPA.

(D) *Entity representing the AFA mothership sector.* NMFS will authorize only one entity to represent the mothership sector for purposes of receiving and managing transferable Chinook salmon PSC allocations on behalf of the vessels eligible to fish under transferable Chinook salmon PSC allocations. NMFS will issue transferable Chinook salmon allocations under the Chinook salmon PSC limit to an entity representing the mothership sector if that entity represents all the owners of AFA-permitted vessels in this sector that are participants in an approved IPA.

(ii) *Request for approval as an entity eligible to receive transferable Chinook salmon PSC allocations.* A

representative of an entity representing the catcher/processor sector or the mothership sector may request approval by NMFS to receive transferable Chinook salmon PSC allocations on behalf of the members of the sector. The application must be submitted to NMFS at the address in paragraph (b)(6) of this section. A completed application consists of the application form and a contract, described below.

(A) *Application form.* The applicant must submit a paper copy of the application form with all information fields accurately filled in, including the affidavit affirming that each eligible vessel owner, from whom the applicant received written notification requesting to join the sector entity, has been allowed to join the sector entity subject to the same terms and conditions that have been agreed on by, and are applicable to, all other parties to the sector entity. The application form is available on the NMFS Alaska Region Web site (<http://alaskafisheries.noaa.gov/>) or from NMFS at the address in paragraph (b)(6) of this section.

(B) *Contract.* A contract containing the following information must be attached to the completed application form:

(1) Information that documents that all vessel owners party to the contract agree that the entity, the entity's representative, and the entity's agent for service of process named in the application form represent them for purposes of receiving transferable Chinook salmon PSC allocations.

(2) A statement that the entity's representative and agent for service of process are authorized to act on behalf of the vessel owners party to the contract.

(3) Signatures, printed names, and date of signature for the owners of each AFA-permitted vessel identified in the application form.

(C) *Contract duration.* Once submitted, the contract attached to the application form is valid until amended or terminated by the parties to the contract.

(D) *Deadline.* An application form and contract must be received by NMFS no later than 1700 hours, A.l.t., on October 1 of the year prior to the year for which the Chinook salmon PSC allocations are effective.

(E) *Approval.* If more than one entity application form is submitted to NMFS, NMFS will approve the application form for the entity that represents the most eligible vessel owners in the sector.

(F) *Amendments to the sector entity.*

(1) An amendment to the sector entity contract, with no change in entity participants, may be submitted to NMFS at any time and is effective upon written notification of approval by NMFS to the entity representative. To amend a contract, the entity representative must submit a complete application, as described in paragraph (f)(8)(ii) of this section.

(2) To make additions or deletions to the vessel owners represented by the entity for the next year, the entity representative must submit a complete application, as described in paragraph (f)(8)(ii) of this section, by December 1.

(iii) *Entity representative.* (A) The entity's representative must —

(1) Act as the primary contact person for NMFS on issues relating to the operation of the entity;

(2) Submit on behalf of the entity any applications required for the entity to receive a transferable Chinook salmon PSC allocation and to transfer some or all of that allocation to and from other entities eligible to receive transfers of Chinook salmon PSC allocations;

(3) Ensure that an agent for service of process is designated by the entity; and

(4) Ensure that NMFS is notified if a substitute agent for service of process is designated. Notification must include the name, address, and telephone number of the substitute agent in the event the previously designated agent is no longer capable of accepting service on behalf of the entity or its members within the 5-year period from the time the agent is identified in the application to NMFS under paragraph (f)(8)(ii) of this section.

(B) Any vessel owner that is a member of an inshore cooperative, or a member of the entity that represents the catcher/processor sector or the mothership sector, may authorize the entity representative to sign a proposed IPA submitted to NMFS, under paragraph (f)(12) of this section, on his or her behalf. This authorization must be included in the contract submitted to NMFS, under paragraph (f)(8)(ii)(B) of this section, for the sector-level entities and in the contract submitted annually to NMFS by inshore cooperatives under § 679.61(d).

(iv) *Agent for service of process.* The entity's agent for service of process must—

(A) Be authorized to receive and respond to any legal process issued in the United States with respect to all owners and operators of vessels that are members of an entity receiving a transferable allocation of Chinook salmon PSC or with respect to a CDQ group. Service on or notice to the

entity's appointed agent constitutes service on or notice to all members of the entity.

(B) Be capable of accepting service on behalf of the entity until December 31 of the year five years after the calendar year for which the entity notified the Regional Administrator of the identity of the agent.

(v) *Absent a catcher/processor sector or mothership sector entity.* If the catcher/processor sector or the mothership sector does not form an entity to receive a transferable allocation of Chinook salmon PSC, the sector will be managed by NMFS under a non-transferable allocation of Chinook salmon PSC under paragraph (f)(10) of this section.

(9) *Transfers of Chinook salmon PSC.*

(i) A Chinook salmon PSC allocation issued to eligible entities under paragraph (f)(8)(i) of this section may be transferred to any other entity receiving a transferable allocation of Chinook salmon PSC by submitting to NMFS an application for transfer described in paragraph (f)(9)(iii) of this section. Transfers of Chinook salmon PSC allocations among eligible entities are subject to the following restrictions:

(A) Entities receiving transferable allocations under the 60,000 PSC limit may only transfer to and from other entities receiving allocations under the 60,000 PSC limit.

(B) Entities receiving transferable allocations under the 45,000 PSC limit may only transfer to and from other entities receiving allocations under the 45,000 PSC limit.

(C) Entities receiving transferable allocations under the 47,591 PSC limit may only transfer to and from other entities receiving allocations under the 47,591 PSC limit.

(D) Entities receiving transferable allocations under the 33,318 PSC limit may only transfer to and from other entities receiving allocations under the 33,318 PSC limit.

(E) Chinook salmon PSC allocations may not be transferred between seasons.

(ii) *Post-delivery transfers.* If the Chinook salmon bycatch by an entity exceeds its seasonal allocation, the entity may receive transfers of Chinook salmon PSC to cover overages for that season. An entity may conduct transfers to cover an overage that results from Chinook salmon bycatch from any fishing trip by a vessel fishing on behalf of that entity that was completed or is in progress at the time the entity's allocation is first exceeded. Under § 679.7(d)(5)(ii)(C)(2) and (k)(8)(v)(B), vessels fishing on behalf of an entity that has exceeded its Chinook salmon PSC allocation for a season may not start

a new fishing trip for pollock in the BS on behalf of that same entity for the remainder of that season.

(iii) *Application for transfer of Chinook salmon PSC allocation—(A) Completed application.* NMFS will process a request for transfer of Chinook salmon PSC provided that a paper or electronic application is completed, with all information fields accurately filled in. Application forms are available on the NMFS Alaska Region Web site (<http://alaskafisheries.noaa.gov/>) or from NMFS at the address in paragraph (b)(6) of this section.

(B) *Certification of transferor—(1) Non-electronic submittal.* The transferor's designated representative must sign and date the application certifying that all information is true, correct, and complete. The transferor's designated representative must submit the paper application as indicated on the application.

(2) *Electronic submittal.* The transferor's designated entity representative must log onto the NMFS online services system and create a transfer request as indicated on the computer screen. By using the transferor's NMFS ID, password, and Transfer Key, and submitting the transfer request, the designated representative certifies that all information is true, correct, and complete.

(C) *Certification of transferee—(1) Non-electronic submittal.* The transferee's designated representative must sign and date the application certifying that all information is true, correct, and complete.

(2) *Electronic submittal.* The transferee's designated representative must log onto the NMFS online services system and accept the transfer request as indicated on the computer screen. By using the transferee's NMFS ID, password, and Transfer Key, the designated representative certifies that all information is true, correct, and complete.

(D) *Deadline.* NMFS will not approve an application for transfer of Chinook salmon PSC after June 25 for the A season or after December 1 for the B season.

(10) *Non-transferable Chinook salmon PSC allocations.* (i) All vessels belonging to a sector that is ineligible to receive transferable allocations under paragraph (f)(8) of this section, any catcher vessels participating in an inshore open access fishery, and all vessels fishing under the opt-out allocation under paragraph (f)(5) of this section will fish under specific non-transferable Chinook salmon PSC allocations.

(ii) All vessels fishing under a non-transferable Chinook salmon PSC allocation, including vessels fishing on behalf of a CDQ group, will be managed together by NMFS under that non-transferable allocation. If, during the fishing year, the Regional Administrator determines that a seasonal non-transferable Chinook salmon PSC allocation will be reached, NMFS will publish a notice in the **Federal Register** closing the BS to directed fishing for pollock by those vessels fishing under that non-transferable allocation for the remainder of the season or for the remainder of the year.

(iii) For each non-transferable Chinook salmon PSC allocation, NMFS will deduct from the B season allocation any amount of Chinook salmon bycatch in the A season that exceeds the amount available under the A season allocation.

(11) *Rollover of unused A season allocation*—(i) *Rollovers of transferable allocations*. NMFS will add any Chinook salmon PSC allocation remaining at the end of the A season, after any transfers under paragraph (f)(9)(ii) of this section, to an entity's B season allocation.

(ii) *Rollover of non-transferable allocations*. For a non-transferable allocation for the mothership sector, catcher/processor sector, or an inshore open access fishery, NMFS will add any Chinook salmon PSC remaining in that non-transferable allocation at the end of the A season to that B season non-transferable allocation.

(12) *Salmon bycatch incentive plan agreements (IPAs)*—(i) *Minimum participation requirements*. More than one IPA may be approved by NMFS. Each IPA must have participants that represent the following:

(A) *Minimum percent pollock*. Parties to an IPA must collectively represent at least 9 percent of the BS pollock quota.

(B) *Minimum number of unaffiliated AFA entities*. Parties to an IPA must represent any combination of two or more CDQ groups or corporations, partnerships, or individuals who own AFA-permitted vessels and are not affiliated, as affiliation is defined for purposes of AFA entities in § 679.2.

(ii) *Membership in an IPA*. (A) No vessel owner or CDQ group is required to join an IPA.

(B) For a vessel owner in the catcher/processor sector or mothership sector to join an IPA, that vessel owner must be a member of the entity representing that sector under paragraph (f)(8).

(C) For a CDQ group to be a member of an IPA, the CDQ group must sign the IPA and list in that IPA each vessel harvesting BS pollock CDQ, on behalf of

that CDQ group, that will participate in that IPA.

(D) Once a member of an IPA, a vessel owner or CDQ group cannot withdraw from the IPA during a fishing year.

(iii) *Request for approval of a proposed IPA*. The IPA representative must submit a proposed IPA to NMFS at the address in paragraph (b)(6) of this section. The proposed IPA must contain the following information:

(A) *Affidavit*. The IPA must include the affidavit affirming that each eligible vessel owner or CDQ group, from whom the IPA representative received written notification requesting to join the IPA, has been allowed to join the IPA subject to the same terms and conditions that have been agreed on by, and are applicable to, all other parties to the IPA.

(B) *Name of the IPA*.

(C) *Representative*. The IPA must include the name, telephone number, and email address of the IPA representative who submits the proposed IPA on behalf of the parties and who is responsible for submitting proposed amendments to the IPA and the annual report required under paragraph (f)(13) of this section.

(D) *Third party group*. The IPA must identify at least one third party group. Third party groups include any entities representing western Alaskans who depend on salmon and have an interest in salmon bycatch reduction but do not directly fish in a groundfish fishery.

(E) *Description of the incentive plan*. The IPA must contain a description of the following—

(1) The incentive(s) that will be implemented under the IPA for the operator of each vessel participating in the IPA to avoid Chinook salmon and chum salmon bycatch under any condition of pollock and Chinook salmon abundance in all years.

(2) How the incentive(s) to avoid chum salmon do not increase Chinook salmon bycatch.

(3) The rewards for avoiding Chinook salmon, penalties for failure to avoid Chinook salmon at the vessel level, or both.

(4) How the incentive measures in the IPA are expected to promote reductions in a vessel's Chinook salmon and chum salmon bycatch rates relative to what would have occurred in absence of the incentive program.

(5) How the incentive measures in the IPA promote Chinook salmon and chum salmon savings in any condition of pollock abundance or Chinook salmon abundance in a manner that is expected to influence operational decisions by vessel operators to avoid Chinook salmon and chum salmon.

(6) How the IPA ensures that the operator of each vessel governed by the IPA will manage that vessel's Chinook salmon bycatch to keep total bycatch below the performance standard described in paragraph (f)(6) of this section for the sector in which the vessel participates.

(7) How the IPA ensures that the operator of each vessel governed by the IPA will manage that vessel's chum salmon bycatch to avoid areas and times where the chum salmon are likely to return to western Alaska.

(8) The rolling hot spot program for salmon bycatch avoidance that operates throughout the entire A season and B season and the agreement to provide notifications of closure areas and any violations of the rolling hot spot program to the third party group.

(9) The restrictions or penalties targeted at vessels that consistently have significantly higher Chinook salmon PSC rates relative to other vessels fishing at the same time.

(10) The requirement for vessels to enter a fishery-wide in-season salmon PSC data sharing agreement.

(11) The requirement for the use of salmon excluder devices, with recognition of contingencies, from January 20 to March 31, and from September 1 until the end of the B season.

(12) The requirement that salmon savings credits are limited to a maximum of three years for IPAs with salmon savings credits.

(13) The restrictions or performance criteria used to ensure that Chinook salmon PSC rates in October are not significantly higher than those achieved in the preceding months.

(F) *Compliance agreement*. The IPA must include a written statement that all parties to the IPA agree to comply with all provisions of the IPA.

(G) *Signatures*. The names and signatures of the owner or representative for each vessel and CDQ group that is a party to the IPA. The representative of an inshore cooperative, or the representative of the entity formed to represent the AFA catcher/processor sector or the AFA mothership sector under paragraph (f)(8) of this section may sign a proposed IPA on behalf of all vessels that are members of that inshore cooperative or sector level entity.

(iv) *Deadline and duration*—(A) *Deadline for proposed IPA*. A proposed IPA must be received by NMFS no later than 1700 hours, A.l.t., on October 1 of the year prior to the year for which the IPA is proposed to be effective.

(B) *Duration*. Once approved, an IPA is effective starting January 1 of the year

following the year in which NMFS approves the IPA, unless the IPA is approved between January 1 and January 19, in which case the IPA is effective starting in the year in which it is approved. Once approved, an IPA is effective until December 31 of the first year in which it is effective or until December 31 of the year in which the IPA representative notifies NMFS in writing that the IPA is no longer in effect, whichever is later. An IPA may not expire mid-year. No party may join or leave an IPA once it is approved, except as allowed under paragraph (f)(12)(v)(C) of this section.

(v) *NMFS review of a proposed IPA*—(A) *Approval*. An IPA will be approved by NMFS if it meets the following requirements:

(1) Meets the minimum participation requirements in paragraph (f)(12)(i) of this section;

(2) Is submitted in compliance with the requirements of paragraphs (f)(12)(ii) and (iv) of this section; and

(3) Contains the information required in paragraph (f)(12)(iii) of this section.

(B) *IPA identification number*. If approved, NMFS will assign an IPA identification number to the approved IPA. This number must be used by the IPA representative in amendments to the IPA.

(C) *Amendments to an IPA*. Amendments to an approved IPA may be submitted to NMFS at any time and will be reviewed under the requirements of this paragraph (f)(12). An amendment to an approved IPA is effective upon written notification of approval by NMFS to the IPA representative.

(D) *Disapproval*. (1) NMFS will disapprove a proposed IPA or a proposed amendment to an IPA for either of the following reasons:

(i) If the proposed IPA fails to meet any of the requirements of paragraphs (f)(12)(i) through (iii) of this section, or

(ii) If a proposed amendment to an IPA would cause the IPA to no longer be consistent with the requirements of paragraphs (f)(12)(i) through (iv) of this section.

(2) *Initial Administrative Determination (IAD)*. If, in NMFS' review of the proposed IPA, NMFS identifies deficiencies in the proposed IPA that require disapproval of the proposed IPA, NMFS will notify the applicant in writing. The IPA representative will be provided one 30-day period to address, in writing, the deficiencies identified by NMFS. Additional information or a revised IPA received by NMFS after the expiration of the 30-day period specified by NMFS will not be considered for purposes of

the review of the proposed IPA. NMFS will evaluate any additional information submitted by the applicant within the 30-day period. If the Regional Administrator determines that the additional information addresses deficiencies in the proposed IPA, the Regional Administrator will approve the proposed IPA under paragraphs (f)(12)(iv)(B) and (f)(12)(v)(A) of this section. However, if, after consideration of the original proposed IPA and any additional information submitted during the 30-day period, NMFS determines that the proposed IPA does not comply with the requirements of paragraph (f)(12) of this section, NMFS will issue an initial administrative determination (IAD) providing the reasons for disapproving the proposed IPA.

(3) *Administrative Appeals*. An IPA representative who receives an IAD disapproving a proposed IPA may appeal under the procedures set forth at § 679.43. If the IPA representative fails to file an appeal of the IAD pursuant to § 679.43, the IAD will become the final agency action. If the IAD is appealed and the final agency action is a determination to approve the proposed IPA, then the IPA will be effective as described in paragraph (f)(12)(iv)(B) of this section.

(4) *Pending appeal*. While appeal of an IAD disapproving a proposed IPA is pending, proposed members of the IPA subject to the IAD that are not currently members of an approved IPA will fish under the opt-out allocation under paragraph (f)(5) of this section. If no other IPA has been approved by NMFS, NMFS will issue all sectors allocations of the 47,591 Chinook salmon PSC limit as described in paragraph (f)(3)(iii)(C) of this section, or, in low Chinook salmon abundance years, allocations of the 33,318 Chinook salmon PSC limit as described in paragraph (f)(3)(iii)(D) of this section.

(vi) *Public release of an IPA*. NMFS will make all proposed IPAs and all approved IPAs and the list of participants in each approved IPA available to the public on the NMFS Alaska Region Web site (<http://alaska.fisheries.noaa.gov/>).

(13) *IPA Annual Report*. The representative of each approved IPA must submit a written annual report to the Council at the address specified in § 679.61(f). The Council will make the annual report available to the public.

(i) *Submission deadline*. The IPA Annual Report must be received by the Council no later than March 15.

(ii) *Information requirements*. The IPA Annual Report must contain the following information:

(A) A comprehensive description of the incentive measures, including the rolling hot spot program and salmon excluder use, in effect in the previous year;

(B) A description of how these incentive measures affected individual vessels;

(C) An evaluation of whether incentive measures were effective in achieving salmon savings beyond levels that would have been achieved in absence of the measures, including the effectiveness of—

(1) Measures to ensure that chum salmon were avoided in areas and at times where chum salmon are likely to return to western Alaska;

(2) Restrictions or penalties that target vessels that consistently have significantly higher Chinook salmon PSC rates relative to other vessels; and

(3) Restrictions or performance criteria used to ensure that Chinook PSC rates in October are not significantly higher than in previous months.

(D) A description of any amendments to the terms of the IPA that were approved by NMFS since the last annual report and the reasons that the amendments to the IPA were made.

(E) The sub-allocation to each participating vessel of the number of Chinook salmon PSC and amount of pollock (mt) at the start of each fishing season, and number of Chinook salmon PSC and amount of pollock (mt) caught at the end of each season.

(F) The following information on in-season transfer of Chinook salmon PSC and pollock among AFA cooperatives, entities eligible to receive Chinook salmon PSC allocations, or CDQ groups:

(1) Date of transfer;

(2) Name of transferor;

(3) Name of transferee;

(4) Number of Chinook salmon PSC transferred; and

(5) Amount of pollock (mt) transferred.

(G) The following information on in-season transfers among vessels participating in the IPA:

(1) Date of transfer;

(2) Name of transferor;

(3) Name of transferee;

(4) Number of Chinook salmon PSC transferred; and

(5) Amount pollock (mt) transferred.

(14) *Non-Chinook salmon prohibited species catch (PSC) limit and Chum Salmon Savings Area*. (i) The PSC limit for non-Chinook salmon caught by vessels using trawl gear from August 15 through October 14 in the Catcher Vessel Operational Area, as defined under § 679.22(a)(5) and in Figure 2 to this part, is 42,000 fish.

(ii) 10.7 percent of the non-Chinook PSC limit is allocated to the CDQ Program as a PSQ reserve.

(iii) If the Regional Administrator determines that 42,000 non-Chinook salmon have been caught by vessels using trawl gear during the period August 15 through October 14 in the Catcher Vessel Operational Area, NMFS will prohibit fishing for pollock for the remainder of the period September 1 through October 14 in the Chum Salmon Savings Area as defined in Figure 9 to this part.

(iv) Trawl vessels participating in directed fishing for pollock and operating under an IPA approved by NMFS under paragraph (f)(12) of this section are exempt from closures in the Chum Salmon Savings Area.

(15) *Salmon handling.* Regulations in this paragraph apply to vessels directed fishing for pollock in the BS, including pollock CDQ, and processors taking deliveries from these vessels.

(i) *Salmon discard.* The operator of a vessel and the manager of a shoreside processor or SFP must not discard any salmon or transfer or process any salmon under the PSD Program at § 679.26 if the salmon were taken incidental to a directed fishery for pollock in the BS until the number of salmon has been determined by the observer and the observer's collection of any scientific data or biological samples from the salmon has been completed.

(ii) *Salmon retention and storage.* (A) Operators of catcher/processors or motherships must—

(1) Sort and transport all salmon bycatch from each haul to an approved storage container located adjacent to the observer sampling station that allows an observer free and unobstructed access to the salmon (see § 679.28(d)(2)(i) and (d)(7)). The salmon storage container must remain in view of the observer from the observer sampling station at all times during the sorting of the haul.

(2) If, at any point during sorting of a haul or delivery, the salmon are too numerous to be contained in the salmon storage container, cease all sorting and give the observer the opportunity to count the salmon in the storage container and collect scientific data or biological samples. Once the observer has completed all counting and sampling duties for the counted salmon, the salmon must be removed by vessel personnel from the approved storage container and the observer sampling station, in the presence of the observer.

(3) Before sorting of the next haul may begin, give the observer the opportunity to complete the count of salmon and the collection of scientific data or biological samples from the previous haul. When

the observer has completed all counting and sampling duties for a haul or delivery, vessel personnel must remove the salmon, in the presence of the observer, from the salmon storage container and the observer sampling station.

(4) Ensure no salmon of any species pass the observer sample collection point, as identified in the scale drawing of the observer sampling station (see § 679.28(d)(2)(i) and (d)(7)).

(B) Operators of vessels delivering to shoreside processors or stationary floating processors must—

(1) Retain all salmon taken incidental to a directed fishery for pollock in the BS until the salmon are delivered to the processor receiving the vessel's BS pollock catch.

(2) Notify the observer at least 15 minutes before handling catch on board the vessel, including, but not limited to, moving catch from one location to another, sorting, or discard of catch prior to the delivery of catch to the processor receiving the vessel's BS pollock catch. This notification requirement is in addition to the notification requirements in § 679.51(e).

(3) Secure all salmon and catch after the observer has completed the collection of scientific data and biological samples and after the vessel crew has completed handling the catch. All salmon and any other catch retained on board the vessel must be made unavailable for sorting and discard until the delivery of catch to the processor receiving the vessel's BS pollock catch. Methods to make salmon or retained catch unavailable for sorting or discard include but are not limited to securing the catch in a completely enclosed container above or below deck, securing the catch in an enclosed codend, or completely and securely covering the fish on deck.

(4) Comply with the requirements in paragraphs (f)(15)(ii)(B)(2) and (3) of this section, before handling the catch prior to delivery.

(C) Shoreside processors or stationary floating processors must—

(1) Comply with the requirements in § 679.28(g)(7)(vii) for the receipt, sorting, and storage of salmon from deliveries of catch from the BS pollock fishery.

(2) Ensure no salmon of any species pass beyond the last point where sorting of fish occurs, as identified in the scale drawing of the plant in the Catch Monitoring Control Plan (CMCP).

(3) Sort and transport all salmon of any species to the salmon storage container identified in the CMCP (see § 679.28 (g)(7)(vi)(C) and (g)(7)(x)(F)). The salmon must remain in that salmon

storage container and within the view of the observer at all times during the offload.

(4) If, at any point during the offload, salmon are too numerous to be contained in the salmon storage container, cease the offload and all sorting and give the observer the opportunity to count the salmon and collect scientific data or biological samples. The counted salmon then must be removed from the area by plant personnel in the presence of the observer.

(5) At the completion of the offload, give the observer the opportunity to count the salmon and collect scientific data or biological samples.

(6) Before sorting of the next offload of catch from the BS pollock fishery may begin, give the observer the opportunity to complete the count of salmon and the collection of scientific data or biological samples from the previous offload of catch from the BS pollock fishery. When the observer has completed all counting and sampling duties for the offload, plant personnel must remove the salmon, in the presence of the observer, from the salmon storage container and location where salmon are counted and biological samples or scientific data are collected.

(iii) *Assignment of crew to assist observer.* Operators of vessels and managers of shoreside processors and SFPs that are required to retain salmon under paragraph (f)(15)(i) of this section must designate and identify to the observer aboard the vessel, or at the shoreside processor or SFP, a crew person or employee responsible for ensuring all sorting, retention, and storage of salmon occurs according to the requirements of (f)(15)(ii) of this section.

(iv) *Discard of salmon.* Except for salmon under the PSD Program at § 679.26, all salmon must be returned to the sea as soon as is practicable, following notification by an observer that the number of salmon has been determined and the collection of scientific data or biological samples has been completed.

(g) *Chinook salmon bycatch management in the AI pollock fishery—*  
(1) *Applicability.* This paragraph contains regulations governing the bycatch of Chinook salmon in the AI pollock fishery.

(2) *AI Chinook salmon PSC limit.* (i) The PSC limit for Chinook salmon caught by vessels while harvesting pollock in the AI is 700 fish.

(ii) 7.5 percent of the PSC limit is allocated to the CDQ Program as a PSQ reserve.

(3) *Area closures.* If, during the fishing year, the Regional Administrator determines that catch of Chinook salmon by vessels using trawl gear while directed fishing for pollock in the AI will reach the PSC limit, NMFS, by notification in the **Federal Register**, will close the AI Chinook Salmon Savings Area, as defined in Figure 8 to this part, to directed fishing for pollock with trawl gear on the following dates:

(i) From the effective date of the closure until April 15, and from September 1 through December 31, if the Regional Administrator determines that the annual limit of AI Chinook salmon will be attained before April 15.

(ii) From September 1 through December 31, if the Regional Administrator determines that the annual limit of AI Chinook salmon will be attained after April 15.

\* \* \* \* \*

■ 6. In § 679.22, revise paragraph (a)(10) to read as follows:

**§ 679.22 Closures.**

(a) \* \* \*

(10) *Chum Salmon Savings Area.* Directed fishing for pollock by vessels using trawl gear is prohibited from August 1 through August 31 in the Chum Salmon Savings Area defined at Figure 9 to this part (see also § 679.21(f)(14)). Vessels directed fishing for pollock in the BS, including pollock CDQ, and operating under an approved IPA under § 679.21(f)(12) are exempt from closures in the Chum Salmon Savings Area.

\* \* \* \* \*

■ 7. In § 679.28, revise paragraphs (d)(7)(i) through (iii) to read as follows:

**§ 679.28 Equipment and operational requirements.**

\* \* \* \* \*

(d) \* \* \*

(7) \* \* \*

(i) A salmon storage container must be located adjacent to the observer sampling station;

(ii) The salmon storage container must remain in view of the observer at the observer sampling station at all times during the sorting of each haul; and

(iii) The salmon storage container must be at least 1.5 cubic meters.

\* \* \* \* \*

■ 8. In § 679.51, revise paragraphs (e)(1)(iii), (e)(2) introductory text, and (e)(2)(iii)(B)(3) to read as follows:

**§ 679.51 Observer requirements for vessels and plants.**

\* \* \* \* \*

(e) \* \* \*

(1) \* \* \*

(iii) *Communications and observer data entry—(A) Observer use of equipment.* Allow an observer to use the vessel's communications equipment and personnel, on request, for the confidential entry, transmission, and receipt of work-related messages, at no cost to the observer or the United States.

(B) The operator of a catcher/processor (except for a catcher/processor placed in the partial observer coverage category under paragraph (a)(3) of this section), mothership, or catcher vessel 125 ft LOA or longer (except for a catcher vessel fishing for groundfish with pot gear) must provide the following equipment, software and data transmission capabilities:

(1) *Observer access to computer.* Make a computer available for use by the observer.

(2) *NMFS-supplied software.* Ensure that the most recent release of NMFS data entry software provided by the Regional Administrator or other approved software is installed on the computer described in paragraph (e)(1)(iii)(B)(1) of this section.

(3) *Data transmission.* The computer and software described in paragraphs (e)(1)(iii)(B)(1) and (2) of this section must be connected to a communication device that provides a point-to-point connection to the NMFS host computer.

(4) *Functional and operational equipment.* Ensure that the required

equipment described in paragraph (e)(1)(iii)(B) of this section and that is used by an observer to enter or transmit data is fully functional and operational. "Functional" means that all the tasks and components of the NMFS-supplied, or other approved, software described in paragraph (e)(1)(iii)(B)(2) of this section and any required data transmissions to NMFS can be executed effectively aboard the vessel by the equipment.

(C) The operator of a catcher vessel participating in the Rockfish Program or a catcher vessel less than 125 ft LOA directed fishing for pollock in the BS must comply with the computer and software requirements described in paragraphs (e)(1)(iii)(B)(1), (2), and (4) of this section.

\* \* \* \* \*

(2) *Shoreside processor and stationary floating processor responsibilities.* A manager of a shoreside processor or a stationary floating processor that is required to maintain observer coverage as specified under paragraph (b) of this section must:

\* \* \* \* \*

(iii) \* \* \*

(B) \* \* \*

(3) *Functional and operational equipment.* Ensuring that the communications equipment required under paragraph (e)(2)(iii)(B) of this section that is used by observers to enter and transmit data is functional and operational. "Functional" means that all the tasks and components of the NMFS-supplied, or other approved, software described at paragraph (e)(2)(iii)(B)(2) of this section and any data transmissions to NMFS can be executed effectively by the communications equipment.

\* \* \* \* \*

**Tables 47a through 47d to Part 679 [Removed]**

■ 9. Remove Tables 47a through 47d to part 679.

[FR Doc. 2016-13697 Filed 6-9-16; 8:45 am]

**BILLING CODE 3510-22-P**

# Proposed Rules

Federal Register

Vol. 81, No. 112

Friday, June 10, 2016

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

## SOCIAL SECURITY ADMINISTRATION

### 20 CFR Parts 404 and 416

[Docket No. SSA–2016–0015]

RIN 0960–AH92

### Evidence From Statutorily Excluded Medical Sources

**AGENCY:** Social Security Administration.**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** In accordance with section 812 of the Bipartisan Budget Act of 2015 (BBA section 812), we propose to revise our rules to explain how we would address evidence furnished by medical sources that meet one of BBA section 812's exclusionary categories (statutorily excluded medical sources). Under this proposed rule, we would not consider evidence furnished by a statutorily excluded medical source unless we find good cause to do so. We propose several circumstances in which we would find good cause, and we also propose to require statutorily excluded medical sources to notify us of their excluded status when they furnish evidence to us. These rules would allow us to fulfill obligations that we have under the Bipartisan Budget Act of 2015 (BBA).

**DATES:** To ensure that we consider your comments, we must receive them by no later than August 9, 2016.

**ADDRESSES:** You may submit comments by any one of three methods—Internet, fax, or mail. Do not submit the same comments multiple times or by more than one method. Regardless of which method you choose, please state that your comments refer to Docket No. SSA–2016–0015 so that we may associate your comments with the correct regulation.

**Caution:** You should be careful to include in your comments only information that you wish to make publicly available. We strongly urge you not to include in your comments any personal information, such as Social

Security numbers or medical information.

1. *Internet:* We strongly recommend that you submit your comments via the Internet. Please visit the Federal eRulemaking portal at <http://www.regulations.gov>. Use the “Search” function to find docket number SSA–2016–0015. The system will issue a tracking number to confirm your submission. You will not be able to view your comment immediately because we must post each comment manually. It may take up to a week for your comment to be viewable.

2. *Fax:* Fax comments to (410) 966–2830.

3. *Mail:* Mail your comments to the Office of Regulations and Reports Clearance, Social Security Administration, 3100 West High Rise Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401.

Comments and background documents are available for public viewing on the Federal eRulemaking portal at [www.regulations.gov](http://www.regulations.gov) or in person, during regular business hours, by arranging with the contact person identified below.

**FOR FURTHER INFORMATION CONTACT:** Dan O'Brien, Office of Disability Policy, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, (410) 597–1632. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213, or TTY 1–800–325–0778, or visit our Internet site, Social Security Online, at [www.socialsecurity.gov](http://www.socialsecurity.gov).

### SUPPLEMENTARY INFORMATION:

#### I. How BBA Section 812 Affects How We Consider Evidence

We consider all evidence we receive when we determine whether an individual is blind or disabled under the Social Security Act (Act).<sup>1</sup> We define evidence as anything you or anyone else submits to us, or that we obtain, that relates to your claim.<sup>2</sup>

The BBA was enacted on November 2, 2015.<sup>3</sup> BBA section 812 amended section 223(d)(5) of the Act, 42 U.S.C. 423(d)(5), by adding a new paragraph “C.” Under this provision, when we

make a disability determination or decision, or when we conduct a continuing disability review (CDR), under titles II or XVI of the Act, we cannot consider evidence furnished by certain sources, unless we have good cause.<sup>4</sup>

Specifically, we may not consider evidence from the following medical sources:

- A medical source convicted of a felony under sections 208 or 1632 of the Act,<sup>5</sup>
- a medical source excluded from participating in any Federal health care program under section 1128 of the Act,<sup>6</sup> or
- a medical source imposed with a civil monetary penalty (CMP),

<sup>4</sup> Public Law 114–74, sec. 812, 129 Stat. 584, 602. Excluding evidence under BBA section 812 does not constitute an exclusion of a medical source from Social Security programs under section 1136 of the Act, 42 U.S.C. 1320b–6.

<sup>5</sup> 42 U.S.C. 408 and 1383a. These sections make it a felony to give false statements or omit information to cause an improper payment, convert a payment intended for someone else, provide us with false information we need for our records concerning the individual's true identity, or misuse a Social Security card or number for the purpose of obtaining or causing an increase in benefits to which the individual is not entitled or eligible.

<sup>6</sup> 42 U.S.C. 1320a–7. This section identifies four mandatory and 16 permissive bases for excluding a provider from participating in all Federal health care programs (as defined in section 1128B(f) of the Act). The four mandatory exclusions from participating in Federal health care programs are: (1) Conviction relating to fraud, (2) conviction relating to obstruction of an investigation or audit, (3) misdemeanor conviction relating to controlled substance, (4) license revocation or suspension, (5) exclusion or suspension under federal or state health care program, (6) claims for excessive charges or unnecessary services and failure of certain organizations to furnish medically necessary services, (7) fraud, kickbacks, and other prohibited activities, (8) entities controlled by a sanctioned individual, (9) failure to disclose required information, (10) failure to supply requested information on subcontractors and suppliers, (11) failure to supply payment information, (12) failure to grant immediate access, (13) failure to take corrective action, (14) default on health education loan or scholarship obligations, (15) individuals controlling a sanctioned entity, and (16) making false statements or misrepresentation of a material fact. The Department of Health and Human Services' Office of Inspector General (HHS OIG), which administers section 1128 of the Act, may grant a waiver for all but one of these bases. A mandatory exclusion for a conviction related to patient abuse may not be waived.

<sup>1</sup> 42 U.S.C. 416(i), 42 U.S.C. 423(d), and 42 U.S.C. 1382c(a).

<sup>2</sup> 20 CFR 404.1512(b) and 416.912(b).

<sup>3</sup> Pub. L. 114–74, 129 Stat. 584.

assessment, or both, for submitting false evidence under section 1129 of the Act.<sup>7</sup> We refer to the individuals and entities that fall into one or more of these exclusionary categories as statutorily excluded medical sources.

Our Inspector General or the Secretary of Health and Human Services (HHS) will inform us about these statutorily excluded medical sources at such times and to the extent necessary for the effective implementation of this requirement.<sup>8</sup> BBA section 812 requires us to issue regulations to carry out the amendments to the Act by November 2, 2016.<sup>9</sup> BBA section 812 is effective on or after the effective date of the regulations, or by November 2, 2016, whichever is earlier.<sup>10</sup>

## II. Proposed Revisions to Our Rules

We propose to implement BBA section 812 by adding new 20 CFR 404.1503b and 416.903b to state that we will not consider evidence from a statutorily excluded medical source under section 223(d)(5)(C) of the Act, unless we find good cause. Under our proposed rules, we may find good cause to consider evidence from an excluded medical source in the following five situations:

- The evidence from the medical source consists of evidence of treatment that occurred before the date the source was convicted of a felony under section 208 or under section 1632 of the Act;
- The evidence from the medical source consists of evidence of treatment that occurred during a period in which the source was not excluded from participation in any Federal health care program under section 1128 of the Act;
- The evidence from the medical source consists of evidence of treatment that occurred before the date the source received a final decision imposing a CMP, assessment, or both, for submitting false evidence under section 1129 of the Act;
- The sole basis for the medical source's exclusion under section 223(d)(5)(C) of the Act is that the source cannot participate in any Federal health care program under section 1128 of the Act, but the Office of Inspector General of the Department of Health and Human

Services granted a waiver of the section 1128 exclusion; or

- The evidence is a laboratory finding about a physical impairment and there is no indication that the finding is unreliable.

We may find good cause to consider evidence from an excluded medical source in any of these five enumerated situations when we make a disability determination or decision or when we conduct a CDR.

The first three good cause exceptions relate to evidence that pertains to periods prior to the event that would trigger exclusion under BBA section 812, or relate to a period during which the medical source was not excluded from participating in any Federal health care program. We believe that it would be consistent with the purpose of BBA section 812 to find good cause to consider evidence furnished by a medical source of treatment that occurred: (1) Before the source is convicted of a felony under section 208 or 1632 of the Act,<sup>11</sup> (2) outside of the period the source cannot participate in Federal health care programs under section 1128 of the Act,<sup>12</sup> or (3) before the source is issued a final decision imposing a CMP, assessment, or both, for submitting false evidence under section 1129 of the Act.<sup>13</sup> We propose these good cause exceptions in order to protect the public interest. In our view, an undue hardship would be placed on our claimants, and the purposes of BBA section 812 would not be served, unless we include these exceptions. In this situation, there is little risk that the evidence would be tainted by the activity for which the source has been sanctioned or convicted, but a greater risk that we could make an incorrect determination or decision by excluding probative evidence.

Specifically, it would be against the public interest if we barred claimants from ever using evidence furnished by statutorily excluded medical sources concerning treatment that occurred prior to the period those sources qualify for a BBA section 812 exclusion. For example, there may be instances where a statutorily excluded medical source provided treatment to a claimant prior to the period the source qualified for a BBA section 812 exclusion or performed the acts that led to the exclusion. In those instances, and others, we would determine whether to consider the source's evidence concerning such treatment on a case-by-case basis. In addition, section 1128 of the Act

permits some medical sources to resume participating in Federal health care programs after a prescribed exclusion period if they successfully apply for reinstatement.<sup>14</sup> We believe it would also be against the public interest for us to place an absolute bar on claimants from ever using evidence of treatment that occurred after termination of the exclusion under section 1128 when medical sources are permitted to resume their participation in Federal health care programs. We would determine whether to consider that evidence on a case-by-case basis as well.

The fourth good cause exception aligns our rules with those of HHS and provides a consistent approach regarding evidence from affected medical sources. HHS' Office of the Inspector General (HHS OIG) may waive a medical source's exclusion<sup>15</sup> from participating in any Federal health care program for three of the four mandatory exclusions contained in section 1128 of the Act if: (1) It receives a written waiver request from the program's administrator who has determined that the exclusion will pose a hardship to any beneficiary, and (2) the medical source is the sole community physician or sole source of essential specialized services in a community.<sup>16</sup> HHS OIG may waive a medical source's exclusion for one of the permissive exclusions if it determines that imposing the exclusion would not be in the public interest.<sup>17</sup> All waivers may be rescinded if the basis for the waiver ceases to exist.<sup>18</sup> Because a waiver from HHS OIG permits an otherwise excluded medical source to participate in a Federal health care program, we may find good cause to consider evidence from such a medical source consistent with the particular terms of the waiver.

The fifth good cause exception relies on the unique nature of laboratory findings about physical impairments.<sup>19</sup> Laboratory findings about physical impairments are objective, reliable, and reproducible tests that require the least amount of subjective interpretation by a medical source. They are important to help us understand fundamental information about claimants' impairments and whether they are

<sup>7</sup> 42 U.S.C. 1320a-8. This section permits the imposition of a CMP or assessment (or both) for certain offenses. One such offense is making a false statement or representation of a material fact for us to use in determining an initial or continuing right to Social Security disability benefits.

<sup>8</sup> Section 812(a) of Public Law 114-74, 129 Stat. at 602.

<sup>9</sup> Section 812(b) of Public Law 114-74, 129 Stat. at 602.

<sup>10</sup> Section 812(c) of Public Law 114-74, 129 Stat. at 602.

<sup>11</sup> 42 U.S.C. 408 and 42 U.S.C. 1383a.

<sup>12</sup> 42 U.S.C. 1320a-7.

<sup>13</sup> 42 U.S.C. 1320a-8.

<sup>14</sup> 42 U.S.C. 1320a-7.

<sup>15</sup> 42 U.S.C. 1320a-7(c)(3)(B); 42 CFR 1001.1801.

<sup>16</sup> 42 U.S.C. 1320a-7(a), (c)(3)(B); 42 CFR 1001.1801(a). HHS OIG cannot waive an exclusion based on a conviction related to patient abuse.

<sup>17</sup> 42 U.S.C. 1320a-7(b); 42 CFR 1001.1801(c).

<sup>18</sup> 42 CFR 1001.1801(d), (e).

<sup>19</sup> Laboratory findings related to a physical impairment include chemical tests (such as blood tests), electrophysiological studies (such as electrocardiograms and electroencephalograms), pathology reports, and medical imaging (such as x-rays). See 20 CFR 404.1528(c) and 416.928(c).

entitled to benefits, such as the onset date and duration of an impairment(s).<sup>20</sup> If we would find that a laboratory finding about a physical impairment in a claim is not reliable, we would not apply the good cause exception.

### III. Proposed Notification Process

Our long-term solution to the administration of BBA section 812 is to implement automated evidence matching within our case processing system(s) to identify excludable evidence. As part of our efforts to comply with BBA section 812's implementation deadline of November 2, 2016, we propose to require that statutorily excluded medical sources inform us in writing of their BBA section 812 exclusion(s) each time they submit evidence to us that relates to a claim for Social Security disability benefits or payments.

Regarding the content of the written statement, statutorily excluded medical sources would be required to include a heading that states,

WRITTEN STATEMENT REGARDING  
SECTION 223(d)(5)(C) OF THE SOCIAL  
SECURITY ACT—DO NOT REMOVE.

Immediately following this heading, sources would also need to include their name, title, and the applicable event(s) that triggered their statutory exclusion. Sources convicted of a felony under section 208 or 1632 of the Act<sup>21</sup> would also need to provide the date of their felony conviction. Similarly, sources imposed with a CMP, assessment, or both, for submitting false evidence

under section 1129 of the Act,<sup>22</sup> would need to provide the date of the final imposition of the CMP, assessment, or both. Sources that cannot participate in any Federal health care program under section 1128 of the Act<sup>23</sup> would need to include the basis for their exclusion, its effective date and anticipated length, and whether HHS' OIG waived it.

As stated above, our proposed self-reporting requirement would apply only to statutorily excluded medical sources. This requirement applies when the statutorily excluded medical source submits evidence to us directly or indirectly through a representative, claimant, or other individual or entity. We further propose to require that no individual or entity be permitted to remove a statutorily excluded medical source's written statement of exclusion prior to submitting the source's evidence to us. We also seek to reserve the right to request that statutorily excluded medical sources provide us with additional information or clarify any information they submit regarding their exclusion under section 223(d)(5)(C) of the Act.

If statutorily excluded medical sources do not inform us of their excluded status, we may refer the medical source to our Office of the Inspector General for any action it deems appropriate, including investigation and CMP pursuit.

*Executive Order 12866, as  
Supplemented by Executive Order  
13563*

We consulted with the Office of Management and Budget (OMB) and determined that this NPRM does not meet the criteria for a significant regulatory action under Executive Order 12866, as supplemented by Executive Order 13563. Therefore, OMB has not reviewed it.

### *Regulatory Flexibility Act*

We certify that this NPRM would not have a significant economic impact on a substantial number of small entities. The only economic impact on small entities from this NPRM results from BBA section 812's requirement that we not consider evidence from statutorily excluded medical sources. As described above and in our Paperwork Reduction Act statement, below, we propose to require statutorily excluded medical sources to provide us with a brief self-report containing basic information each time they submit evidence related to a claim for benefits under titles II or XVI of the Act. Therefore, a regulatory flexibility analysis is not required under the Regulatory Flexibility Act, as amended.

### *Paperwork Reduction Act*

This proposed rule poses new public reporting burdens in the sections listed below. Because these requirements are not covered by an existing OMB-approved form, we provide burden estimates for them.

Regulation section	Description of public reporting requirement	Number of respondents (annually)	Frequency of response	Average burden per response (minutes)	Estimated annual burden (hours)
404.1503b(c) 416.903b(c).	Statutorily excluded medical sources must inform us in writing that they are excluded under section 223(d)(5)(C) of the Act, as amended, each time they submit evidence related to a claim for benefits under titles II or XVI of the Act. The written statement must include: A heading stating that it is a written statement regarding section 223(d)(5)(C) of the Act; the name and title of the medical source; the applicable excluding event(s); the date of the medical source's felony conviction if applicable; the date of the imposition of a civil monetary penalty or assessment, or both, for the submission of false evidence if applicable; the basis, effective date, anticipated length of the exclusion, and whether the Office of Inspector General of the Department of Health and Human Services waived the exclusion.	50	60	20	1000
Total .....	.....	50	.....	.....	1000

We submitted an Information  
Collection Request for clearance to

OMB. We are soliciting comments on  
the burden estimate; the need for the

information; its practical utility; ways to  
enhance its quality, utility, and clarity;

<sup>20</sup> See 20 CFR 404.130, 404.1509, and 416.909.

and ways to minimize the burden on respondents, including the use of automated techniques or other forms of information technology. If you would like to submit comments, please send them to the following locations:

Office of Management and Budget, Attn: Desk Officer for SSA, Fax Number: 202–395–6974, Email address: [OIRA\\_Submission@omb.eop.gov](mailto:OIRA_Submission@omb.eop.gov)

Social Security Administration, Attn: Reports Clearance Officer, 1333 Annex, 6401 Security Blvd., Baltimore, MD 21235–0001, Fax Number: 410–965–6400, Email: [OR.Reports.Clearance@ssa.gov](mailto:OR.Reports.Clearance@ssa.gov)

You can submit comments until August 9, 2016, which is 60 days after the publication of this notice. However, your comments will be most useful if you send them to SSA by July 11, 2016, which is 30 days after publication. To receive a copy of the OMB clearance package, contact our Reports Clearance Officer using any of the above contact methods. We prefer to receive comments by email or fax.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security—Disability Insurance; 96.002, Social Security—Retirement Insurance; and 96.004, Social Security—Survivors Insurance)

## List of Subjects

### 20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors, and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

### 20 CFR Part 416

Administrative practice and procedure, Reporting and recordkeeping requirements, Supplemental Security Income (SSI).

Dated: May 27, 2016.

**Carolyn W. Colvin,**

*Acting Commissioner of Social Security.*

For the reasons set out in the preamble, we propose to amend 20 CFR part 404 subpart P and part 416 subpart I as set forth below:

## PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950– )

### Subpart P—Determining Disability and Blindness

■ 1. The authority citation for subpart P of part 404 continues to read as follows:

**Authority:** Secs. 202, 205(a)–(b) and (d)–(h), 216(i), 221(a), (i), and (j), 222(c), 223, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 402, 405(a)–(b) and (d)–(h), 416(i), 421(a), (i), and (j), 422(c), 423, 425, and

902(a)(5)); sec. 211(b), Pub. L. 104–193, 110 Stat. 2105, 2189; sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

■ 2. Add § 404.1503b to read as follows:

#### § 404.1503b Evidence from statutorily excluded medical sources.

(a) *General.* We will not consider evidence from the following medical sources statutorily excluded under section 223(d)(5)(C) of the Social Security Act (Act), as amended, unless we find good cause under paragraph (b) of this section:

(1) Any medical source that has been convicted of a felony under section 208 or under section 1632 of the Act;

(2) Any medical source that has been excluded from participation in any Federal health care program under section 1128 of the Act; or

(3) Any medical source that has received a final decision imposing a civil monetary penalty or assessment, or both, for submitting false evidence under section 1129 of the Act.

(b) *Good cause.* We may find good cause to consider evidence from a statutorily excluded medical source under section 223(d)(5)(C) of the Act, as amended, if:

(1) The evidence from the medical source consists of evidence of treatment that occurred before the date the source was convicted of a felony under section 208 or under section 1632 of the Act;

(2) The evidence from the medical source consists of evidence of treatment that occurred during a period in which the source was not excluded from participation in any Federal health care program under section 1128 of the Act;

(3) The evidence from the medical source consists of evidence of treatment that occurred before the date the source received a final decision imposing a civil monetary penalty or assessment, or both, for submitting false evidence under section 1129 of the Act;

(4) The sole basis for the medical source's exclusion under section 223(d)(5)(C) of the Act, as amended, is that the source cannot participate in any Federal health care program under section 1128 of the Act, but the Office of Inspector General of the Department of Health and Human Services granted a waiver of the section 1128 exclusion; or

(5) The evidence is a laboratory finding about a physical impairment and there is no indication that the finding is unreliable.

(c) *Statutorily excluded medical sources' reporting requirements.* Statutorily excluded medical sources (as described in paragraph (a) of this section) must inform us in writing that they are excluded under section

223(d)(5)(C) of the Act, as amended, each time they submit evidence related to a claim for benefits under titles II or XVI of the Act. This reporting requirement applies to evidence that statutorily excluded medical sources submit to us either directly or through a representative, claimant, or other individual or entity.

(1) Statutorily excluded medical sources must provide a written statement, which contains the following information:

(i) A heading stating: “WRITTEN STATEMENT REGARDING SECTION 223(d)(5)(C) OF THE SOCIAL SECURITY ACT—DO NOT REMOVE”

(ii) The name and title of the medical source;

(iii) The applicable excluding event(s) stated in paragraphs (a)(1)–(a)(3) of this section;

(iv) The date of the medical source's felony conviction under sections 208 or 1632 of the Act, if applicable;

(v) The date of the imposition of a civil monetary penalty or assessment, or both, for the submission of false evidence, under section 1129 of the Act, if applicable; and

(vi) The basis, effective date, anticipated length of the exclusion, and whether the Office of the Inspector General of the Department of Health and Human Services waived the exclusion, if the excluding event was the medical source's exclusion from participation in any Federal health care program under section 1128 of the Act.

(2) The written statement provided by an excluded medical source may not be removed by any individual or entity prior to submitting evidence to us.

(3) We may request that the excluded medical source provide us with additional information or clarify any information submitted that bears on the medical source's exclusion(s) under section 223(d)(5)(C) of the Act, as amended.

## PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

### Subpart I—Determining Disability and Blindness

■ 3. The authority citation for subpart I of part 416 continues to read as follows:

**Authority:** Secs. 221(m), 702(a)(5), 1611, 1614, 1619, 1631(a), (c), (d)(1), and (p), and 1633 of the Social Security Act (42 U.S.C. 421(m), 902(a)(5), 1382, 1382c, 1382h, 1383(a), (c), (d)(1), and (p), and 1383(b); secs. 4(c) and 5, 6(c)–(e), 14(a), and 15, Pub. L. 98–460, 98 Stat. 1794, 1801, 1802, and 1808 (42 U.S.C. 421 note, 423 note, and 1382h note).

■ 4. Add § 416.903b to read as follows:

**§ 416.903b Evidence from statutorily excluded medical sources.**

(a) *General.* We will not consider evidence from the following medical sources statutorily excluded under section 223(d)(5)(C) of the Social Security Act (Act), as amended, unless we find good cause under paragraph (b) of this section:

(1) Any medical source that has been convicted of a felony under section 208 or under section 1632 of the Act;

(2) Any medical source that has been excluded from participation in any Federal health care program under section 1128 of the Act; or

(3) Any medical source that has received a final decision imposing a civil monetary penalty or assessment, or both, for submitting false evidence under section 1129 of the Act.

(b) *Good cause.* We may find good cause to consider evidence from a statutorily excluded medical source under section 223(d)(5)(C) of the Act, as amended, if:

(1) The evidence from the medical source consists of evidence of treatment that occurred before the date the source was convicted of a felony under section 208 or under section 1632 of the Act;

(2) The evidence from the medical source consists of evidence of treatment that occurred during a period in which the source was not excluded from participation in any Federal health care program under section 1128 of the Act;

(3) The evidence from the medical source consists of evidence of treatment that occurred before the date the source received a final decision imposing a civil monetary penalty or assessment, or both, for submitting false evidence under section 1129 of the Act;

(4) The sole basis for the medical source's exclusion under section 223(d)(5)(C) of the Act, as amended, is that the source cannot participate in any Federal health care program under section 1128 of the Act, but the Office of Inspector General of the Department of Health and Human Services granted a waiver of the section 1128 exclusion; or

(5) The evidence is a laboratory finding about a physical impairment and there is no indication that the finding is unreliable.

(c) *Statutorily excluded medical sources' reporting requirements.* Statutorily excluded medical sources (as described in paragraph (a) of this section) must inform us in writing that they are excluded under section 223(d)(5)(C) of the Act, as amended, each time they submit evidence related to a claim for benefits under titles II or XVI of the Act. This reporting requirement applies to evidence that

statutorily excluded medical sources submit to us either directly or through a representative, claimant, or other individual or entity.

(1) Statutorily excluded medical sources must provide a written statement, which contains the following information:

(i) A heading stating: "WRITTEN STATEMENT REGARDING SECTION 223(d)(5)(C) OF THE SOCIAL SECURITY ACT—DO NOT REMOVE"

(ii) The name and title of the medical source;

(iii) The applicable excluding event(s) stated in paragraphs (a)(1)–(a)(3) of this section;

(iv) The date of the medical source's felony conviction under sections 208 or 1632 of the Act, if applicable;

(v) The date of the imposition of a civil monetary penalty or assessment, or both, for the submission of false evidence, under section 1129 of the Act, if applicable; and

(vi) The basis, effective date, anticipated length of the exclusion, and whether the Office of the Inspector General of the Department of Health and Human Services waived the exclusion, if the excluding event was the medical source's exclusion from participation in any Federal health care program under section 1128 of the Act.

(2) The written statement provided by an excluded medical source may not be removed by any individual or entity prior to submitting evidence to us.

(3) We may request that the excluded medical source provide us with additional information or clarify any information submitted that bears on the medical source's exclusion(s) under section 223(d)(5)(C) of the Act, as amended.

[FR Doc. 2016–13744 Filed 6–9–16; 8:45 am]

**BILLING CODE 4191–02–P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Food and Drug Administration****21 CFR Parts 175, 176, 177, and 178**

[Docket No. FDA–2016–F–1253]

**Breast Cancer Fund, Center for Environmental Health, Center for Food Safety, Center for Science in the Public Interest, Clean Water Action, Consumer Federation of America, Earthjustice, Environmental Defense Fund, Improving Kids' Environment, Learning Disabilities Association of America, and Natural Resources Defense Council; Filing of Food Additive Petition; Correction**

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

**ACTION:** Notice of petition; correction.

**SUMMARY:** The Food and Drug Administration (FDA or we) is correcting a notice entitled "Breast Cancer Fund, Center for Environmental Health, Center for Food Safety, Center for Science in the Public Interest, Clean Water Action, Consumer Federation of America, Earthjustice, Environmental Defense Fund, Improving Kids' Environment, Learning Disabilities Association of America, and Natural Resources Defense Council; Filing of Food Additive Petition" that appeared in the **Federal Register** of May 20, 2016 (81 FR 31877). The document announced that Breast Cancer Fund, Center for Environmental Health, Center for Food Safety, Center for Science in the Public Interest, Clean Water Action, Consumer Federation of America, Earthjustice, Environmental Defense Fund, Improving Kids' Environment, Learning Disabilities Association of America, and Natural Resources Defense Council filed a petition proposing that we amend and/or revoke specified regulations to no longer provide for the food contact use of specified ortho-phthalates, but omitted two items. This document corrects that error.

**FOR FURTHER INFORMATION CONTACT:** Kelly Randolph, Center for Food Safety and Applied Nutrition (HFS–275), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740–3835, 240–402–1188.

**SUPPLEMENTARY INFORMATION:** In FR Doc. 2016–11866, appearing on page 31878 in the **Federal Register** of Friday, May 20, 2016, the following correction is made:

On page 31878, in the third column, under the heading "**§ 175.300 Resinous and Polymeric Coatings,**" the

document is corrected to add “Butyl phthalyl butyl glycolate (CAS No. 85–70–1)” and “Ethyl phthalyl ethyl glycolate (CAS No. 84–72–0)” in alphabetical order.

Dated: June 7, 2016.

**Dennis M. Keefe,**

*Director, Office of Food Additive Safety,  
Center for Food Safety and Applied Nutrition.*

[FR Doc. 2016–13739 Filed 6–9–16; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 100

[Docket Number USCG–2016–0169]

RIN 1625–AA08

#### Special Local Regulation; Cumberland River, Mile 190.0 to 191.5; Nashville, TN

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes to establish a special local regulation for all waters of the Cumberland River beginning at mile marker 190.0 and ending at mile marker 191.5 from 9 a.m. until noon on July 30, 2016. This proposed special regulation is necessary to provide safety for the participants in the “Music City SUP Race” marine event. This proposed rulemaking would prohibit persons and vessels from being in the special local regulated area unless authorized by the Captain of the Port Ohio Valley or a designated representative. We invite your comments on this proposed rulemaking.

**DATES:** Comments and related material must be received by the Coast Guard on or before June 27, 2016.

**ADDRESSES:** You may submit comments identified by docket number USCG–2016–0169 using the Federal eRulemaking Portal at <http://www.regulations.gov>. See the “Public Participation and Request for Comments” portion of the

**SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** If you have questions about this proposed rulemaking, call or email Petty Officer Ashley Schad, MSD Nashville, Nashville, TN, at 615–736–5421 or at [Ashley.M.Schad@uscg.mil](mailto:Ashley.M.Schad@uscg.mil).

#### SUPPLEMENTARY INFORMATION:

#### I. Table of Abbreviations

CFR Code of Federal Regulations

DHS Department of Homeland Security  
E.O. Executive order  
FR Federal Register  
NPRM Notice of proposed rulemaking  
Pub. L. Public Law  
§ Section  
U.S.C. United States Code

#### II. Background, Purpose, and Legal Basis

On January 28, 2016, the Nashville Paddle Company notified the Coast Guard that it will be conducting a race from 9 a.m. to noon on July 30, 2016. The event will consist of at least 75 participants on various sized stand up paddle boards and kayaks on the Cumberland River. The Captain of the Port Ohio Valley (COTP) has determined that additional safety measures are necessary to protect participants, spectators, and waterway users during this event. Therefore, the Coast Guard proposes to establish a special local regulation on specified waters of the Cumberland River. This proposed regulation would be in effect from 9 a.m. until noon on July 30, 2016.

The purpose of this rulemaking is to ensure the safety of vessels and participants of the navigable waters before, during, and after the scheduled event. The Coast Guard proposes this rulemaking under authority in 33 U.S.C. 1233, which authorizes the Coast Guard to establish and define special local regulations under 33 CFR 100.

#### III. Discussion of Proposed Rule

The Captain of the Port Ohio Valley proposes to establish a special local regulated area from 9 a.m. to noon on July 30, 2016 for all waters of the Cumberland River beginning at mile marker 190.0 and ending at mile marker 191.5. The duration of the special local regulated area is intended to ensure the safety of vessels, participants, and these navigable waters before, during, and after the scheduled event. No vessel or person would be permitted to enter the special local regulated area without obtaining permission from the COTP or a designated representative. The regulatory text we are proposing appears at the end of this document.

#### IV. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and executive orders (E.O.s) related to rulemaking. Below we summarize our analyses based on a number of these statutes and E.O.s, and we discuss First Amendment rights of protestors.

##### A. Regulatory Planning and Review

E.O.s 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if

regulation is necessary, to select regulatory approaches that maximize net benefits. E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This NPRM has not been designated a “significant regulatory action,” under E.O. 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget.

This regulatory action determination is based on the size, location, duration, and time-of-day of the special local regulated area.

This proposed special local regulation restricts transit on the Cumberland River from mile 190.0 to 191.5, for a short duration of 3 hours for one day; Broadcast Notices to Mariners and Local Notices to Mariners will also inform the community of this special local regulation so that they may plan accordingly for this short restriction on transit. Vessel traffic may request permission from the COTP Ohio Valley or a designated representative to enter the restricted area.

##### B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the special local regulated area may be small entities, for the reasons stated in section IV.A above this proposed rule would not have a significant economic impact on any vessel owner or operator.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions

concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

#### C. Collection of Information

This proposed rule would not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

#### D. Federalism and Indian Tribal Governments

A rule has implications for federalism under E.O. 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in E.O. 13132.

Also, this proposed rule does not have tribal implications under E.O. 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this proposed rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

#### E. Unfunded Mandates Reform Act

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

#### F. Environment

We have analyzed this proposed rule under Department of Homeland

Security Management Directive 023–01 and Commandant Instruction M16475.ID, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination 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 proposed rule involves a special local regulated area that would prohibit entry to unauthorized vessels. Normally such actions are categorically excluded from further review under paragraph 34(h) of Figure 2–1 of Commandant Instruction M16475.ID. A preliminary environmental analysis checklist and 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 proposed rule.

#### G. Protest Activities

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

#### V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at <http://www.regulations.gov>. If your material cannot be submitted using <http://www.regulations.gov>, contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to <http://www.regulations.gov> and will include

any personal information you have provided. For more about privacy and the docket, you may review a Privacy Act notice regarding the Federal Docket Management System in the March 24, 2005, issue of the **Federal Register** (70 FR 15086).

Documents mentioned in this NPRM as being available in the docket, and all public comments, will be in our online docket at <http://www.regulations.gov> and can be viewed by following that Web site's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

#### List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water), Reporting and recordkeeping requirements, and Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 100 as follows:

#### PART 100—SAFETY OF LIFE ON NAVIGABLE WATERWAYS

■ 1. The authority citation for part 100 continues to read as follows:

**Authority:** 33 U.S.C. 1233.

■ 2. Add § 100.35T08–0169 to read as follows:

#### § 100.35T08–0169 Special Local Regulation; Cumberland River Mile 190.0 to 191.5; Nashville, TN

(a) *Location.* All waters of the Cumberland River beginning at mile marker 190.0 and ending at mile marker 191.5 at Nashville, TN.

(b) *Regulations.*

(1) In accordance with the general regulations in § 100.801 of this part, entry into this area is prohibited unless authorized by the Captain of the Port Ohio Valley or a designated representative.

(2) Persons or vessels requiring entry into or passage through the area must request permission from the Captain of the Port Ohio Valley or a designated representative. U.S. Coast Guard Sector Ohio Valley may be contacted on VHF Channel 13 or 16, or at 1–800–253–7465.

Dated: May 10, 2016.

**R.V. Timme,**

*Captain, U.S. Coast Guard, Captain of the Port Ohio Valley.*

[FR Doc. 2016–13782 Filed 6–9–16; 8:45 am]

**BILLING CODE 9110–04–P**

## LIBRARY OF CONGRESS

## U.S. Copyright Office

## 37 CFR Part 202

[Docket No. 2016–3]

**Mandatory Deposit of Electronic Books and Sound Recordings Available Only Online****AGENCY:** U.S. Copyright Office, Library of Congress.**ACTION:** Extension of comment period.

**SUMMARY:** The United States Copyright Office is extending the deadline for the submission of written comments in response to its May 17, 2016 Notice of Inquiry regarding the mandatory deposit of online-only electronic books and sound recordings.

**DATES:** Written comments are now due no later than 11:59 p.m. Eastern Time on August 18, 2016.

**ADDRESSES:** The Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. Specific instructions for submitting comments are available on the Copyright Office Web site at [http://copyright.gov/policy/mandatory\\_deposit/](http://copyright.gov/policy/mandatory_deposit/). If electronic submission of comments is not feasible, please contact the Office using the contact information below for special instructions.

**FOR FURTHER INFORMATION CONTACT:** Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, [jcharlesworth@loc.gov](mailto:jcharlesworth@loc.gov); or Sarang V. Damle, Deputy General Counsel, [sdam@loc.gov](mailto:sdam@loc.gov). Both can be reached by telephone at 202–707–8350.

**SUPPLEMENTARY INFORMATION:** The United States Copyright Office is undertaking an inquiry into the current interim rule regarding mandatory deposit of online-only electronic works, and the rule's potential expansion to cover electronic books and sound recordings. On May 17, 2016, the Copyright Office issued a Notice of Inquiry seeking public input on several questions related to that topic. See 81 FR 30505 (May 17, 2016). To ensure that commenters have sufficient time to respond, the Copyright Office is extending the deadline for the submission of initial comments in response to the Notice to August 18, 2016, at 11:59 p.m. Eastern Time.

Dated: June 7, 2016.

Jacqueline C. Charlesworth,  
General Counsel and Associate Register of  
Copyrights, U.S. Copyright Office.

[FR Doc. 2016–13814 Filed 6–9–16; 8:45 am]

BILLING CODE 1410–30–P

**ENVIRONMENTAL PROTECTION AGENCY**

## 40 CFR Part 52

[EPA–R05–OAR–2015–0009; EPA–R05–OAR–2015–0314; FRL–9946–79–Region 5]

**Air Plan Approval; Illinois; NAAQS Update****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve revised rules submitted by the State of Illinois as State Implementation Plan (SIP) revisions. The submitted rules update Illinois' ambient air quality standards to include the 2012 primary National Ambient Air Quality Standard (NAAQS) for fine particulate matter (PM<sub>2.5</sub>), add EPA-promulgated monitoring methods, and address the “sunset provisions” in our regulation, finding that the 1971 NAAQS for sulfur dioxide no longer applies to the Lemont and Pekin areas in Illinois. In addition, the revised rules contain the timing requirements for the “flagging of exceptional events” and the submitting of documentation supporting the determination of exceptional events for the 2012 primary annual averaged PM<sub>2.5</sub> standard.

**DATES:** Comments must be received on or before July 11, 2016.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R05–OAR–2015–0009 or EPA–R05–OAR–2015–0314 at <http://www.regulations.gov> or via email to [Aburano.Douglas@epa.gov](mailto:Aburano.Douglas@epa.gov). For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia

submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:** Edward Doty, Air Programs Branch (AR–18J), Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6057, [Doty.Edward@epa.gov](mailto:Doty.Edward@epa.gov).

**SUPPLEMENTARY INFORMATION:** In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittals as a direct final rule without prior proposal because the Agency views these as noncontroversial submittals 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 rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that, if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. For additional information, see the direct final rule which is located in the Rules section of this **Federal Register**.

Dated: May 10, 2016.

Robert A. Kaplan,

Acting Regional Administrator, Region 5.

[FR Doc. 2016–13695 Filed 6–9–16; 8:45 am]

BILLING CODE 6560–50–P

**ENVIRONMENTAL PROTECTION  
AGENCY****40 CFR Part 261****[EPA-HQ-RCRA-2016-0040; FRL-9947-60-  
OLEM]****Hazardous Waste Management  
System; Tentative Denial of Petition To  
Revise the RCRA Corrosivity  
Hazardous Characteristic****AGENCY:** Environmental Protection  
Agency (EPA).**ACTION:** Extension of comment period.

**SUMMARY:** The Environmental Protection Agency (EPA or the Agency) is extending the comment period on the tentative denial of a petition to revise the Resource Conservation and Recovery Act (RCRA) corrosivity hazardous waste characteristic regulation, published in the **Federal Register** on April 11, 2016. EPA is tentatively denying the rulemaking petition because the materials submitted in support of the petition fail to demonstrate that the requested regulatory revisions are warranted, as further explained in the tentative denial. The Agency's review of additional materials it identified as relevant to the petition similarly did not demonstrate that any change to the corrosivity characteristic regulation is warranted at this time. The comment period is being extended to December 7, 2016.

**DATES:** Comments must be received on or before December 7, 2016.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-

RCRA-2016-0040, at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www.epa.gov/dockets/submitting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:**

Gregory Helms, Materials Recovery and Waste Management Division, Office of Resource Conservation and Recovery, (5304P), Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number: 703-308-8855; email address: [helms.greg@epa.gov](mailto:helms.greg@epa.gov).

**SUPPLEMENTARY INFORMATION:** This document extends the public comment period on the tentative denial of a

petition to revise the Resource Conservation and Recovery Act (RCRA) corrosivity hazardous waste characteristic regulation, published in the **Federal Register** on April 11, 2016 (81 FR 21295). In that **Federal Register** notice, the Agency tentatively denied petitioners' requests that the Agency make two changes to the current RCRA corrosivity characteristic regulation: (1) Revise the regulatory value for defining waste as corrosive from the current value of pH 12.5, to pH 11.5; and (2) expand the scope of the RCRA corrosivity definition to include nonaqueous wastes in addition to the aqueous wastes currently regulated. Petitioner-Public Employees for Environmental Responsibility ("PEER") has requested that the Agency extend the public comment period to allow additional time to evaluate the record supporting the tentative denial. EPA is hereby extending the comment period, which was set to end on June 10, 2016, to December 7, 2016. Late comments on this tentative denial may not be considered.

To submit comments or access the docket, please follow the detailed instructions as provided under

**ADDRESSES.** If you have questions, consult the individuals listed under **FOR FURTHER INFORMATION CONTACT.**

Dated: June 3, 2016.

**Barnes Johnson,**

*Director, Office of Resource Conservation and Recovery, Office of Solid Waste and Emergency Response.*

[FR Doc. 2016-13793 Filed 6-9-16; 8:45 am]

**BILLING CODE 6560-50-P**

# Notices

Federal Register

Vol. 81, No. 112

Friday, June 10, 2016

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

#### National Advisory Council on Maternal, Infant and Fetal Nutrition; Notice of Meeting

**AGENCY:** Food and Nutrition Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** Pursuant to the Federal Advisory Committee Act, 5 U.S.C. APP., this notice announces a meeting of the National Advisory Council on Maternal, Infant and Fetal Nutrition.

Date and Time: July 12–14, 2016, 9:00 a.m.–5:30 p.m.

Place: The meeting will be held at the Hilton Garden Inn Arlington/Shirlington, Environment Room, 4271 Campbell Avenue, Arlington, Virginia, 22206.

**SUPPLEMENTARY INFORMATION:** The National Advisory Council on Maternal, Infant and Fetal Nutrition will meet to continue its study of the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), and the Commodity Supplemental Food Program (CSFP). The agenda will include updates and a discussion of Breastfeeding Promotion and Support activities, the WIC food packages, WIC funding, Electronic Benefits Transfer, CSFP initiatives, and current research studies.

Status: Meetings of the National Advisory Council on Maternal, Infant and Fetal Nutrition are open to the public. Members of the public may participate, as time permits. Members of the public may file written statements with the contact person named below before or after the meeting.

Contact Person for Additional Information: Anne Bartholomew, Supplemental Food Programs Division, Food and Nutrition Service, Department of Agriculture, (703) 305–2746. If members of the public need special

accommodations, please notify Anne Bartholomew by June 28, 2016, at (703) 305–2746, or email at [WICHQ-SFPD@fns.usda.gov](mailto:WICHQ-SFPD@fns.usda.gov).

Dated: May 26, 2016.

**Audrey Rowe,**  
*Administrator, Food and Nutrition Service.*

[FR Doc. 2016–13703 Filed 6–9–16; 8:45 am]

**BILLING CODE 3410–30–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

#### Uinta-Wasatch-Cache Resource Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Uinta-Wasatch-Cache Resource Advisory Committee (RAC) will meet in South Jordan, Utah. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with title II of the Act. RAC information can be found at the following Web site: <http://www.fs.usda.gov/main/uwcnf/workingtogether/advisorycommittees>.

**DATES:** The meeting will be held on June 28, 2016, from 6:00 p.m.–8:00 p.m.

All RAC meetings are subject to cancellation. For status of meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

**ADDRESSES:** The meeting will be held at the Forest Service Office, Room #314, 857 West South Jordan Parkway, South Jordan, Utah. The meeting will also be available via conference call, for the conference line information, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at [www.fs.usda.gov/](http://www.fs.usda.gov/)

*uwcnf*. Please call ahead to facilitate entry into the building.

#### FOR FURTHER INFORMATION CONTACT:

Loyal Clark, RAC Coordinator, by phone at 801–999–2113 or via email at [lfclark@fs.fed.us](mailto:lfclark@fs.fed.us).

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** The purpose of the meeting is to:

1. Review the roles and responsibilities of the RAC,
2. Develop operating guidelines,
3. Elect a chair person, and
4. Review and recommend project proposals.

The meeting is open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by June 17, 2016, to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time to make oral comments must be sent to Loyal Clark, RAC Coordinator, Uinta-Wasatch-Cache National Forest, 857 West South Jordan Parkway, South Jordan, Utah 84095; by email to [lfclark@fs.fed.us](mailto:lfclark@fs.fed.us), or via facsimile to 801–253–8118.

**Meeting Accommodations:** If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpreting, assistive listening devices, or other reasonable accommodation. For access to the facility or proceedings, please contact the person listed in the section titled **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case by case basis.

Dated: June 3, 2016.

**David C. Whittekiend,**  
*Forest Supervisor.*

[FR Doc. 2016–13745 Filed 6–9–16; 8:45 am]

**BILLING CODE 3411–15–P**

**DEPARTMENT OF AGRICULTURE****Forest Service****Sanders Resource Advisory Committee****AGENCY:** Forest Service, USDA.**ACTION:** Notice of meeting.

**SUMMARY:** The Sanders Resource Advisory Committee (RAC) will meet in Thompson Falls, Montana. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with Title II of the Act. Additional RAC information, including the meeting agenda and the meeting summary/minutes can be found at the following Web site: [http://cloudapps-usda.gov.force.com/FSSRS/RAC\\_Page?id=001t0000002jcwJAAS](http://cloudapps-usda.gov.force.com/FSSRS/RAC_Page?id=001t0000002jcwJAAS).

**DATES:** The meeting will be held July 14, 2016, at 7:00 p.m.

All RAC meetings are subject to cancellation. For status of meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

**ADDRESSES:** The meeting will be held at the Sanders County Courthouse, 1111 Main Street, Thompson Falls, Montana.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Plains Ranger District, 408 Clayton Plains, Montana. Please call ahead to facilitate entry into the building.

**FOR FURTHER INFORMATION CONTACT:** John Gubel, Designated Federal Officer, by phone at 406-827-3533 or via email at [jgubel@fs.fed.us](mailto:jgubel@fs.fed.us).

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** The purpose of the meeting is:

1. Review and approve previous meeting minutes;
2. Discuss project proposals and address project specific questions;
3. Discuss project recommendations and rankings;

4. Vote on projects to be recommended for approval; and
5. Open forum for public discussion.

The meeting is open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by July 1, 2016, to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time for oral comments must be sent to Robin Walker, RAC Coordinator, P.O. Box 429, Plains, Montana 59859; by email to [robinmwalker@fs.fed.us](mailto:robinmwalker@fs.fed.us), or via facsimile to 406-826-4358.

**Meeting Accommodations:** If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpreting, assistive listening devices or other reasonable accommodation for access to the facility or proceedings by contacting the person listed in the section titled **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case by case basis.

Dated: May 23, 2016.

John Gubel,

*Designated Federal Official, Sanders Resource Advisory Committee.*

[FR Doc. 2016-13759 Filed 6-9-16; 8:45 am]

**BILLING CODE 3411-15-P**

**DEPARTMENT OF AGRICULTURE****Forest Service****Northeast Oregon Forests Resource Advisory Committee****AGENCY:** Forest Service, USDA.**ACTION:** Notice of meeting.

**SUMMARY:** The Northeast Oregon Forests Resource Advisory Committee (RAC) will meet in Baker City, Oregon. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with Title II of the Act. RAC information can be found at the following Web site: <http://www.fs.usda.gov/main/pts/specialprojects/racweb>.

**DATES:** The meeting will be held on the following dates:

- July 14, 2016, from 9:30 a.m. to 4:00 p.m.; and
- July 15, 2016, from 9:30 a.m. to 4:00 p.m.

All RAC meetings are subject to cancellation. For status of meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

**ADDRESSES:** The meeting will be held at the Whitman Ranger District, Baker Work Center, 3285 11th St., Baker City, Oregon.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Whitman Ranger District. Please call ahead to facilitate entry into the building.

**FOR FURTHER INFORMATION CONTACT:** Jeff Tomac, Designated Federal Officer, by phone at 541-523-1301 or via email at [jtomac@fs.fed.us](mailto:jtomac@fs.fed.us).

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** The purpose of the meeting is to review and recommend 2016/2017 project proposals.

The meeting is open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by July 7, 2016, to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time to make oral comments must be sent to Jeff Tomac, Designated Federal Officer, Whitman Ranger District, 1550 Dewey Avenue, Suite A, Baker City, Oregon 97814; by email to [jtomac@fs.fed.us](mailto:jtomac@fs.fed.us), or via facsimile to 541-523-6395.

**Meeting Accommodations:** If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpreting, assistive listening devices, or other reasonable accommodation. For access to the facility or proceedings, please contact the person listed in the section titled **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case by case basis.

Dated: May 31, 2016.

**Jeff Tomac,**

*Designated Federal Official.*

[FR Doc. 2016-13749 Filed 6-9-16; 8:45 am]

**BILLING CODE 3411-15-P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

#### **Black Hills Resource Advisory Committee**

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Black Hills Resource Advisory Committee (RAC) will meet in Rapid City, South Dakota. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with title II of the Act. RAC information can be found at the following Web site: <http://www.fs.usda.gov/main/blackhills/workingtogether/advisorycommittees>.

**DATES:** The meeting will be held on June 30, 2016, at 5:00 p.m. to 8:00 p.m.

All RAC meetings are subject to cancellation. For status of meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

**ADDRESSES:** The meeting will be held at the Mystic Ranger District, 8221 South Highway 16, Rapid City, South Dakota.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Mystic Ranger District. Please call ahead to facilitate entry into the building.

**FOR FURTHER INFORMATION CONTACT:** Ruth Esperance, Designated Federal Officer, by phone at 605-343-1567 or via email at [resperance@fs.fed.us](mailto:resperance@fs.fed.us).

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** The purpose of the meeting is to review and recommend projects for funding under

the Secure Rural School allocations to the Custer, Lawrence, and Pennington Counties for 2014 and 2015.

The meeting is open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by June 24, 2016, to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time to make oral comments must be sent to Ruth Esperance, Designated Federal Officer, 8221 South Highway 16, Rapid City, South Dakota; by email to [resperance@fs.fed.us](mailto:resperance@fs.fed.us); or via facsimile to 605-343-7134.

**Meeting Accommodations:** If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpreting, assistive listening devices, or other reasonable accommodation. For access to the facility or proceedings by contacting the person listed in the section titled **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case by case basis.

Dated: June 6, 2016.

**Ruth Esperance,**

*Designated Federal Officer.*

[FR Doc. 2016-13743 Filed 6-9-16; 8:45 am]

**BILLING CODE 3411-15-P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

#### **Notice of New Fee Site; Federal Lands Recreation Enhancement Act, (Title VIII, Pub. L. 108-447)**

**AGENCY:** Coronado National Forest, USDA Forest Service, USDA.

**ACTION:** Notice of new fee site.

**SUMMARY:** The Coronado National Forest is proposing to charge a \$175 fee for the overnight rental of the Sollers Cabin, located on the Santa Catalina Ranger District. The Sollers Cabin has not been available for recreation use prior to this date. Rentals of other cabins on National Forests in Arizona have shown that the public appreciates the enhanced recreational opportunity afforded by these rehabilitated historic structures. Funds from the rental will be used for the continued operation and maintenance of this facility and other properties in the Arizona "Rooms with a View" Cabin Rental Program. This fee is only a proposal and will be

determined upon further analysis and public comment.

**DATES:** Please send any comments on this fee proposal by December, 2016, so comments can be compiled, and analyzed and shared with the BLM—Arizona Recreation Resource Advisory Council. If the fee proposal is approved, the Sollers Cabin will likely be available for rent in the spring of 2017.

**ADDRESSES:** Forest Supervisor, Coronado National Forest, 300 West Congress, Tucson, AZ 85701.

**FOR FURTHER INFORMATION CONTACT:** Kathy Makansi, Archaeologist, 520-760-2502.

**SUPPLEMENTARY INFORMATION:** The Federal Recreation Lands Enhancement Act (Title VII, Pub. L. 108-447) directed the Secretary of Agriculture to publish a six month advance notice in the **Federal Register** whenever new recreation fee areas are established. This new fee will be reviewed by the BLM—Arizona Recreation Resource Advisory Council prior to a final decision and implementation. The Coronado National Forest currently has seven other cabin rentals. These rentals are often fully booked throughout their rental season. Sollers is a large three bedroom (2-story) cabin located in a remote setting (at the end of a dirt road) approximately 20 miles from Tucson, Arizona. The cabin consists of 3 bedrooms, a living room, kitchen, and a bathroom. The cabin also has electricity and indoor plumbing. A business analysis of the Sollers Cabin has shown that people desire having this sort of recreation experience on the Coronado National Forest. A market analysis indicates that the \$175.00/per night fee is both reasonable and acceptable for this sort of unique recreation experience.

People wanting to rent the Sollers Cabin will need to do so through the National Recreation Reservation Service, at [www.recreation.gov](http://www.recreation.gov) or by calling 1-877-444-6777. The National Recreation Reservation Service charges a \$9 fee for reservations.

Dated: June 2, 2016.

**Kerwin S. Dewberry,**

*Coronado National Forest Supervisor.*

[FR Doc. 2016-13747 Filed 6-9-16; 8:45 am]

**BILLING CODE 3411-15-P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

#### **Sanders Resource Advisory Committee**

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Sanders Resource Advisory Committee (RAC) will meet in Thompson Falls, Montana. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with Title II of the Act. RAC information can be found at the following Web site: [http://cloudapps-usda.gov/force.com/FSSRS/RAC\\_Page?id=001t00000002jcwJAAS](http://cloudapps-usda.gov/force.com/FSSRS/RAC_Page?id=001t00000002jcwJAAS).

**DATES:** The meeting will be held June 30, 2016, at 7:00 p.m.

All RAC meetings are subject to cancellation. For status of meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

**ADDRESSES:** The meeting will be held at the Sanders County Courthouse, 1111 Main Street, Thompson Falls, Montana.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Plains Ranger District. Please call ahead to facilitate entry into the building.

**FOR FURTHER INFORMATION CONTACT:** John Gubel, Designated Federal Officer, by phone at 406-827-3533 or via email at [jgubel@fs.fed.us](mailto:jgubel@fs.fed.us).

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** The purpose of the meeting is to:

1. Review and approve previous meeting minutes;
2. Discuss status of RAC and membership;
3. Review status of approved projects and discuss monitoring;
4. Review project proposals submitted; and
5. Open forum for public discussion.

The meeting is open to the public.

The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by June 15, 2016, to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of

the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time to make oral comments must be sent to Robin Walker, RAC Coordinator, P.O. Box 429, Plains, Montana 59859; by email to [robinmwalker@fs.fed.us](mailto:robinmwalker@fs.fed.us), or via facsimile to 406-826-4358.

**Meeting Accommodations:** If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpreting, assistive listening devices, or other reasonable accommodation. For access to the facility or proceedings, please contact the person listed in the section titled **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case by case basis.

Dated: May 23, 2016.

**John Gubel,**

*Designated Federal Official, Sanders Resource Advisory Committee.*

[FR Doc. 2016-13758 Filed 6-9-16; 8:45 am]

**BILLING CODE 3411-15-P**

## COMMISSION ON CIVIL RIGHTS

### Notice of Public Meeting of the Wisconsin Advisory Committee To Discuss Preparations for a Hearing on Hate Crimes in the State

**AGENCY:** U.S. Commission on Civil Rights.

**ACTION:** Announcement of meeting.

**SUMMARY:** 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 that the Wisconsin Advisory Committee (Committee) will hold a meeting on Friday, June 24, 2016, at 12:00 p.m. CDT for the purpose of preparing for a hearing on hate crime in the state.

This meeting is open to the public through the following toll-free call-in number: 888-481-2877, conference ID: 4195513. Any interested member of the public may call this number and listen to the meeting. The conference call operator will ask callers to identify themselves, the organization they are affiliated with (if any), and an email address prior to placing callers into the conference room. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may

also follow the proceedings by first calling the Federal Relay Service at 1-800-977-8339 and providing the Service with the conference call number and conference ID number.

Member of the public are invited to make statements to the Committee during the scheduled open comment period. In addition, members of the public may submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be mailed to the Regional Programs Unit, U.S. Commission on Civil Rights, 55 W. Monroe St., Suite 410, Chicago, IL 60615. They may also be faxed to the Commission at (312) 353-8324, or emailed to Carolyn Allen at [callen@usccr.gov](mailto:callen@usccr.gov). Persons who desire additional information may contact the Regional Programs Unit at (312) 353-8311.

Records and documents discussed during the meeting will be available for public viewing prior to and after the meeting at <https://database.faca.gov/committee/meetings.aspx?cid=282>. Click on the "Meeting Details" and "Documents" links to download. Records generated from this meeting may also be inspected and reproduced at the Regional Programs Unit, as they become available, both before and after the meeting. Persons interested in the work of this Committee are directed to the Commission's Web site, <http://www.usccr.gov>, or may contact the Regional Programs Unit at the above email or street address.

#### Agenda:

- I. Welcome and Introductions—Naheed Blecker, Chair
- II. Hearing Preparation: Hate Crimes and Civil Rights in Wisconsin
  - Panelists
  - Logistics (schedule, location, date)
- III. Open Comment—Public Participation
- IV. Adjournment

**DATES:** The meeting will be held on Friday, June 24, 2016, at 12:00 p.m. CDT.

*Public Call Information:*

*Dial:* 888-481-2877.

*Conference ID:* 4195513.

**FOR FURTHER INFORMATION CONTACT:** Melissa Wojnaroski, DFO, at 312-353-8311 or [mwojnaroski@usccr.gov](mailto:mwojnaroski@usccr.gov).

Dated: June 07, 2016.

**David Mussatt,**

*Chief, Regional Programs Unit.*

[FR Doc. 2016-13756 Filed 6-9-16; 8:45 am]

**BILLING CODE 6335-01-P**

## DEPARTMENT OF COMMERCE

## Foreign-Trade Zones Board

[B-5-2016]

**[Authorization of Production Activity, Foreign-Trade Subzone 279A, Thoma-Sea Marine Constructors, L.L.C. (Shipbuilding), Houma, Louisiana]**

On February 3, 2016, the Houma-Terrebonne Airport commission, grantee of FTZ 279, submitted a notification of proposed production activity to the Foreign-Trade Zones (FTZ) Board on behalf of Thoma-Sea Marine Constructors, L.L.C., operator of Subzone 279A, in Houma, Louisiana.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (81 FR 7500, February 12, 2016). The FTZ Board has determined that no further review of the activity is warranted at this time. The production activity described in the notification is authorized, subject to the FTZ Act and the FTZ Board's regulations, including Section 400.14, and the following special conditions:

(1) Any foreign steel mill products admitted to the zone for the Thoma-Sea Marine Constructors, L.L.C., activity, including plate, angles, shapes, channels, rolled steel stock, bars, pipes and tubes, not incorporated into merchandise otherwise classified, and which is used in manufacturing, shall be subject to full customs duties in accordance with applicable law, unless the Executive Secretary determines that the same item is not then being produced by a domestic steel mill.

(2) Thoma-Sea Marine Constructors, L.L.C., shall meet its obligation under 15 CFR 400.13(b) by annually advising the FTZ Board's Executive Secretary as to significant new contracts with appropriate information concerning foreign purchases otherwise dutiable, so that the FTZ Board may consider whether any foreign dutiable items are being imported for manufacturing in the zone primarily because of FTZ procedures and whether the FTZ Board should consider requiring customs duties to be paid on such items.

Dated: June 2, 2016.

**Andrew McGilvray,**  
*Executive Secretary.*

[FR Doc. 2016-13712 Filed 6-9-16; 8:45 am]

**BILLING CODE 3510-DS-P**

## DEPARTMENT OF COMMERCE

## Foreign-Trade Zones Board

[B-39-2016]

**Foreign-Trade Zone 119—Minneapolis, Minnesota; Notification of Proposed Production Activity; SICK, Inc.; Subzone 119G; (Electronic Industrial Sensors, Encoders, Optical Readers and Monitoring Systems); Savage, Minnesota**

The Greater Metropolitan Area Foreign Trade Zone Commission, grantee of FTZ 119, submitted a notification of proposed production activity to the FTZ Board on behalf of SICK, Inc. (SICK), operator of Subzone 119G, at its facility located in Savage, Minnesota. The notification conforming to the requirements of the regulations of the FTZ Board (15 CFR 400.22) was received on May 17, 2016.

SICK already has authority to produce photo-electronic industrial automation sensors within Subzone 119G. The current request would add new finished products (encoders, zone control sensors, proximity sensors, integrated optical readers, data process monitoring/reporting systems) and certain foreign components and materials to the scope of authority. Pursuant to 15 CFR 400.14(b), FTZ activity would be limited to the specific foreign-status 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 SICK from customs duty payments on the foreign status components and materials used in export production. On its domestic sales, SICK would be able to choose the duty rates during customs entry procedures that apply to photo-electronic industrial automation sensors, encoders, zone control sensors, proximity sensors, integrated optical readers, and data process monitoring/reporting systems (free, 2.6% or 2.7%) for the foreign status inputs noted below and in the existing scope of authority. Customs duties also could possibly be deferred or reduced on foreign status production equipment.

The components and materials sourced from abroad are: adhesives of polymers; plastic labels; plastic gaskets/washers/seals; corrugated cartons; steel screws/bolts/nuts/washers; steel and brass nuts/bolts/screws; steel brackets; inductors; electrical connectors; and, metal clamps and brackets (duty rate ranges from free to 6.5%).

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board's Executive Secretary at the address below. The closing period for their receipt is July 20, 2016.

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 FTZ Board's Web site, which is accessible via [www.trade.gov/ftz](http://www.trade.gov/ftz).

For further information, contact Pierre Duy at [Pierre.Duy@trade.gov](mailto:Pierre.Duy@trade.gov) or (202) 482-1378.

Dated: June 2, 2016.

*Executive Secretary.*

[FR Doc. 2016-13706 Filed 6-9-16; 8:45 am]

**BILLING CODE 3510-DS-P**

## DEPARTMENT OF COMMERCE

## Foreign-Trade Zones Board

[B-1-2016]

**Subzone 230D; Authorization of Limited Production Activity; Klaussner Furniture Industries, Inc. (Upholstered Furniture); Asheboro and Candor, North Carolina**

On January 5, 2016, Klaussner Furniture Industries, Inc., operator of Subzone 230D, submitted a notification of proposed production activity to the Foreign Trade-Zones (FTZ) Board for its facilities within Subzone 230D, in Asheboro and Candor, North Carolina.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (81 FR 3100, January 20, 2016). The FTZ Board has determined that further review of part of the proposed activity is warranted at this time. The production activity described in the notification is authorized on a limited basis, subject to the FTZ Act and the FTZ Board's regulations, including Section 400.14, and further subject to a restriction requiring that foreign status upholstery leather including hides (classified within HTSUS Subheadings 4107.11, 4107.92, and 4107.99) be admitted to the subzone in privileged foreign status (19 CFR 146.41).

Dated: June 2, 2016.

**Andrew McGilvray,**  
*Executive Secretary.*

[FR Doc. 2016-13720 Filed 6-9-16; 8:45 am]

**BILLING CODE 3510-DS-P**

## DEPARTMENT OF COMMERCE

## Foreign-Trade Zones Board

[S-78-2016]

**Foreign-Trade Zone 233—Dothan, Alabama, Application for Subzone, Next Level Apparel, Ashford, Alabama**

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Dothan-Houston County Foreign Trade Zone, Inc., grantee of FTZ 233, requesting subzone status for the facility of Next Level Apparel located in Ashford, Alabama. 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 June 1, 2016.

The proposed subzone (22.27 acres) is located at 814 6th Avenue in Ashford. The proposed subzone would be subject to the existing activation limit of FTZ 233. No authorization for production activity has been requested at this time.

In accordance with the Board's regulations, Camille Evans of the FTZ Staff is designated examiner to review the application and make recommendations to the Executive Secretary.

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 July 20, 2016. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to August 4, 2016.

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](http://www.trade.gov/ftz). For further information, contact Camille Evans at [Camille.Evans@trade.gov](mailto:Camille.Evans@trade.gov) or (202) 482–2350.

Dated: June 1, 2016.

**Andrew McGilvray,**  
Executive Secretary.

[FR Doc. 2016–13719 Filed 6–9–16; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

## International Trade Administration

[A-520-804]

**Certain Steel Nails From the United Arab Emirates: Preliminary Results of Antidumping Duty Administrative Review; 2014–2015**

**AGENCY:** Enforcement and Compliance, 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 steel nails (nails) from the United Arab Emirates (UAE). The period of review (POR) is May 1, 2014, through April 30, 2015.<sup>1</sup> We preliminarily find that ODS and Dubai Wire sold subject merchandise at less than normal value in the United States and that Oman Fasteners, OISI, and Precision had no shipments during the POR. Interested parties are invited to comment on these preliminary results.

**DATES:** Effective Date: June 10, 2016.

**FOR FURTHER INFORMATION CONTACT:** Bryan Hansen or Minoo Hatten, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3683, and (202) 482–1690, respectively.

**SUPPLEMENTARY INFORMATION:****Scope of the Order**

The merchandise subject to the Order<sup>2</sup> is nails from the UAE. The products are currently classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7317.00.55, 7317.00.65, and 7317.00.75. While the HTSUS subheadings are provided for convenience and customs purposes, the written product description remains dispositive. A full description of the scope of the order is contained in the Preliminary Decision Memorandum.<sup>3</sup>

<sup>1</sup> The review covers five producers/exporters of the subject merchandise, Dubai Wire FZE (Dubai Wire), Oman Fasteners LLC (Oman Fasteners), Overseas Distribution Services Inc. (ODS), Overseas International Steel Industry LLC (OISI), and Precision Fasteners LLC (Precision).

<sup>2</sup> See *Certain Steel Nails from the United Arab Emirates: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 77 FR 27421 (May 10, 2012) (*Order*).

<sup>3</sup> See the Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Enforcement and Compliance, "Decision Memorandum for Preliminary Results of Antidumping Duty

**Preliminary Determination of No Shipments**

Based on our analysis of U.S. Customs and Border Protection (CBP) information and information provided by Oman Fasteners, OISI, and Precision, we preliminarily determine that these companies had no shipments of the subject merchandise, and, therefore, no reviewable transactions, during the POR. For a full discussion of this determination, see the Preliminary Decision Memorandum.

**Methodology**

The Department is conducting this review in accordance with section 751(a)(2) of the Tariff Act of 1930, as amended (the Act). Export price is calculated in accordance with section 772 of the Act. Normal value is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying our conclusions, see Preliminary Decision Memorandum.

The Preliminary Decision Memorandum is a public document and is made available to the public via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at <http://access.trade.gov> and is available to all parties in the Central Records Unit, room B8024 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be found at <http://enforcement.trade.gov/frn/index.html>. The signed Preliminary Decision Memorandum and the electronic version of the Preliminary Decision Memorandum are identical in content. A list of the topics discussed in the Preliminary Decision Memorandum is attached as an Appendix to this notice.

**Preliminary Results of Review**

As a result of this review, we preliminarily determine that the following weighted-average dumping margins exist for the period May 1, 2014, through April 30, 2015:

Producer/exporter	Weighted-average margin (percent)
Overseas Distribution Services Inc. ....	7.80
Dubai Wire FZE <sup>4</sup> .....	7.80

Administrative Review; 2014–2015: Certain Steel Nails from the United Arab Emirates" dated concurrently with and hereby adopted by this notice (Preliminary Decision Memorandum).

## Disclosure and Public Comment

We intend to disclose the calculations performed to parties in this proceeding within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). 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.<sup>5</sup> 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.<sup>6</sup>

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. An electronically filed document must be received successfully in its entirety by the Department's electronic records system, ACCESS, by 5 p.m. Eastern Time within 30 days after the date of publication of this notice.<sup>7</sup> 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, unless extended, pursuant to section 751(a)(3)(A) of the Act.

<sup>4</sup> Dubai Wire was not selected for individual examination in this review. Generally, we look 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. Section 735(c)(5)(A) of the Act instructs that we are not to calculate an all-others rate using any zero or *de minimis* margins or any margins based on total facts available. Accordingly, our usual practice has been to average the rates for the selected companies excluding zero, *de minimis*, and rates based entirely on facts available. In this review, we calculated a weighted-average dumping margin above zero or *de minimis* for the sole respondent selected for individual examination, ODS. Based on this, and analogous to the statutory provision concerning investigations, we preliminarily determine that a reasonable method for determining the weighted-average dumping margin for Dubai Wire in this review is to assign the rate calculated for ODS.

<sup>5</sup> See 19 CFR 351.309(d).

<sup>6</sup> See 19 CFR 351.303 (for general filing requirements).

<sup>7</sup> See 19 CFR 351.310(c).

## Assessment Rates

Upon completion of the administrative review, the Department shall determine and CBP shall assess antidumping duties on all appropriate entries. If ODS' weighted-average dumping margin continues to be 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 each importer's examined sales and the total entered value of the sales in accordance with 19 CFR 351.212(b)(1). If ODS' weighted-average dumping margin is 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."<sup>8</sup>

For entries of subject merchandise during the POR produced by ODS for which it did not know its merchandise was destined for the United States, 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.

Consistent with our practice, if we continue to find that Oman Fasteners, OISI, and Precision had no shipments of subject merchandise to the United States in the final results of this review, we intend to instruct CBP to liquidate any existing entries of merchandise produced by Oman Fasteners, OISI, and Precision and exported by other parties at the all-others rate.

For Dubai Wire, the company not selected for individual examination, we will instruct CBP to apply the rate assigned to it in the final results of this review, to all entries of subject merchandise produced and/or exported by Dubai Wire.

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 nails from the UAE entered, or withdrawn from warehouse, for consumption on or after the date of publication as provided by

<sup>8</sup> See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification*, 77 FR 8101, 8102 (February 14, 2012).

section 751(a)(2) of the Act: (1) The cash deposit rates for ODS and Dubai Wire will be the rates established in the final results of this administrative review; (2) for merchandise exported by manufacturers or exporters not covered in this review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; (4) the cash deposit rate for all other manufacturers or exporters will continue to be 4.30 percent, the all-others rate established in the *Order*. 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 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: June 3, 2016.

**Paul Piquado,**

*Assistant Secretary for Enforcement and Compliance.*

## Appendix—List of Topics Discussed in the Preliminary Decision Memorandum

- Summary
- Background
- Scope of the Order
- Preliminary Determination of No Shipments Rate for Respondent Not Selected for Individual Examination
- Discussion of the Methodology
  - A. Comparisons to Normal Value
    - 1. Determination of Comparison Method
    - 2. Results of Differential Pricing Analysis
  - B. Product Comparisons
  - C. Date of Sale
  - D. U.S. Price
  - E. Normal Value
    - 1. Home Market Viability and Comparison Market
    - 2. Level of Trade
  - 3. Calculation of Normal Value Based on Constructed Value
  - 4. Cost of Production
  - F. Verification

G. Currency Conversion  
Recommendation  
[FR Doc. 2016-13704 Filed 6-9-16; 8:45 am]  
BILLING CODE 3510-DS-P

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-570-827]

#### Certain Cased Pencils From the People's Republic of China: Preliminary Results of Antidumping Duty New Shipper Review; 2014-2015

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (the Department) is conducting a new shipper review (NSR) of the antidumping duty order on certain cased pencils from the People's Republic of China (PRC). The NSR covers the exporter Wah Yuen Stationery Co., Ltd. and its affiliated producer, Shandong Wah Yuen Stationery Co., Ltd. (collectively, Wah Yuen). The period of review (POR) is December 1, 2014, through May 31, 2015. The Department preliminarily finds that Wah Yuen made a sale of subject merchandise at below normal value. Interested parties are invited to comment on these preliminary results.

**DATES:** Effective Date: June 10, 2016.

#### FOR FURTHER INFORMATION CONTACT:

Mary Kolberg, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482-1785.

#### Scope of the Order

Imports covered by this order are shipments of certain cased pencils of any shape or dimension which are writing and/or drawing instruments that feature cores of graphite or other materials, encased in wood and/or man-made materials, whether or not decorated and whether or not tipped (*e.g.*, with erasers, *etc.*) in any fashion, and either sharpened or unsharpened. The pencils subject to the order are currently classifiable under subheading 9609.10.00 of the Harmonized Tariff Schedule of the United States (HTSUS). A full description of the scope of the order is contained in the Preliminary Decision Memorandum.<sup>1</sup> Although the HTSUS subheadings are provided for convenience and customs purposes, the written product description is dispositive.

#### Methodology

The Department is conducting this review in accordance with section

751(a)(2)(B) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.214. For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum. A list of topics discussed in the Preliminary Decision Memorandum is in the attached Appendix to this notice.

The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's centralized electronic service system (ACCESS). ACCESS is available to registered users at <http://access.trade.gov>, and it is available to all parties in the Department's Central Records Unit, B8024 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://enforcement.trade.gov/frn/>. The signed Preliminary Decision Memorandum and the electronic versions of the Preliminary Decision Memorandum are identical in content.

#### Preliminary Results of New Shipper Review

The Department preliminarily determines that the following weighted-average dumping margin exists for the POR December 1, 2014, through May 31, 2015:

Exporter	Producer	Weighted average dumping margin (percent)
Wah Yuen Stationery Co., Ltd. ....	Shandong Wah Yuen Stationery Co., Ltd..	31.03

#### Disclosure and Public Comment

The Department will disclose the analysis performed for these preliminary results to the parties within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). Interested parties may submit case briefs by no later than 30 days after the date of publication of these preliminary results of review.<sup>2</sup> Rebuttals, limited to issues raised in the case briefs, may be filed by no later than five days after the case briefs are filed.<sup>3</sup>

Any interested party may request a hearing within 30 days of publication of this notice.<sup>4</sup> Hearing requests should contain the following information: (1) The party's name, address, and telephone number; (2) the number of

participants; and (3) a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs. If a request for a hearing is made, parties will be notified of the time and date for the hearing to be held at the U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230.<sup>5</sup>

Unless the deadline is extended pursuant to section 751(a)(2)(B)(iii), the Department intends to issue the final results of this new shipper review, which will include the results of its analysis of all issues raised in the case and rebuttal briefs, within 90 days of publication of these preliminary results, pursuant to section 751(a)(2)(B)(iv) of the Act.

#### Assessment Rates

Upon issuance of the final results, pursuant to 19 CFR 351.212(b), the Department will determine, and the U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries.<sup>6</sup> The Department intends to issue assessment instructions to CBP 15 days after the date of publication of the final results of this new shipper review.

If the respondent's weighted average dumping margin is not zero or *de minimis* (*i.e.*, less than 0.50 percent) in the final results, the Department will calculate importer-specific assessment rates on the basis of the ratio of the total amount of dumping calculated for each importer's examined sales to the total

<sup>1</sup> See Memorandum to Paul Piquado, Assistant Secretary for Enforcement and Compliance, from Christian Marsh, Deputy Assistant Secretary, re: "Decision Memorandum for Preliminary Results of

Antidumping Duty New Shipper Review: Certain Cased Pencils from the People's Republic of China," dated June 2, 2016.

<sup>2</sup> See 19 CFR 351.309(c).

<sup>3</sup> See 19 CFR 351.309(d).

<sup>4</sup> See 19 CFR 351.310(c).

<sup>5</sup> See 19 CFR 351.310(d).

<sup>6</sup> See 19 CFR 351.212(b)(1).

entered value of those sales, in accordance with 19 CFR 351.212(b)(1). Where an importer-specific *ad valorem* rate is not zero or *de minimis*, the Department will instruct CBP to collect the appropriate antidumping duties at the time of liquidation.<sup>7</sup> Where either a respondent's weighted average dumping margin is zero or *de minimis*, or an importer-specific *ad valorem* rate is zero or *de minimis*, the Department will instruct CBP to liquidate appropriate entries without regard to antidumping duties.<sup>8</sup>

For entries that were not reported in the U.S. sales data submitted by Wah Yuen, the Department will instruct CBP to liquidate such entries at the rate for the PRC-wide entity.<sup>9</sup> The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future cash deposits of estimated antidumping duties, where applicable.

#### Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this new shipper review for shipments of the subject merchandise from the PRC entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: For merchandise produced by Shandong Wah Yuen Stationery Co., Ltd. and exported by Wah Yuen Stationery Co., Ltd., the cash deposit rates will be equal to the weighted-average dumping margin established in the final results of this review (except, if the rate is zero or *de minimis*, then zero cash deposit will be required). These cash deposit requirements, when imposed, shall remain in effect until further notice.

#### Notification to Importers

This notice also serves as a reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during the POR. 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 Regarding Administrative Protective Orders

This notice serves as a reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and the terms of an APO is a violation subject to sanction.

#### Notification to Interested Parties

These preliminary results are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.214 and 351.221(b)(4).

Dated: June 2, 2016.

**Paul Piquado,**

*Assistant Secretary for Enforcement and Compliance.*

#### Appendix—List of Topics Discussed in the Preliminary Decision Memorandum

- I. Summary
- II. Background
- III. Scope of the Order
- IV. Discussion of the Methodology
- V. Date of Sale
- VI. Comparisons to Normal Value
- VII. Results of Differential Pricing Analysis
- VIII. U.S. Price
- IX. Normal Value
- X. Factor Valuations
- XI. Currency Conversion
- XII. Recommendation

[FR Doc. 2016-13721 Filed 6-9-16; 8:45 am]

**BILLING CODE 3510-DS-P**

#### DEPARTMENT OF COMMERCE

##### International Trade Administration

##### United States Travel and Tourism Advisory Board: Meeting of the United States Travel and Tourism Advisory Board

**AGENCY:** International Trade Administration, U.S. Department of Commerce.

**ACTION:** Notice of an open meeting.

**SUMMARY:** The United States Travel and Tourism Advisory Board (Board) will hold the first meeting of its newly appointed members on Thursday, June 30, 2016. The Board was re-chartered in August 2015, to advise the Secretary of Commerce on matters relating to the travel and tourism industry. At the meeting, members will be sworn-in and will begin a discussion of the work they will undertake during their appointment

term. They are expected to discuss issues impacting the travel and tourism industry, including travel promotion, visa policy, travel facilitation, data and research, sustainable tourism, and domestic travel and tourism issues, in addition to other topics. The agenda may change to accommodate Board business. The final agenda will be posted on the Department of Commerce Web site for the Board at <http://trade.gov/ttab>, at least one week in advance of the meeting.

**DATES:** Thursday, June 30, 2016, 9 a.m.–12 p.m. EDT. The deadline for members of the public to register, including requests to make comments during the meeting and for auxiliary aids, or to submit written comments for dissemination prior to the meeting, is 5 p.m. EDT on June 23, 2016.

**ADDRESSES:** The meeting will be held at the Department of Commerce. Requests to register (including to speak or for auxiliary aids) and any written comments should be submitted to: U.S. Travel and Tourism Advisory Board, U.S. Department of Commerce, Room 4043, 1401 Constitution Avenue NW., Washington, DC 20230, [OACIO@trade.gov](mailto:OACIO@trade.gov). Members of the public are encouraged to submit registration requests and written comments via email to ensure timely receipt.

**FOR FURTHER INFORMATION CONTACT:** Li Zhou, the United States Travel and Tourism Advisory Board, Room 4043, 1401 Constitution Avenue NW., Washington, DC 20230, telephone: 202-482-4501, email: [OACIO@trade.gov](mailto:OACIO@trade.gov).

#### SUPPLEMENTARY INFORMATION:

**Background:** The Board advises the Secretary of Commerce on matters relating to the U.S. travel and tourism industry.

**Public Participation:** The meeting will be open to the public and will be accessible to people with disabilities. All guests are required to register in advance by the deadline identified under the DATES caption. Requests for auxiliary aids must be submitted by the registration deadline. Last minute requests will be accepted, but may be impossible to fill. There will be fifteen (15) minutes allotted for oral comments from members of the public joining the meeting. To accommodate as many speakers as possible, the time for public comments may be limited to three (3) minutes per person. Individuals wishing to reserve speaking time during the meeting must submit a request at the time of registration, as well as the name and address of the proposed speaker. If the number of registrants requesting to make statements is greater than can be reasonably accommodated during the

<sup>7</sup> See 19 CFR 351.212(b)(1).

<sup>8</sup> See 19 CFR 351.106(c)(2).

<sup>9</sup> For a full discussion of this practice, see *Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties*, 76 FR 65694 (October 24, 2011).

meeting, the International Trade Administration may conduct a lottery to determine the speakers. Speakers are requested to submit a written copy of their prepared remarks by 5:00 p.m. EDT on Thursday, June 23, 2016, for inclusion in the meeting records and for circulation to the members of the Travel and Tourism Advisory Board.

In addition, any member of the public may submit pertinent written comments concerning the Board's affairs at any time before or after the meeting. Comments may be submitted to Li Zhou at the contact information indicated above. To be considered during the meeting, comments must be received no later than 5:00 p.m. EDT on Thursday, June 23, 2016, to ensure transmission to the Board prior to the meeting. Comments received after that date and time will be distributed to the members but may not be considered on the call. Copies of Board meeting minutes will be available within 90 days of the meeting.

Dated: June 6, 2016.

**Li Zhou,**

*Executive Secretary, United States Travel and Tourism Advisory Board.*

[FR Doc. 2016-13775 Filed 6-9-16; 8:45 am]

**BILLING CODE 3510-DR-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### Proposed Information Collection; Comment Request; Pacific Coast Groundfish Trawl Rationalization Program Permit and License Information Collection

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

**DATES:** Written comments must be submitted on or before August 9, 2016.

**ADDRESSES:** Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at [Jjessup@doc.gov](mailto:Jjessup@doc.gov)).

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or

copies of the information collection instrument and instructions should be directed to Sarah Towne, NMFS West Coast Region, 7600 Sand Point Way NE., Seattle, WA 98103, (206) 526-4140, or [sarah.towne@noaa.gov](mailto:sarah.towne@noaa.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Abstract

The National Marine Fisheries Service (NMFS) requests comments on the extension of a currently approved information collection for the West Coast Region's Pacific Coast Groundfish Trawl Rationalization Program.

The Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, provides that the Secretary of Commerce is responsible for the conservation and management of marine fisheries resources in the Exclusive Economic Zone (3-200 miles) of the United States. NMFS West Coast Region manages the Pacific Coast Groundfish Fishery in the Exclusive Economic Zone (EEZ) off of Washington, Oregon, and California under the Pacific Coast Groundfish Fishery Management Plan.

In January 2011, NMFS implemented a trawl rationalization program, which is a catch share program, for the Pacific Coast Groundfish Limited Entry Trawl Fishery. The program was implemented through Amendments 20 and 21 to the Pacific Coast Groundfish Fishery Management Plan and the corresponding implementing regulations at 50 CFR part 660. Amendment 20 established the trawl rationalization program that consists of: an individual fishing quota (IFQ) program for the shorebased trawl fleet (including whiting and nonwhiting sectors), and cooperative programs for the at-sea mothership and catcher/processor trawl fleets (whiting only). Amendment 21 set long-term allocations for the limited entry trawl sectors of certain groundfish species.

Under the trawl rationalization program, new permits, accounts, endorsements and licenses were established. These consist of: Quota share (QS) permits/accounts, vessel accounts, first receiver site licenses, mothership endorsements on certain limited entry trawl permits, mothership catcher vessel endorsements on certain limited entry trawl permits, catcher/processor endorsements on certain limited entry trawl permits, a mothership cooperative permit, and a catcher/processor cooperative permit. NMFS collects information from program participants required to: (1) Establish new permits, accounts, and licenses; (2) renew permits, accounts, and licenses; (3) allow trading of QS

percentages and quota pounds (QP) in online QS and vessel accounts, and allow transfer of catch history assignments between limited entry trawl permits; (4) track compliance with program control limits; and (5) implement other features of the regulations pertaining to permits and licenses. NMFS requests comments on the extension of these permit information collections.

As part of this request, NMFS plans to remove the notary requirement on all of our forms in this collection, which will save time and money for permit, vessel, and license owners.

##### II. Method of Collection

Information is collected by mail and electronically.

The following information is collected by mail: QS permit application forms; late QS permit renewals; vessel account registration requests; late vessel account renewals; trawl identification of ownership interest forms for new applicants, mothership catcher vessel endorsed limited entry permit owners, and mothership permit owners; first receiver site license application forms; mothership permit renewal forms; mothership permit change of vessel registration, permit owner, or vessel owner application forms; mothership cooperative permit application forms; change of mothership catcher vessel endorsement and catch history assignment registration forms; mutual agreement exception forms; mothership withdrawal forms; catcher/processor cooperative permit application forms; material change forms; and QS abandonment requests.

The following information is collected electronically: QS permit renewals; QS percent transfers; QP transfers from a QS account to a vessel account; vessel account renewals; QP transfers from a vessel account to another vessel account; and trawl identification of ownership interest forms for online QS and vessel account renewals.

##### III. Data

*OMB Control Number:* 0648-0620.

*Form Number(s):* None.

*Type of Review:* Extension of a currently approved collection, with revision.

*Affected Public:* Business or other for-profit organizations; Not-for-profit institutions; State, Local, or Tribal government.

*Estimated Number of Respondents:* 410 unique respondents.

*Estimated Time per Response:* QS permit/account application form—30 minutes; QS permit/account online renewal—10 minutes; QS permit/

account late renewal form—15 minutes; QS transfer—10 minutes; QP transfer from QS account to vessel account—8 minutes; vessel account registration request—15 minutes; vessel account online renewal—10 minutes; vessel account late renewal form—15 minutes; QP transfer from vessel account to another vessel account—8 minutes; trawl identification of ownership interest form for new entrants—45 minutes; trawl identification of ownership interest form for renewals—5 minutes; first receiver site license application form for new entrants—210 minutes; first receiver site license application form for re-registering license holders—110 minutes; mothership permit renewal form—20 minutes; mothership permit change of vessel registration, permit owner, or vessel owner application form—45 minutes; mothership cooperative permit application form—240 minutes; change of mothership catcher vessel endorsement and catch history assignment registration form—45 minutes; mutual agreement exception—60 minutes; mothership withdrawal—120 minutes; catcher/processor cooperative permit application form—120 minutes; QS abandonment request—10 minutes.

*Estimated Total Annual Burden Hours:* 640.

*Estimated Total Annual Cost to Public:* \$12,475.

#### IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: June 7, 2016.

**Sarah Brabson,**  
NOAA PRA Clearance Officer.

[FR Doc. 2016-13748 Filed 6-9-16; 8:45 am]

BILLING CODE 3510-22-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

RIN 0648-XE614

#### Endangered Species; File No. 20114

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

**ACTION:** Notice; receipt of application.

**SUMMARY:** Notice is hereby given that Commonwealth of Northern Mariana Islands Department of Lands & Natural Resources, Sea Turtle Program, Caller Box 10007 Saipan, MP 96950 Northern Mariana Islands [Responsible Party: Richard B. Seman,], has applied in due form for a permit to take green (*Chelonia mydas*) and hawksbill (*Eretmochelys imbricata*) sea turtles for purposes of scientific research.

**DATES:** Written, telefaxed, or email comments must be received on or before July 11, 2016.

**ADDRESSES:** The application and related documents are available for review by selecting "Records Open for Public Comment" from the "Features" box on the Applications and Permits for Protected Species (APPS) home page, <https://apps.nmfs.noaa.gov>, and then selecting File No. 20114 from the list of available applications.

These documents are also available upon written request or by appointment in the Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427-8401; fax (301) 713-0376.

Written comments on this application should be submitted to the Chief, Permits and Conservation Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713-0376, or by email to [NMFS.Pr1Comments@noaa.gov](mailto:NMFS.Pr1Comments@noaa.gov). Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

**FOR FURTHER INFORMATION CONTACT:** Arturo Herrera or Amy Hapeman (301) 427-8401.

**SUPPLEMENTARY INFORMATION:** The subject permit is requested under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations

governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222-226).

The applicant requests a five-year permit to research green and hawksbill sea turtles within the U.S. CNMI. The purpose of the project is to characterize the population structure, size class composition, foraging ecology, health, and migration patterns of green and hawksbill turtles in the region. Researchers would be authorized to capture 265 green and 40 hawksbill sea turtles annually by hand-capture and perform the following procedures: Examine; measure; photograph; video; weigh; flipper and Passive Integrated Transponder (PIT) tag; temporary carapace mark; oral swab, tissue, and blood sample. 235 green and 20 hawksbill sea turtles will receive scute sampling, while 30 captured hawksbills and 20 greens will have satellite transmitters attached by epoxy. In addition, dead carcasses, tissues and parts may be salvaged from up to 15 greens and 10 hawksbills annually.

Dated: June 6, 2016.

**Julia Harrison,**

Chief, Permits and Conservation Division,  
Office of Protected Resources, National  
Marine Fisheries Service.

[FR Doc. 2016-13713 Filed 6-9-16; 8:45 am]

BILLING CODE 3510-22-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

RIN 0648-BA21

#### Notice of Availability of a Draft Environmental Impact Statement for the Proposed Expansion for the Flower Garden Banks National Marine Sanctuary; Announcement of Public Meetings

**AGENCY:** Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

**ACTION:** Notice of availability and public meetings.

**SUMMARY:** The National Oceanic and Atmospheric Administration (NOAA) has prepared a draft environmental impact statement for the proposed actions of boundary expansion, and application of existing regulations and management plan actions to new geographic areas of the Flower Garden Banks National Marine Sanctuary (FGBNMS or sanctuary). The purpose of this action is to provide sanctuary

protection for a number of nationally significant reefs and banks in the northcentral Gulf of Mexico. Five alternatives to implement these proposed actions are analyzed for potential effects on the human environment. NOAA is soliciting public comment on the draft environmental impact statement.

**DATES:** Comments on this draft environmental impact statement will be considered if received by August 19, 2016. Public meetings will be held in the following locations and times as indicated below:

**(1) Galveston, Texas**

*Date:* July 12, 2016  
*Location:* Flower Garden Banks National Marine Sanctuary Office  
*Address:* 4700 Avenue U, Building 216, Galveston, TX 77551  
*Time:* 5:30–7:30 p.m.

**(2) Houston, Texas**

*Date:* July 13, 2016  
*Location:* Trini Mendenhall Community Center  
*Address:* 1414 Wirt Rd., Houston, TX 77055  
*Time:* 5:30–7:30 p.m.

**(3) New Orleans, Louisiana**

*Date:* July 19, 2016  
*Location:* Hilton New Orleans Airport, Segnette Room  
*Address:* 901 Airline Drive, Kenner, LA 70062  
*Time:* 5:30–7:30 p.m.

**(4) Mobile, Alabama**

*Date:* July 20, 2016  
*Location:* Five Rivers Delta Center  
*Address:* 30945 Five Rivers Blvd., Spanish Fort, AL 36527  
*Time:* 5:30–7:30 p.m.

**(5) Lafayette, Louisiana**

*Date:* July 21, 2016  
*Location:* Estuarine Habitats and Coastal Fisheries Center  
*Address:* 646 Cajundome Blvd., Lafayette, LA 70506  
*Time:* 5:30–7:30 p.m.

**ADDRESSES:** You may submit comments on this document, identified by NOAA–NOS–2016–0059, by any of the following methods:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to [www.regulations.gov/#/docketDetail;D=NOAA-NOS-2016-0059](http://www.regulations.gov/#/docketDetail;D=NOAA-NOS-2016-0059), click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.
- **Mail:** Flower Garden Banks National Marine Sanctuary, NOAA, 4700 Avenue U, Building 216,

Galveston, TX 77551, Attn: George Schmahl, Superintendent.

**Instructions:** Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NOAA. All comments received are a part of the public record and will generally be posted for public viewing on [www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NOAA will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous).

**FOR FURTHER INFORMATION CONTACT:** Kelly Drinnen, Education and Outreach Specialist, Flower Garden Banks National Marine Sanctuary at 409–621–5151 ext. 102 or via email at [fgbexpansion@noaa.gov](mailto:fgbexpansion@noaa.gov).

Copies of the draft environmental impact statement can be downloaded or viewed on the internet at [www.regulations.gov](http://www.regulations.gov) (search for docket #NOAA–NOS–2016–0059) or at <http://flowergarden.noaa.gov>. Copies can also be obtained by contacting the person identified under **FOR FURTHER INFORMATION CONTACT**.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

*Flower Garden Banks National Marine Sanctuary*

Located in the northwestern Gulf of Mexico, 70 to 115 miles off the coasts of Texas and Louisiana, Flower Garden Banks National Marine Sanctuary (FGBNMS or sanctuary) currently includes three separate undersea features: East Flower Garden Bank; West Flower Garden Bank; and Stetson Bank. The banks range in depth from 55 feet to nearly 500 feet and provide a wide range of habitat conditions that support several distinct biological communities, including the northernmost coral reefs in the continental United States. These and similar formations throughout the north central Gulf of Mexico provide the foundation for significant habitat for a variety of species. The combination of location and geology makes FGBNMS extremely productive and diverse, and presents a unique set of challenges for managing and protecting its natural wonders. East and West Flower Garden Banks were designated a national marine sanctuary in 1992 for purposes of protecting and managing the conservation, ecological, recreational, research, education, historic and aesthetic resources and qualities of

these areas. Stetson Bank was added to the sanctuary by Congress in 1996 (Pub. Law 104–283).

The Office of National Marine Sanctuaries (ONMS) is required to periodically review sanctuary management plans to ensure that sanctuary sites continue to best conserve, protect and enhance their nationally significant living and cultural resources. In 2012 NOAA updated and revised the 1991 Flower Garden Banks Management Plan to address recent scientific discoveries, advancements in managing marine resources, and new resource management issues. As a result of this review, the FGBNMS Advisory Council recommended expanding the sanctuary to provide similar protections to additional banks in the north central Gulf of Mexico.

On February 3, 2015 NOAA initiated the public scoping process (80 FR 5699) to consider expanding FGBNMS to include additional areas in the Gulf of Mexico. The public scoping period ended on April 6, 2015, during which time three public hearings were held and NOAA received both written and oral comments on the concept of expanding the boundaries of the sanctuary. NOAA received approximately 200 comments during that scoping period, generally supportive of the concept to expand the sanctuary boundary. Some comments were supportive with conditions tied to specific issues such as access to oil and gas resources and fisheries concerns. This information was considered during the development of the range of alternatives in the expansion proposal.

The expansion of the sanctuary to include additional nationally significant habitat is supported for a number of reasons. In general, the northern Gulf of Mexico is a heavily utilized and industrialized region, and there is a significant concern about impacts from bottom-disturbing activities (e.g. some activities related to oil and gas exploration and production, fishing with bottom tending gear, vessel anchoring, and salvage activities) on the sensitive biological resources and geological features associated with many reefs and banks in the area. Additional opportunities for research, exploration, and education related to these significant ocean resources is critical for understanding changes occurring in the environment, fostering a stewardship ethic, and developing an understanding of the ecosystem services these resources provide for communities throughout the Gulf of Mexico region.

## II. NOAA Proposed Action

NOAA is releasing for public comment a DEIS that analyzes a proposed action to expand the FGBNMS boundary to include additional bank and reef areas in the northcentral Gulf of Mexico and to apply the existing sanctuary regulations and management regime to the expanded area. NOAA developed five alternatives for expanding the FGBNMS boundary. The alternatives range from taking no action to adding as much as an additional approximate 880 square miles.

NOAA's preferred alternative (Alternative 3) is the expansion of the existing boundaries from ~56 square miles to an area that encompasses ~383 square miles of waters in the northwestern Gulf of Mexico. This alternative would add 15 additional banks ranging from 70 to 120 miles off-shore that are comprised of reefs and bottom features that provide habitat for fish and other biological resources that serve as engines of sustainability for much of the Gulf of Mexico.

The proposed sanctuary expansion advances NOAA's mission to conserve and manage coastal and marine ecosystems and resources and furthers the FGBNMS mission to identify, protect, conserve, and enhance the natural and cultural resources, values, and qualities of FGBNMS and its regional environment for this and future generations. The need for the proposed sanctuary expansion is informed by widespread acute and chronic threats to marine habitat in the north central Gulf of Mexico that can most effectively be addressed through NOAA's evaluation and implementation of the comprehensive suite of habitat conservation and management actions made possible by FGBNMS expansion to ensure that valuable natural resources are available to future generations of Americans.

NOAA is seeking public comment on the DEIS which is available at <http://flowergarden.noaa.gov/> or may be obtained by contacting the individual listed under the heading **FOR FURTHER INFORMATION CONTACT**.

**Authority:** 16 U.S.C. 1431 *et seq.*

Dated: June 1, 2016.

**John Armor,**

*Acting Director, Office of National Marine Sanctuaries.*

[FR Doc. 2016-13661 Filed 6-9-16; 8:45 am]

**BILLING CODE 3510-NK-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648-XE404 and 0648-XE486**

### Marine Mammals; File Nos. 18978 and 19768

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

**ACTION:** Notice; issuance of permits.

**SUMMARY:** Notice is hereby given that permits have been issued to the following entities for research on marine mammal parts:

File No. 18978: Pam Miller, Alaska Community Action on Toxics, 505 West Northern Lights Blvd., Suite 205, Anchorage, AK 99503; and

File No. 19768: Evin Hildebrandt, Ph.D., University of Massachusetts Medical School, 55 Lake Avenue, S3-221, Worcester, MA 01655.

**ADDRESSES:** The permits and related documents are available for review upon written request or by appointment in the Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427-8401; fax (301) 713-0376.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Skidmore or Amy Sloan, (301) 427-8401.

**SUPPLEMENTARY INFORMATION:** On March 8, 2016 (File No. 18978; 81 FR 12075) and March 11, 2016 (File No. 19768; 81 FR 12879), notices were published in the **Federal Register** that requests for permits to conduct research on marine mammal parts had been submitted by the above-named applicants. The requested permits have been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222-226).

File No. 18978 (Miller) authorizes the receipt and export of subsistence hunted marine mammal parts. Researchers will work with Yupik households and local hunters on St. Lawrence Island, Alaska, to obtain samples from up to 8 animals per year from ringed seal (*Pusa hispida*); bearded seal (*Erignathus barbatus*); and ribbon seal (*Histiophoca fasciata*) and 9 animals per year from bowhead whale

(*Balaena mysticetus*) and spotted seal (*Phoca largha*). Samples would be measured for contaminant levels to determine marine mammal exposure to polybrominated diphenyl ethers and perfluorinated compounds. No live animals would be affected. The permit is valid through April 30, 2021.

File No. 19768 (Hildebrandt) authorizes the receipt of cell lines from other researchers and the creation of cell lines from animal tissues obtained from the stranding network under a regional authorization letter for scientific research purposes. Up to 15 cell lines would be received or created annually from certain cetacean species. These cell lines would be used to study the evolution of endogenous viruses (viruses that integrate into the genome of the host) using the DNA and RNA sequencing. No live animals would be affected. The permit is valid through May 31, 2021.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a final determination has been made that the activities proposed are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

As required by the ESA, issuance of these permits was based on a finding that such permits: (1) Were applied for in good faith; (2) will not operate to the disadvantage of such endangered species; and (3) are consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: June 6, 2016.

**Julia Harrison,**

*Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2016-13714 Filed 6-9-16; 8:45 am]

**BILLING CODE 3510-22-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648-XE619**

### Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries; Application for Exempted Fishing Permits

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

**ACTION:** Notice; request for comments.

**SUMMARY:** The Assistant Regional Administrator for Sustainable Fisheries, Greater Atlantic Region, NMFS

(Assistant Regional Administrator), has made a preliminary determination that an exempted fishing permit application contains all of the required information and warrants further consideration. This permit would allow one commercial fishing vessel to test the economic viability of using electric rod and reel gear to target pollock in the Western Gulf of Maine Closure Area, and to temporarily retain undersized catch for measurement and data collection. The privately-funded study would be conducted by a commercial fisherman as a pilot demonstration project.

Regulations under the Magnuson-Stevens Fishery Conservation and Management Act require publication of this notification to provide interested parties the opportunity to comment on applications for proposed exempted fishing permits.

**DATES:** Comments must be received on or before June 27, 2016.

**ADDRESSES:** You may submit written comments by any of the following methods:

- *Email:* NMFS.GAR.EFP@noaa.gov. Include in the subject line "Comments on Rod and Reel Fishing in WGOM Closed Area EFP."

- *Mail:* John K. Bullard, Regional Administrator, NMFS, Greater Atlantic Regional Fisheries Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope "Comments Rod and Reel Fishing in WGOM Closed Area EFP."

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Scheimer, Fisheries Management Specialist, 978-281-9236, [Elizabeth.scheimer@noaa.gov](mailto:Elizabeth.scheimer@noaa.gov).

**SUPPLEMENTARY INFORMATION:** A commercial fisherman submitted a complete application for an exempted fishing permit (EFP) on May 4, 2016, to conduct commercial fishing activities that the regulations would otherwise restrict. The EFP would authorize one vessel to use electric rod and reel gear in the Western Gulf of Maine (GOM) Closure Area and to temporarily retain undersized catch for measurement and data collection.

The project, titled "Utilization of Electric Rod and Reel to Target Pollock in WGOM Closed Area," is privately funded by a commercial fisherman as a pilot study to test the economic viability of using electric rod and reel gear to target pollock while avoiding non-target catch. The study would take place in the Western GOM Closure Area, from June through August 2016, with one vessel planning to fish up to 5 days per month. The exemptions are necessary because groundfish vessels on commercial groundfish trips are prohibited from

fishing in the Western GOM Closure Area and from retaining undersized groundfish. The vessel would use four electric rod and reels each day and fish for at least 4 to 6 hours, with an additional 5 to 6 hours of steaming, for a total trip of approximately 12 hours. Fishing would primarily occur within the Western GOM Closure Area, in the area known as "The Fingers," with some effort being conducted outside the area. The researcher is requesting access to the Western GOM Closure Area based on his belief that pollock is concentrated in this area, and that they can be targeted with minimal catch of non-target species.

A research technician would accompany all trips that occur under this EFP to measure and document fish caught (retained and discarded), document fishing gear, bait, location, and fishing conditions to evaluate gear performance. Undersized fish would be discarded as quickly as possible after sampling. All Northeast multispecies of legal size would be landed, with all catch being attributed to the sector vessel's annual catch entitlement. Proceeds from the sales would be retained by the vessel. The participating vessel would not be exempt from any sector monitoring or reporting requirements.

If approved, the applicant may request minor modifications and extensions to the EFP throughout the year. EFP modifications and extensions may be granted without further notice if they are deemed essential to facilitate completion of the proposed research and have minimal impacts that do not change the scope or impact of the initially approved EFP request. Any fishing activity conducted outside the scope of the exempted fishing activity would be prohibited.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: June 6, 2016.

**Alan D. Risenhoover,**  
*Director, Office of Sustainable Fisheries,*  
*National Marine Fisheries Service.*

[FR Doc. 2016-13728 Filed 6-9-16; 8:45 am]

**BILLING CODE 3510-22-P**

## DEPARTMENT OF COMMERCE

### United States Patent and Trademark Office

[Docket No.: PTO-P-2016-00014]

### Grant of Interim Extension of the Term of U.S. Patent No. 5,912,231; LOCILEX® (pexiganan)

**AGENCY:** United States Patent and Trademark Office, Commerce.

**ACTION:** Notice of Interim Patent Term Extension.

**SUMMARY:** The United States Patent and Trademark Office has issued an order granting interim extension under 35 U.S.C. 156(d)(5) for a one-year interim extension of the term of U.S. Patent No. 5,912,231.

### FOR FURTHER INFORMATION CONTACT:

Mary C. Till by telephone at (571) 272-7755; by mail marked to her attention and addressed to the Commissioner for Patents, Mail Stop Hatch-Waxman PTE, P.O. Box 1450, Alexandria, VA 22313-1450; by fax marked to her attention at (571) 273-7755; or by email to [Mary.Till@uspto.gov](mailto:Mary.Till@uspto.gov).

**SUPPLEMENTARY INFORMATION:** Section 156 of Title 35, United States Code, generally provides that the term of a patent may be extended for a period of up to five years if the patent claims a product, or a method of making or using a product, that has been subject to certain defined regulatory review, and that the patent may be extended for interim periods of up to one year if the regulatory review is anticipated to extend beyond the expiration date of the patent.

On May 26, 2016, Scripps Research Institute, the patent owner of record, timely filed an application under 35 U.S.C. 156(d)(5) for an interim extension of the term of U.S. Patent No. 5,912,231. The patent claims a composition of the active ingredient pexiganan of the human drug product LOCILEX®. The application for patent term extension indicates that New Drug Application (NDA) 29-930 was submitted to the Food and Drug Administration (FDA) on July 24, 1998.

Review of the patent term extension application indicates that, except for permission to market or use the product commercially, the subject patent would be eligible for an extension of the patent term under 35 U.S.C. 156, and that the patent should be extended for one year as required by 35 U.S.C. 156(d)(5)(B). Because the regulatory review period will continue beyond the original expiration date of the patent, June 15, 2016, interim extension of the patent term under 35 U.S.C. 156(d)(5) is appropriate.

An interim extension under 35 U.S.C. 156(d)(5) of the term of U.S. Patent No. 5,912,231 is granted for a period of one year from the original expiration date of the patent.

Dated: June 6, 2016.

**Robert Bahr,**

*Deputy Commissioner for Patent Examination Policy, United States Patent and Trademark Office.*

[FR Doc. 2016-13764 Filed 6-9-16; 8:45 am]

**BILLING CODE 3510-16-P**

## DEPARTMENT OF COMMERCE

### United States Patent and Trademark Office

[Docket No. PTO-P-2016-0020]

### Patent and Trademark Public Advisory Committees

**AGENCY:** United States Patent and Trademark Office, Commerce.

**ACTION:** Notice and request for nominations for the Patent and Trademark Public Advisory Committees.

**SUMMARY:** On November 29, 1999, the President signed into law the Patent and Trademark Office Efficiency Act (the “Act”), Public Law 106-113, which, among other things, established two Public Advisory Committees to review the policies, goals, performance, budget and user fees of the United States Patent and Trademark Office (USPTO) with respect to patents, in the case of the Patent Public Advisory Committee, and with respect to trademarks, in the case of the Trademark Public Advisory Committee, and to advise the Director on these matters (now codified at 35 U.S.C. 5). The America Invents Act Technical Corrections Act made several amendments to the 1999 Act, including the requirement that the terms of the USPTO Public Advisory Committee members be realigned by 2014, so that December 1 be used as the start and end date, with terms staggered so that each year three existing terms expire and three new terms begin on December 1. Through this Notice, the USPTO is requesting nominations for up to three (3) members of the Patent Public Advisory Committee, and for up to three (3) members of the Trademark Public Advisory Committee, for terms of three years that begin on December 1, 2016.

**DATES:** Nominations must be postmarked or electronically transmitted on or before July 25, 2016.

**ADDRESSES:** Persons wishing to submit nominations should send the nominee’s resumé by postal mail to Vikrum D. Aiyer, Chief of Staff, Office of the Under Secretary of Commerce for Intellectual Property and Director of the USPTO, Post Office Box 1450, Alexandria, Virginia 22313-1450 or by electronic mail to: [PPACnominations@uspto.gov](mailto:PPACnominations@uspto.gov)

for the Patent Public Advisory Committee, or [TPACnominations@uspto.gov](mailto:TPACnominations@uspto.gov) for the Trademark Public Advisory Committee.

#### FOR FURTHER INFORMATION CONTACT:

Vikrum D. Aiyer, Chief of Staff, Office of the Under Secretary of Commerce for Intellectual Property and Director of the USPTO, at (571) 272-8600.

**SUPPLEMENTARY INFORMATION:** The Advisory Committees’ duties include:

- Review and advise the Under Secretary of Commerce for Intellectual Property and Director of the USPTO on matters relating to policies, goals, performance, budget, and user fees of the USPTO relating to patents and trademarks, respectively; and
- Within 60 days after the end of each fiscal year: (1) Prepare an annual report on matters listed above; (2) transmit the report to the Secretary of Commerce, the President, and the Committees on the Judiciary of the Senate and the House of Representatives; and (3) publish the report in the Official Gazette of the USPTO.

#### Advisory Committees

The Public Advisory Committees are each composed of nine (9) voting members who are appointed by the Secretary of Commerce (the “Secretary”) and serve at the pleasure of the Secretary for three-year terms. Members are eligible for reappointment for a second consecutive three-year term. The Public Advisory Committee members must be citizens of the United States and are chosen to represent the interests of diverse users of the United States Patent and Trademark Office with respect to patents, in the case of the Patent Public Advisory Committee, and with respect to trademarks, in the case of the Trademark Public Advisory Committee. Members must represent small and large entity applicants located in the United States in proportion to the number of applications filed by such applicants. The Committees must include individuals with “substantial background and achievement in finance, management, labor relations, science, technology, and office automation.” 35 U.S.C. 5(b)(3). Each of the Public Advisory Committees also includes three (3) non-voting members representing each labor organization recognized by the USPTO.

Administration policy discourages the appointment of federally registered lobbyists to agency advisory boards and commissions (Lobbyists on Agency Boards and Commissions, <http://www.whitehouse.gov/blog/2009/09/23/lobbyist-agency-boards-and-commissions> (Sept. 23, 2009)); cf. Exec.

Order No. 13490, 74 FR 4673 (January 21, 2009) (While Executive Order 13490 does not specifically apply to federally registered lobbyists appointed by agency or department heads, it sets forth the Administration’s general policy of decreasing the influence of special interests in the Federal Government).

#### Procedures and Guidelines of the Patent and Trademark Public Advisory Committees

Each newly appointed member of the Patent and Trademark Public Advisory Committees will serve for a three-year term that begins on December 1, 2015, and ends on December 1, 2018. As required by the 1999 Act, members of the Patent and Trademark Public Advisory Committees will receive compensation for each day (including travel time) while the member is attending meetings or engaged in the business of that Advisory Committee. The enabling statute states that members are to be compensated at the daily equivalent of the annual rate of basic pay in effect for level III of the Executive Schedule under section 5314 of Title 5, United States Code. Committee members are compensated on an hourly basis, calculated at the daily rate. While away from home or regular place of business, each member shall be allowed travel expenses, including per diem in lieu of subsistence, as authorized by Section 5703 of Title 5, United States Code.

#### Applicability of Certain Ethics Laws

Public Advisory Committee Members are Special Government Employees within the meaning of Section 202 of Title 18, United States Code. The following additional information includes several, but not all, of the ethics rules that apply to members, and assumes that members are not engaged in Public Advisory Committee business more than 60 days during any period of 365 consecutive days.

- Each member will be required to file a confidential financial disclosure form within thirty (30) days of appointment. 5 CFR 2634.202(c), 2634.204, 2634.903, and 2634.904(b).

- Each member will be subject to many of the public integrity laws, including criminal bars against representing a party in a particular matter that came before the member’s committee and that involved at least one specific party. 18 U.S.C. 205(c); *see also* 18 U.S.C. 207 for post-membership bars. A member also must not act on a matter in which the member (or any of certain closely related entities) has a financial interest. 18 U.S.C. 208.

• Representation of foreign interests may also raise issues. 35 U.S.C. 5(a)(1) and 18 U.S.C. 219.

### Meetings of the Patent and Trademark Public Advisory Committees

Meetings of each Advisory Committee will take place at the call of the respective Committee Chair to consider an agenda set by that Chair. Meetings may be conducted in person, telephonically, on-line through the Internet, or by other appropriate means. The meetings of each Advisory Committee will be open to the public except each Advisory Committee may, by majority vote, meet in executive session when considering personnel, privileged, or other confidential information. Nominees must have the ability to participate in Committee business through the Internet.

Dated: June 3, 2016.

**Michelle K. Lee,**

*Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.*

[FR Doc. 2016-13765 Filed 6-9-16; 8:45 am]

**BILLING CODE 3510-16-P**

### COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

#### Procurement List; Deletions

**AGENCY:** Committee for Purchase From People Who Are Blind or Severely Disabled.

**ACTION:** Deletions from the Procurement List.

**SUMMARY:** The Committee is proposing to delete products and services from the Procurement List that were previously furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

**DATES:** Effective July 10, 2016

**ADDRESSES:** Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 715, Arlington, Virginia 22202-4149.

**FOR FURTHER INFORMATION CONTACT:** Barry S. Lineback, Telephone: (703) 603-7740, Fax: (703) 603-0655, or email [CMTEFedReg@AbilityOne.gov](mailto:CMTEFedReg@AbilityOne.gov).

#### SUPPLEMENTARY INFORMATION:

##### Deletions

On 4/22/2016 (81 FR 23682), 5/6/2016 (81 FR 27419-27420), and 5/20/2016 (81 FR 31917-31918), the Committee for Purchase From People Who Are Blind or Severely Disabled published notices of proposed deletions from the Procurement List.

After consideration of the relevant matter presented, the Committee has determined that the products and services listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 8501-8506 and 41 CFR 51-2.4.

#### Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the products and services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501-8506) in connection with the products and services deleted from the Procurement List.

#### End of Certification

Accordingly, the following products and services are deleted from the Procurement List:

##### Products

##### NSN(s)—Product Name(s):

8415-01-580-0038—Cover, Helmet, Advanced Combat, Multi Camouflage, Large/X-Large

8415-01-580-0064—Cover, Helmet, Advanced Combat, Multi Camouflage, Small/Medium

8415-01-580-0074—Cover, Helmet, Advanced Combat, Multi Camouflage, XX-Large

##### Mandatory Source(s) of Supply:

Mount Rogers Community Services Board, Wytheville, VA

Lions Volunteer Blind Industries, Inc., Morristown, TN

##### Contracting Activities:

Army Contracting Command—Aberdeen Proving Ground, Natick Contracting Division, Natick, MA

Defense Logistics Agency Troop Support, Philadelphia, PA

##### NSN(s)—Product Name(s):

7510-01-463-1985—Jumbo Refill, Ballpoint Pen “Aristocrat”

7510-01-463-1987—Jumbo Refill, Ballpoint Pen “Aristocrat”

7510-01-463-1988—Jumbo Refill, Ballpoint Pen “Aristocrat”

7510-01-463-1989—Jumbo Refill, Ballpoint Pen “Aristocrat”

7520-01-446-4500—Pen, Retractable, Cushion Grip, Exec. “Aristocrat”

7520-01-446-4503—Pen, Retractable, Cushion Grip, Exec. “Aristocrat”

7520-01-446-4504—Pen, Retractable, Cushion Grip, Exec. “Aristocrat”

7520-01-446-4505—Pen, Retractable, Cushion Grip, Exec. “Aristocrat”  
*Mandatory Source(s) of Supply:* Industries of the Blind, Inc., Greensboro, NC

*Contracting Activity:* General Services Administration, New York, NY

*NSN(s)—Product Name(s):* 7530-01-555-2906—Paper, Tabulating Machine

*Mandatory Source(s) of Supply:* Tarrant County Association for the Blind, Fort Worth, TX

*Contracting Activity:* General Services Administration, New York, NY

*NSN(s)—Product Name(s):* 7530-00-800-0996—Paper, Tabulating Machine

*Mandatory Source(s) of Supply:* The Lighthouse for the Blind, St. Louis, MO

Tarrant County Association for the Blind, Fort Worth, TX

*Contracting Activity:* General Services Administration, New York, NY

##### Services

*Service Type:* Document Destruction Service

*Mandatory for:* Internal Revenue Service: St. Paul Headquarters, Minneapolis, MN

*Mandatory Source(s) of Supply:* AccessAbility, Inc., Minneapolis, MN

*Contracting Activity:* Dept. of the Treasury, Washington, DC

*Service Type:* Janitorial/Custodial Service

*Service Mandatory For:* Middle River Depot, 2800 Eastern Blvd., Baltimore, MD

*Mandatory Source(s) of Supply:* The Chimes, Inc., Baltimore, MD

*Contracting Activity:* GSA/PBS/R03 Regional Contracts Support Services Section, Philadelphia, PA

**Barry S. Lineback,**

*Director, Business Operations.*

[FR Doc. 2016-13769 Filed 6-9-16; 8:45 am]

**BILLING CODE 6353-01-P**

### COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

#### Procurement List; Proposed Additions and Deletion

**AGENCY:** Committee for Purchase From People Who Are Blind or Severely Disabled.

**ACTION:** Proposed additions to and deletion from the procurement list.

**SUMMARY:** The Committee is proposing to add products and services to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes a product previously furnished by such agency.

Comments must be received on or before: 7/10/2016.

**ADDRESSES:** Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 715, Arlington, Virginia, 22202-4149.

**FOR FURTHER INFORMATION OR TO SUBMIT COMMENTS CONTACT:** Barry S. Lineback, Telephone: (703) 603-7740, Fax: (703) 603-0655, or email [CMTEFedReg@AbilityOne.gov](mailto:CMTEFedReg@AbilityOne.gov).

**SUPPLEMENTARY INFORMATION:** This notice is published pursuant to 41 U.S.C. 8503 (a)(2) and 41 CFR 51-2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

### Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice will be required to procure the products and services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

The following products and services are proposed for addition to the Procurement List for production by the nonprofit agencies listed:

#### Products

##### NSN(s)—Product Name(s):

5120-00-NIB-0163—Socket Set, Chrome, 1/4" Drive Deep, Metric 6 Point Fasteners, 11 Pieces

5120-00-NIB-0164—Socket Set, Chrome 1/4" Drive Shallow, Metric 6 Point Fasteners, 11 Pieces

5120-01-047-4356—Socket Set, Chrome 3/8" Drive Shallow, Metric 12 Point Fasteners, 12 Pieces

5120-01-429-3550—Socket Set, Chrome 1/2" Drive Deep, Metric 12 Point Fasteners, 13 Pieces

5120-01-429-3569—Socket Set, Chrome 1/2" Drive Shallow, Metric 12 Point Fasteners, 13 Pieces

5120-01-429-3605—Socket Set, Chrome 3/8" Drive Deep, Metric 6 Point Fasteners, 12 Pieces

**Mandatory Purchase For:** Total Government Requirement

**Mandatory Source(s) of Supply:** Beyond Vision, Inc., Milwaukee, WI

**Contracting Activity:** General Services Administration, Kansas City, MO

**Distribution:** B-List

##### NSN(s)—Product Name(s):

8105-00-022-1319—Grocery Bag, Kraft Paper, Natural Brown, 1/6 Barrel, Heavy Duty, 12" x 7" x 16 1/2"

8105-00-271-1485—Grocery Bag, Kraft Paper, Natural Brown, No. 12, 7" x 4 1/2" x 13 7/8"

8105-00-281-1158—Grocery Bag, Kraft Paper, Natural Brown, No. 2, 4 1/4" x 2 3/8" x 8 1/8"

8105-00-281-1425—Grocery Bag, Kraft Paper, Natural Brown, No. 8, 6 1/4" x 3 3/4" x 12 3/4"

8105-00-281-1429—Grocery Bag, Kraft Paper, Natural Brown, No. 25, 8 1/4" x 5 1/4" x 17 7/8"

8105-00-286-7308—Grocery Bag, Kraft Paper, Natural Brown, No. 20, 8 1/8" x 6" x 14 3/8"

8105-00-543-7169—Grocery Bag, Kraft Paper, Natural Brown, 1/4 Barrel Bag, 11" x 7" x 23 1/4"

8105-00-857-2250—Grocery Bag, Kraft Paper, Natural Brown, 1/6 Barrel, Heavy Duty, 17" x 13" x 7"

**Mandatory Purchase For:** Total Government Requirement

**Mandatory Source(s) of Supply:** South Texas Lighthouse for the Blind, Corpus Christi, TX

**Contracting Activity:** General Services Administration, New York, NY

**Distribution:** A-List

**NSN(s)—Product Name(s):** 8530-01-490-7372—Kit, Toiletries

**Mandatory Purchase For:** Total Government Requirement

**Mandatory Source(s) of Supply:** NewView Oklahoma, Inc., Oklahoma City, OK

**Contracting Activity:** General Services Administration, Fort Worth, TX

**Distribution:** B-List

**NSN(s)—Product Name(s):** 6210-00-NIB-0006—Tube Light, LED, T8, Universal (Type A or B), 4100K, 2 Foot

**Mandatory Purchase For:** Total Government Requirement

**Mandatory Source(s) of Supply:** Central Association for the Blind and Visually Impaired, Utica, NY

**Industries for the Blind, Inc., Greensboro, NC**

**Contracting Activity:** Defense Logistics Agency Troop Support

**Distribution:** B-List

#### Services

**Service Type:** Dormitory Support Service

**Mandatory for:** US Air Force, Cannon Air Force Base, Dormitory Campus, CAFB Fire Department,

Base Confinement Area, and Fire Department, Melrose AF Range, Cannon AFB, NM

**Mandatory Source(s) of Supply:** ENMRSH, Inc., Clovis, NM

**Contracting Activity:** US Air Force, 27th Special Operations Contracting Squadron, Cannon Air Force Base, NM

**Service Type:** Laundry Service

**Mandatory for:** US Army, Tripler Army Medical Center and Clinics Schofield Barracks, HI

**Mandatory Source(s) of Supply:** Great Plains Enterprises, Inc., Las Vegas, NV

**Contracting Activity:** US Army, US Army 0413 AQ HQ, KO Directorate of Contracting, Building 520 Pierce St., Fort Shafter, HI

**Service Type:** Transcription Service

**Mandatory for:** U.S. Navy, Naval Medical Logistics Command, Fort Detrick, MD

**Mandatory Source(s) of Supply:** Lighthouse of Houston, Houston, TX

**Contracting Activity:** Naval Medical Logistics Command, Fort Detrick, MD

### Deletion

The following product is proposed for deletion from the Procurement List:

#### Product

**NSN(s)—Product Name(s):** 2510-01-063-3893—Floorboard, Wood

**Mandatory Source(s) of Supply:** UNKNOWN  
**Contracting Activity:** Defense Logistics

Agency Land and Maritime, Columbus, OH

**Barry S. Lineback,**

*Director, Business Operations.*

[FR Doc. 2016-13768 Filed 6-9-16; 8:45 am]

**BILLING CODE 6353-01-P**

## CONSUMER PRODUCT SAFETY COMMISSION

### Sunshine Act Meeting

**TIME AND DATE:** Wednesday June 15, 2016, 10:00 a.m.—4:00 p.m.

**PLACE:** Hearing Room 420, Bethesda Towers, 4330 East-West Highway, Bethesda, Maryland.

**STATUS:** Commission Meeting—Open to the Public.

**MATTERS TO BE CONSIDERED:** Hearing: Agenda and Priorities for Fiscal Years 2017 and 2018. A live webcast of the Meeting can be viewed at [www.cpsc.gov/live](http://www.cpsc.gov/live).

#### FOR FURTHER INFORMATION CONTACT:

Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504-7923.

Dated: June 7, 2016.

**Todd A. Stevenson,**  
*Secretary.*

[FR Doc. 2016-13855 Filed 6-8-16; 11:15 am]

**BILLING CODE 6355-01-P**

## CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

### Proposed Information Collection; Comment Request

**AGENCY:** Corporation for National and Community Service.

**ACTION:** Notice.

**SUMMARY:** The Corporation for National and Community Service (CNCS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. Sec. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirement on respondents can be properly assessed.

Currently, CNCS is soliciting comments concerning its proposed renewal of its Senior Corps Project Progress Report (PPR)—OMB Control Number 3045–0033, with an expiration date of August 31, 2016. The Senior Corps PPR has two components: (1) Narratives and work plans, and (2) the Progress Report Supplement (PRS) which is an annual survey of volunteer demographics and grantee characteristics. The resulting data is used by grantees and CNCS to track performance and inform continued grant funding support, as well as to identify trends and to support management and analysis.

Copies of the information collection request can be obtained by contacting the office listed in the Addresses section of this Notice.

**DATES:** Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by August 9, 2016.

**ADDRESSES:** You may submit comments, identified by the title of the information collection activity, by any of the following methods:

(1) *By mail sent to:* Corporation for National and Community Service, Corporation for National and Community Service, Senior Corps; Attention Ms. Jill Sears, Program Officer; 250 E Street SW., Washington, DC 20525.

(2) By hand delivery or by courier to the CNCS mailroom on the 4th Floor at the mail address given in paragraph (1) above, between 9:00 a.m. and 4:00 p.m. Eastern Time, Monday through Friday, except Federal holidays.

(3) Electronically through [www.regulations.gov](http://www.regulations.gov).

Individuals who use a telecommunications device for the deaf (TTY–TDD) may call 1–800–833–3722 between 8:00 a.m. and 8:00 p.m. Eastern Time, Monday through Friday.

**FOR FURTHER INFORMATION CONTACT:** Jill Sears, (202) 606–7577, or by email at [jsears@cns.gov](mailto:jsears@cns.gov).

#### **SUPPLEMENTARY INFORMATION:**

CNCS is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of CNCS, including whether the information will have practical utility;

- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are expected to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submissions of responses).

#### **Background**

The Progress Report (PPR) was designed to assure that grantees of the Senior Corps' programs (RSVP, Foster Grandparent and Senior Companion Programs) address and fulfill legislated program purposes; meet agency program management and grant requirements; track and measure progress to benefit the local project and its contributions to senior volunteers and the community; and to report progress toward work plan objectives agreed upon in the granting of the award. The resulting data is used by grantees and CNCS to track performance and inform continued grant funding support, as well as to identify trends and to support management and analysis.

#### **Current Action**

CNCS seeks to renew and revise the current OMB approved Progress Report. In August of 2015, Senior Corps revised its OMB approved Grant Application Instructions. The revised Grant Application Instructions incorporated a revised standard national performance measures framework for Senior Corps programs. The revised PPR will align to the national performance measures revisions and allow grantees to enter actual data relative to the revised framework.

The revised PPR will be used in the same manner as the existing report. CNCS also seeks to continue using the current report until the revised report is approved by OMB. The current application is due to expire on August 31, 2016.

*Type of Review:* Renewal.

*Agency:* Corporation for National and Community Service.

*Title:* Senior Corps Project Progress Report.

*OMB Number:* 3045–0033.

*Agency Number:* CNCS Form 1020.

*Affected Public:* Sponsors of Senior Corps grants.

*Total Respondents:* 1,250.

*Frequency:* Work plans and narratives: Semi-Annual. Progress Report Supplement: Annual.

*Average Time per Response:* Work plans and narratives: Four hours. Progress Report.

*Supplement:* Eight hours.

*Estimated Total Burden Hours:* 20,000 hours.

*Total Burden Cost (Capital/Startup):*

None.

*Total Burden Cost (Operating/Maintenance):* None.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: June 6, 2016.

**Mikel Herrington,**

*Acting Director Senior Corps.*

[FR Doc. 2016–13702 Filed 6–9–16; 8:45 am]

**BILLING CODE 6050–28–P**

## **DEPARTMENT OF DEFENSE**

### **Office of the Secretary**

#### **Government-Industry Advisory Panel; Notice of Federal Advisory Committee Meeting**

**AGENCY:** Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics), Department of Defense (DoD).

**ACTION:** Federal advisory committee meeting notice.

**SUMMARY:** The Department of Defense is publishing this notice to announce the following Federal advisory committee meeting of the Government-Industry Advisory Panel. This meeting is open to the public.

**DATES:** The meeting will be held from 1:00 p.m. to 5:00 p.m. on Tuesday, June 21, 2016. Public registration will begin at 12:30 p.m. For entrance into the meeting, you must meet the necessary requirements for entrance into the Pentagon. For more detailed information, please see the following link: <http://www.pfpa.mil/access.html>.

**ADDRESSES:** Pentagon Library, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301–1155. The meeting will be held in Room M2. The Pentagon Library is located in the Pentagon Library and Conference Center (PLC2) across the Corridor 8 bridge.

**FOR FURTHER INFORMATION CONTACT:** LTC Andrew Lunoff, Office of the Assistant Secretary of Defense (Acquisition), 3090 Defense Pentagon, Washington, DC 20301–3090, email: [andrew.s.lunoff.mil@mail.mil](mailto:andrew.s.lunoff.mil@mail.mil), phone: 571–256–9004.

**SUPPLEMENTARY INFORMATION:** Due to circumstances beyond the control of the Designated Federal Officer and the Department of Defense, the

Government-Industry Advisory Panel was unable to provide public notification of its meeting of June 21, 2016, as required by 41 CFR 102–3.150(a). Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

*Purpose of the Meeting:* This meeting is being held under the provisions of the Federal Advisory Committee Act of 1972 (FACA) (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 Government-Industry Advisory Panel will review sections 2320 and 2321 of title 10, United States Code (U.S.C.), regarding rights in technical data and the validation of proprietary data restrictions and the regulations implementing such sections, for the purpose of ensuring that such statutory and regulatory requirements are best structured to serve the interest of the taxpayers and the national defense. The scope of the panel is as follows: (1) Ensuring that the Department of Defense (DoD) does not pay more than once for the same work, (2) Ensuring that the DoD contractors are appropriately rewarded for their innovation and invention, (3) Providing for cost-effective procurement, sustainment, modification, and upgrades to the DoD systems, (4) Encouraging the private sector to invest in new products, technologies, and processes relevant to the missions of the DoD, and (5) Ensuring that the DoD has appropriate access to innovative products, technologies, and processes developed by the private sector for commercial use.

*Agenda:* This will be the second meeting of the Government-Industry Advisory Panel with a series of meetings planned through September 1, 2016. The panel will cover details of 10 U.S.C. 2320 and 2321, begin understanding the implementing regulations and detailed the necessary groups within the private sector and government to provide supporting documentation for their review of these codes and regulations during follow-on meetings. Agenda items for the second meeting will include the following: (1) Issues or concerns of 10 U.S.C. 2320 and 2321; (2) Implementing DFARS regulations (Subparts 227.71 and .72, and associated clauses); (3) Discussions on DoD's policy and guidance on Intellectual Property (IP) strategy and management; (4) Discussions on DoD personnel preparation for implementation of DoD's IP policy and guidance; (5) Discussion of regulation of extending and adapting the scheme of 10 U.S.C. 2320 and 2321

to apply to computer software; (6) Discussion on applicability of 10 U.S.C. 2320 and 2321, and implementing DFARS requirements and clauses, to contracts and subcontracts for commercial items; (7) Discussions on practices used by DoD in acquiring IP from non-traditional contractors, commercial contractors, and traditional contractors; (8) Discussion on DoD's policy, guidance and practices linking technical data management and other IP considerations with open systems architecture (OSA) and/or modular open systems approaches (MOSA); (9) Planning for follow-on meeting.

*Availability of Materials for the Meeting:* A copy of the agenda or any updates to the agenda for the June 21, 2016 meeting will be available as requested or at the following site: <http://www.facadatabase.gov/committee/meetings.aspx?cid=2561>.

Minor changes to the agenda will be announced at the meeting. All materials will be posted to the FACA database after the meeting.

*Public Accessibility to the Meeting:* Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.140 through 102–3.165, and subject to the availability of space, this meeting is open to the public. Registration of members of the public who wish to attend the meeting will begin upon publication of this meeting notice and end three business days (June 16) prior to the start of the meeting. All members of the public must contact LTC Lunoff at the phone number or email listed in the **FOR FURTHER INFORMATION CONTACT** section to make arrangements for Pentagon escort, if necessary. Public attendees should arrive at the Pentagon's Visitor's Center, located near the Pentagon Metro Station's south exit and adjacent to the Pentagon Transit Center bus terminal with sufficient time to complete security screening no later than 12:30 p.m. on June 21. To complete security screening, please come prepared to present two forms of identification of which one must be a pictured identification card. Government and military DoD CAC holders are not required to have an escort, but are still required to pass through the Visitor's Center to gain access to the Building. Seating is limited and is on a first-to-arrive basis. Attendees will be asked to provide their name, title, affiliation, and contact information to include email address and daytime telephone number to the Designated Federal Officer (DFO) listed in the **FOR FURTHER INFORMATION CONTACT** section. Any interested person may attend the meeting, file written comments or statements with the committee, or make verbal comments

from the floor during the public meeting, at the times, and in the manner, permitted by the committee.

*Special Accommodations:* The meeting venue is fully handicap accessible, with wheelchair access.

Individuals requiring special accommodations to access the public meeting or seeking additional information about public access procedures, should contact LTC Lunoff, the committee DFO, at the email address or telephone number listed in the **FOR FURTHER INFORMATION CONTACT** section, at least five (5) business days prior to the meeting so that appropriate arrangements can be made.

*Written Comments or Statements:* Pursuant to 41 CFR 102–3.105(j) and 102–3.140 and section 10(a)(3) of the Federal Advisory Committee Act, the public or interested organizations may submit written comments or statements to the Government-Industry Advisory Panel about its mission and/or the topics to be addressed in this public meeting. Written comments or statements should be submitted to LTC Lunoff, the committee DFO, via electronic mail, the preferred mode of submission, at the email address listed in the **FOR FURTHER INFORMATION CONTACT** section in the following formats: Adobe Acrobat or Microsoft Word. The comment or statement must include the author's name, title, affiliation, address, and daytime telephone number. Written comments or statements being submitted in response to the agenda set forth in this notice must be received by the committee DFO at least five (5) business days prior to the meeting so that they may be made available to the Government-Industry Advisory Panel for its consideration prior to the meeting. Written comments or statements received after this date may not be provided to the panel until its next meeting. Please note that because the panel operates under the provisions of the Federal Advisory Committee Act, as amended, all written comments will be treated as public documents and will be made available for public inspection.

*Verbal Comments:* Members of the public will be permitted to make verbal comments during the meeting only at the time and in the manner allowed herein. If a member of the public is interested in making a verbal comment at the open meeting, that individual must submit a request, with a brief statement of the subject matter to be addressed by the comment, at least three (3) business days in advance to the committee DFO, via electronic mail, the preferred mode of submission, at the email address listed in the **FOR FURTHER**

**INFORMATION CONTACT** section. The committee DFO will log each request to make a comment, in the order received, and determine whether the subject matter of each comment is relevant to the panel's mission and/or the topics to be addressed in this public meeting. A 30-minute period near the end of the meeting will be available for verbal public comments. Members of the public who have requested to make a verbal comment and whose comments have been deemed relevant under the process described in this paragraph, will be allotted no more than three (3) minutes during this period, and will be invited to speak in the order in which their requests were received by the DFO.

Dated: June 6, 2016.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2016-13718 Filed 6-9-16; 8:45 am]

**BILLING CODE 5001-06-P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

[Docket ID: DOD-2016-OS-0071]

### Privacy Act of 1974; System of Records

**AGENCY:** Office of the Secretary of Defense, DoD.

**ACTION:** Notice to alter a System of Records.

**SUMMARY:** The Office of the Secretary of Defense proposes to alter a system of records, DPR 37, entitled "DoD Employer Support of Guard and Reserve Volunteer Rosters." The system is used to maintain a roster of and facilitate communication between ESGR members; to track ESGR-related training, awards, and hours donated by ESGR DoD volunteer staff; and to identify federal employee and ESGR DoD volunteer emergency contact information.

**DATES:** Comments will be accepted on or before July 11, 2016. This proposed action will be effective the date following the end of the comment period unless comments are received which result in a contrary determination.

**ADDRESSES:** You may submit comments, identified by docket number and title, by any of the following methods:

\* *Federal Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

\* *Mail:* Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and

Compliance, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350-1700.

*Instructions:* All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Mrs. Luz D. Ortiz, Chief, Records, Privacy and Declassification Division (RPD2), 1155 Defense Pentagon, Washington, DC 20301-1155, or by phone at (571) 372-0478.

**SUPPLEMENTARY INFORMATION:** The Office of the Secretary of Defense notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT** or at the Defense Privacy and Civil Liberties Division Web site at <http://dpcl.dod.mil>.

The proposed systems reports, as required by 5 U.S.C. 552a(r) of the Privacy Act, as amended, were submitted on May 23, 2016, to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4 of Appendix I to OMB Circular No. A-130, "Federal Agency Responsibilities for Maintaining Records About Individuals," revised November 28, 2000 (December 12, 2000 65 FR 77677).

Dated: June 7, 2016.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

### DPR 37

#### SYSTEM NAME:

DoD Employer Support of Guard and Reserve Volunteer Rosters (January 29, 2010, 75 FR 4788)

#### CHANGES:

#### SYSTEM ID:

Delete entry and replace with "DHRA 17."

#### SYSTEM NAME:

Delete entry and replace with "Employer Support of the Guard and Reserve Member Management System (MMS)."

#### SYSTEM LOCATION:

Delete entry and replace with "Defense Information Systems Agency (DISA), Computing Directorate Mechanicsburg, 5450 Carlisle Pike, Mechanicsburg, PA 17050-2411."

*Backup:* Iron Mountain, 1665 S 5350 W, Salt Lake City, UT 84104-4721."

#### CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with "Federal employees and DoD volunteers who work for Employer Support of the Guard and Reserve (ESGR)."

#### CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with "Full name; role/position and ESGR affiliation (State Committee region or Headquarters); military base for volunteer activity; home address, home and/or mobile phone number, and personal email address; ESGR-related training completed; affiliated Service (if applicable); and emergency contact name, phone number, and relationship.

Additional information collected on federal employees includes: work address, phone number, and email; assigned military unit and rank (where applicable); and official report and departure date.

Additional information collected on DoD volunteers includes: volunteer hours performed; awards; mentor/mentee assignments; military experience (Component, rank, status, and years of service); civilian work experience (industry and position type); special skills or qualifications; and form of DoD identification (where applicable)."

#### AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with "10 U.S.C. 136, Under Secretary of Defense for Personnel and Readiness; 10 U.S.C. 1588, Authority to accept certain voluntary services; DoDD 1250.01, National Committee for Employer Support of the Guard and Reserve (NCESGR); DoD Instruction (DoDI) 1205.22, Employer Support of the Guard and Reserve; DoDI 1100.21, Voluntary Services in the Department of Defense; and DoDI 3001.02, Personnel Accountability in Conjunction With Natural or Manmade Disasters."

#### PURPOSE(S):

Delete entry and replace with "To maintain a roster of and facilitate communication between ESGR members; to track ESGR-related training, awards, and hours donated by ESGR DoD volunteer staff; and to identify federal employee and ESGR DoD volunteer emergency contact

information for accountability during manmade disasters and other emergencies.”

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

Delete entry and replace with “In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, as amended, the records contained herein may be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

*Law Enforcement Routine Use:* If a system of records maintained by a DoD Component to carry out its functions indicates a violation or potential violation of law, whether civil, criminal, or regulatory in nature, and whether arising by general statute or by regulation, rule, or order issued pursuant thereto, the relevant records in the system of records may be referred, as a routine use, to the agency concerned, whether federal, state, local, or foreign, charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, rule, regulation, or order issued pursuant thereto.

*Congressional Inquiries Disclosure Routine Use:* Disclosure from a system of records maintained by a DoD Component may be made to a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of that individual.

*Disclosure to the Department of Justice for Litigation Routine Use:* A record from a system of records maintained by a DoD Component may be disclosed as a routine use to any component of the Department of Justice for the purpose of representing the Department of Defense, or any officer, employee or member of the Department in pending or potential litigation to which the record is pertinent.

*Disclosure of Information to the National Archives and Records Administration Routine Use:* A record from a system of records maintained by a DoD Component may be disclosed as a routine use to the National Archives and Records Administration for the purpose of records management inspections conducted under authority of 44 U.S.C. 2904 and 2906.

*Data Breach Remediation Purposes Routine Use:* A record from a system of records maintained by a Component may be disclosed to appropriate agencies, entities, and persons when (1) The Component suspects or has confirmed that the security or

confidentiality of the information in the system of records has been compromised; (2) the Component has determined that as a result of the suspected or confirmed compromise 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 (whether maintained by the Component or another agency or entity) that rely upon the compromised information; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Component's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

The DoD Blanket Routine Uses set forth at the beginning of the Office of the Secretary of Defense (OSD) compilation of systems of records notices apply to this system. The complete list of DoD Blanket Routine Uses can be found online at: <http://dpcl.d.defense.gov/Privacy/SORNsIndex/BlanketRoutineUses.aspx>.

\* \* \* \* \*

**RETRIEVABILITY:**

Delete entry and replace with “Full name and ESGR affiliation.”

**SAFEGUARDS:**

Delete entry and replace with “All personally identifiable information (PII) is maintained in a secure, password protected electronic system. The system utilizes security hardware and software to include physical controls such as combination locks, cipher locks, key cards, identification badges, closed circuit televisions, and controlled screenings. Technical controls include the use of user identifications and passwords, intrusion detection systems, encryption, Common Access Cards (CAC), firewalls, virtual private networks, role-based access controls, and two-factor authentication. Administrative controls include periodic security audits, regular monitoring of users' security practices, methods to ensure only authorized personnel access information, encryption of backups containing sensitive data, visitor registers, backups secured off-site, and use of visitor registers.”

**RETENTION AND DISPOSAL:**

Delete entry and replace with “Headquarters Personnel Records: Destroy upon separation or transfer of employee.

*Volunteer Staff Records:* Destroy/delete 4 years after volunteer departs program.”

**SYSTEM MANAGER(S) AND ADDRESS:**

Delete entry and replace with “Executive Director, Headquarters, Employer Support of the Guard and Reserve, 4800 Mark Center Drive, Alexandria, VA 22350-1200.”

**NOTIFICATION PROCEDURE:**

Delete entry and replace with “Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Executive Director, Headquarters, Employer Support of the Guard and Reserve, 4800 Mark Center Drive, Alexandria, VA 22350-1200.

Signed, written requests should contain the individual's full name, ESGR affiliation, and personal contact information (home address, phone number, and email).”

**RECORDS ACCESS PROCEDURES:**

Delete entry and replace with “Individuals seeking access to records about themselves contained in this system should address written inquiries to the Office of the Secretary of Defense/ Joint Staff, Freedom of Information Act Requester Service Center, Office of Freedom of Information, 1155 Defense Pentagon, Washington, DC 20301-1155.

Signed, written requests should contain the individual's full name, personal contact information (home address, phone number, email), and the number and name of this system of records notice.”

\* \* \* \* \*

[FR Doc. 2016-13776 Filed 6-9-16; 8:45 am]

BILLING CODE 5001-06-P

**DEPARTMENT OF DEFENSE**

**Office of the Secretary**

**Charter Re-Establishment of Department of Defense Federal Advisory Committees**

**AGENCY:** Department of Defense.

**ACTION:** Re-establishment of Federal Advisory Committee.

**SUMMARY:** The Department of Defense (DoD) is publishing this notice to announce that it is re-establishing the Board of Advisors to the Presidents of the Naval Postgraduate School and the Naval War College (“the Board”).

**FOR FURTHER INFORMATION CONTACT:** Jim Freeman, Advisory Committee Management Officer for the Department of Defense, 703-692-5952.

**SUPPLEMENTARY INFORMATION:** The Board is being re-established in accordance with the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended) and 41 CFR 102–3.50(d). The Board's charter and contact information for the Board's Designated Federal Officer (DFO) can be found at <http://www.facadatabase.gov/>.

The Board provides the Secretary of Defense and the Deputy Secretary of Defense, through the Secretary of the Navy, independent advice and recommendations on matters relating to the Naval Postgraduate School and the Naval War College. These matters include, but are not limited to, organizational management, curricula and methods of instructions, facilities, and other matters of interest.

The Board is composed of no more than ten members who are eminent authorities in the fields of academia, business, national defense and security, the defense industry, and research and analysis. Membership appointments are authorized by the Secretary of Defense or the Deputy Secretary of Defense and administratively certified by the Secretary of the Navy for a term of service of one-to-four years, with annual renewals, in accordance with DoD policies and procedures. Board members, who are not full-time or permanent part-time Federal officers or employees, shall be appointed as experts or consultants pursuant to 5 U.S.C. 3109 to serve as special government employee members. Board members who are full-time or permanent part-time Federal officers or employees shall be appointed pursuant to 41 CFR 102–3.130(a) to serve as regular government employee members. No member, unless authorized by the Secretary of Defense or the Deputy Secretary of Defense, may serve more than two consecutive terms of service on the Board, including its subcommittees, or serve on more than two DoD federal advisory committees at one time. All members of the Board are appointed to provide advice on behalf of the Government on the basis of their best judgment without representing any particular point of view and in a manner that is free from conflict of interest. Except for reimbursement of official Board-related travel and per diem, Board members serve without compensation. The DoD may establish subcommittees, task forces, or working groups to support the Board. Currently, the DoD has approved two permanent subcommittees to the Board—the Naval Postgraduate School Subcommittee, and the Naval War College Subcommittee. The Naval Postgraduate School Subcommittee, comprised of no more

than 15 members, shall focus on the Naval Postgraduate School, and the Secretary of Defense has approved the following non-voting ex-officio appointments to the Naval Postgraduate School Subcommittee—the Chief of Naval Personnel/Deputy Chief of Naval Operations for Manpower, Personnel, Training and Education Command; the Commanding General USMC Training and Education Command; the Commandant Army War College; the Chief of Naval Research; and the Commander and President of the Air University. The Naval Postgraduate School Subcommittee shall meet a minimum of two times a year. The Naval War College Subcommittee, comprised of no more than ten members, shall focus on the Naval War College, and the Secretary of Defense has approved the following ex-officio non-voting member to the Naval War College Subcommittee—the Chief of Naval Personnel/Deputy Chief of Naval Operations for Manpower, Personnel, Training and Education. The Naval War College Subcommittee shall meet a minimum of two times a year.

Subcommittees will not work independently of the Board and must report all recommendations and advice solely to the Board for full deliberation and discussion. Subcommittees, task forces, or working groups have no authority to make decisions and recommendations, verbally or in writing, on behalf of the Board. No subcommittee or any of its members can update or report, verbally or in writing, directly to the DoD or any Federal officers or employees. The Board's DFO, pursuant to DoD policy, must be a full-time or permanent part-time DoD employee, and must be in attendance for the duration of each and every Board/subcommittee meeting. The public or interested organizations may submit written statements to Board membership about the Board's mission and functions. Written statements may be submitted at any time or in response to the stated agenda of planned meeting of the Board. All written statements shall be submitted to the DFO for the Board, and this individual will ensure that the written statements are provided to the membership for their consideration.

Dated: June 7, 2016.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2016–13838 Filed 6–9–16; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

#### Charter Renewal of Department of Defense Federal Advisory Committees

**AGENCY:** Department of Defense.

**ACTION:** Renewal of Federal Advisory Committee.

**SUMMARY:** The Department of Defense (DoD) is publishing this notice to announce that it is renewing the charter for the Defense Business Board (“the Board”).

**FOR FURTHER INFORMATION CONTACT:** Jim Freeman, Advisory Committee Management Officer for the Department of Defense, 703–692–5952.

**SUPPLEMENTARY INFORMATION:** This committee's charter is being renewed in accordance with the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended) and 41 CFR 102–3.50(d). The charter and contact information for the Board's Designated Federal Officer (DFO) can be obtained at <http://www.facadatabase.gov/>.

The Board provides the Secretary of Defense and the Deputy Secretary of Defense with independent advice and recommendations on critical matters concerning the Department of Defense (DoD). The Board shall be composed of no more than 35 members who must possess the following: (a) A proven track record of sound judgment and business acumen in leading or governing large, complex private sector corporations or organizations and (b) a wealth of top-level, global business experience in the areas of executive management, corporate governance, audit and finance, human resources, economics, technology, or healthcare. Members who are not full-time or permanent part-time Federal officers or employees are appointed as experts or consultants pursuant to 5 U.S.C. 3109 to serve as special government employee members. Members who are full-time or permanent part-time Federal officers or employees are appointed pursuant to 41 CFR 102–3.130(a) to serve as regular government employee members. Each member is appointed to provide advice on behalf of the Government on the basis of their best judgment without representing any particular point of view and in a manner that is free from conflict of interest. Except for reimbursement of official Board-related travel and per diem, members serve without compensation. The DoD, as necessary and consistent with the Board's mission and DoD policies and procedures, may establish

subcommittees, task forces, or working groups to support the Board, and all subcommittees must operate under the provisions of FACA and the Government in the Sunshine Act. Subcommittees will not work independently of the Board and must report all recommendations and advice solely to the Board for full deliberation and discussion. Subcommittees, task forces, or working groups have no authority to make decisions and recommendations, verbally or in writing, on behalf of the Board. No subcommittee or any of its members can update or report, verbally or in writing, directly to the DoD or any Federal officers or employees. The Board's DFO, pursuant to DoD policy, must be a full-time or permanent part-time DoD employee, and must be in attendance for the duration of each and every Board/subcommittee meeting. The public or interested organizations may submit written statements to the Board membership about the Board's mission and functions. Such statements may be submitted at any time or in response to the stated agenda of planned Board meetings. All written statements must be submitted to the Board's DFO who will ensure the written statements are provided to the membership for their consideration.

Dated: June 6, 2016.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2016-13729 Filed 6-9-16; 8:45 am]

**BILLING CODE 5001-06-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Project No. 2556-077]

#### **Messalonskee Stream Hydro, LLC—Maryland; Messalonskee Stream Hydro, LLC—Maine; Notice of Application for Partial Transfer of License and Soliciting Comments, Motions To Intervene, and Protests**

On May 20, 2016, Messalonskee Stream Hydro, LLC—Maryland (transferor) and Messalonskee Stream Hydro, LLC—Maine (transferee) filed an application for the transfer of license of the Messalonskee Project No. 2556. The project is located on Messalonskee Stream, a tributary of the Kennebec River, in Kennebec County, Maine. The project does not occupy Federal lands.

The applicants seek Commission approval to transfer the license for the Messalonskee Project from the transferor

to the transferee. This transfer of license reflects an internal corporate reorganization. The transferor will be merged into newly created transferee.

**Applicants Contact:** Mr. Andrew Locke, Messalonskee Stream Hydro, LLC, c/o Essex Hydro Assets, 55 Union Street, Boston, MA 02108, Phone: 617-367-0032, Email: [alocke@essexhydro.com](mailto:alocke@essexhydro.com).

**FERC Contact:** Patricia W. Gillis, (202) 502-8735, [patricia.gillis@ferc.gov](mailto:patricia.gillis@ferc.gov).

**Deadline for filing comments, motions to intervene, and protests:** 30 days from the date that the Commission issues this notice. The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at <http://www.ferc.gov/docs-filing/efiling.asp>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <http://www.ferc.gov/docs-filing/ecomment.asp>. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), (866) 208-3676 (toll free), or (202) 502-8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. The first page of any filing should include docket number P-2556-077.

Dated: June 6, 2016.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2016-13751 Filed 6-9-16; 8:45 am]

**BILLING CODE 6717-01-P**

## ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OGC-2016-0301; FRL-9947-57-OGC]

#### **Proposed Consent Decree, Clean Air Act Citizen Suit; Request for Public Comment**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of proposed consent decree.

**SUMMARY:** In accordance with section 113(g) of the Clean Air Act, as amended ("CAA" or the "Act"), notice is hereby given of a proposed consent decree to address a lawsuit filed by Partnership for Policy Integrity ("Plaintiffs") in the United States District Court for the Middle District of Georgia: *Partnership for Policy Integrity v. McCarthy*, Civil Action No. 5:16-cv-00038-CAR (M.D.

G.A.). On January 25, 2016, Plaintiffs filed a complaint alleging that Gina McCarthy, in her official capacity as Administrator of the United States Environmental Protection Agency ("EPA"), failed to perform a non-discretionary duty to grant or deny within 60 days a petition submitted by Plaintiffs on May 26, 2015 requesting that EPA object to a CAA Title V permit issued by the Environmental Protection Division ("EPD") of Georgia's Department of Natural Resources, to Piedmont Green Power, LLC, authorizing the operation of a 60.5 megawatt (MW) steam-turbine generator powered by a 700 million British thermal unit per hour (MMBtu) biomass boiler in Barnesville, Georgia. The proposed consent decree would establish a deadline for EPA to take such action.

**DATES:** Written comments on the proposed consent decree must be received by July 11, 2016.

**ADDRESSES:** Submit your comments, identified by Docket ID number EPA-HQ-OGC-2016-0301, online at [www.regulations.gov](http://www.regulations.gov) (EPA's preferred method); by email to [oei.docket@epa.gov](mailto:oei.docket@epa.gov); by mail to EPA Docket Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460-0001; or by hand delivery or courier to EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC, between 8:30 a.m. and 4:30 p.m. Monday through Friday, excluding legal holidays. Comments on a disk or CD-ROM should be formatted in Word or ASCII file, avoiding the use of special characters and any form of encryption, and may be mailed to the mailing address above.

**FOR FURTHER INFORMATION CONTACT:** John Krallman, Air and Radiation Law Office (2344A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone: (202) 564-0904; email address: [krallman.john@epa.gov](mailto:krallman.john@epa.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Additional Information About the Proposed Consent Decree**

The proposed consent decree would resolve a lawsuit filed by the Plaintiffs seeking to compel the Administrator to take actions under CAA section 505(b)(2). Under the terms of the proposed consent decree, EPA would agree to sign its response granting or denying the petition filed by Plaintiffs regarding Piedmont Green Power's biomass boiler located in Barnesville, Georgia, pursuant to section 505(b)(2) of

the CAA, on or before December 16, 2016.

Under the terms of the proposed consent decree, EPA would expeditiously deliver notice of EPA's response to the Office of the **Federal Register** for review and publication following signature of such response. In addition, the proposed consent decree outlines the procedure for the Plaintiffs to request costs of litigation, including attorney fees.

For a period of thirty (30) days following the date of publication of this notice, the Agency will accept written comments relating to the proposed consent decree from persons who are not named as parties or intervenors to the litigation in question. EPA or the Department of Justice may withdraw or withhold consent to the proposed consent decree if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act. Unless EPA or the Department of Justice determines that consent to this consent decree should be withdrawn, the terms of the consent decree will be affirmed.

## II. Additional Information About Commenting on the Proposed Consent Decree

### A. How can I get a copy of the consent decree?

The official public docket for this action (identified by Docket ID No. EPA-HQ-OGC-2016-0301) contains a copy of the proposed consent decree. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OEI Docket is (202) 566-1752.

An electronic version of the public docket is available through [www.regulations.gov](http://www.regulations.gov). You may use [www.regulations.gov](http://www.regulations.gov) to submit or view public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select "search."

It is important to note that EPA's policy is that public comments, whether submitted electronically or in paper,

will be made available for public viewing online at [www.regulations.gov](http://www.regulations.gov) without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose disclosure is restricted by statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in the electronic public docket. EPA's policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the EPA Docket Center.

### B. How and to whom do I submit comments?

You may submit comments as provided in the **ADDRESSES** section. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment and with any disk or CD ROM you submit. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the [www.regulations.gov](http://www.regulations.gov) Web site to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an "anonymous access" system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (email) system is not an "anonymous access" system. If you send an email comment

directly to the Docket without going through [www.regulations.gov](http://www.regulations.gov), your email address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Dated: June 1, 2016.

**Lorie J. Schmidt,**

*Associate General Counsel.*

[FR Doc. 2016-13792 Filed 6-9-16; 8:45 am]

**BILLING CODE 6560-50-P**

## ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2007-0268; FRL-9947-55-OW]

### Notice of Availability: Draft Protective Action Guide (PAG) for Drinking Water After a Radiological Incident

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of document availability; request for public comment.

**SUMMARY:** As part of its mission to protect human health and the environment, the Environmental Protection Agency (EPA) publishes protective action guides to help federal, state, local and tribal emergency response officials make radiation protection decisions during emergencies. EPA, in coordination with a multi-agency working group within the Federal Radiological Preparedness Coordinating Committee, is proposing an addition to the 2013 revised interim Protective Action Guides and Planning Guidance for Radiological Incidents ("2013 revised PAG Manual" hereafter) to provide guidance on drinking water. The Draft Protective Action Guide for Drinking Water is now available in the EPA Docket, under ID No. EPA-HQ-OAR-2007-0268, and EPA is requesting comment on the draft guide.

**DATES:** Comments must be received on or before July 25, 2016.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2007-0268, to the *Federal eRulemaking Portal*: <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written

comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:** Lisa M. Christ, Standards and Risk Management Division, Office of Ground Water and Drinking Water, Mail Code 4607M, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number: (202) 564-8354; fax number: (202) 564-3758; Email: [christ.lisa@epa.gov](mailto:christ.lisa@epa.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **1. General Information**

###### *A. Does this action apply to me?*

This action does not impose any requirements on anyone. It notifies interested parties of EPA's proposed, draft drinking water protective action guide (PAG) and requests public comment. The drinking water PAG will help federal, state, local, tribal officials and public water systems make decisions about use of water during radiological emergencies. The drinking water PAG is non-regulatory guidance.

###### *B. What authority does EPA have to provide Protective Action Guidance?*

The historical and legal basis of EPA's role in the 2013 PAG Manual begins with Reorganization Plan No. 3 of 1970, in which the Administrator of the EPA assumed all the functions of the Federal Radiation Council (FRC), including the charge to "... advise the President with respect to radiation matters, directly or indirectly affecting health, including guidance for all federal agencies in the formulation of radiation standards and in the establishment and execution of programs of cooperation with [s]tates." (Reorg. Plan No. 3 of 1970, sec. 2(a)(7), 6(a)(2); § 274.h of the Atomic Energy Act of 1954, as amended (AEA), codified at 42 U.S.C. 2021(h)). Recognizing this role, the Federal Emergency Management Agency (FEMA) directed EPA, in its Radiological Emergency Planning and Preparedness Regulations, to "establish Protective Action Guides (PAGs) for all aspects of radiological emergency planning in coordination with

appropriate federal agencies." (44 CFR 351.22(a)). FEMA also tasked EPA with preparing "guidance for state and local governments on implementing PAGs, including recommendations on protective actions which can be taken to mitigate the potential radiation dose to the population." (44 CFR 351.22(b)). All of this information was to "be presented in the Environmental Protection Agency (EPA) 'Manual of Protective Action Guides and Protective Actions for Nuclear Incidents.'" (44 CFR 351.22(b)).

Additionally, section 2021(h) charged the Administrator with performing "such other functions as the President may assign to him [or her] by Executive Order." Executive Order 12656 states that the Administrator shall "[d]evelop, for national security emergencies, guidance on acceptable emergency levels of nuclear radiation. . . ." (Executive Order No. 12656, sec. 1601(2)). EPA's role in PAGs development was reaffirmed by the *National Response Framework, Nuclear/Radiological Incident Annex* of June 2008.

###### *C. What is the PAG Manual: Protective Action Guides and Planning Guidance for Radiological Incidents?*

In 2013, EPA revised the PAG Manual to provide federal, state and local emergency management officials with guidance for responding to radiological emergencies (78 FR 22257, April 15, 2013). See the 2013 PAG Manual at <https://www.epa.gov/radiation/protective-action-guides-pags>. A protective action guide (PAG) is the projected dose to an individual from a release of radioactive material at which a specific protective action to reduce or avoid that dose is recommended. Emergency management officials use PAGs for making decisions regarding actions to protect the public from exposure to radiation during an emergency. Such actions include evacuation, shelter-in-place, temporary relocation, water and food restrictions.

The PAGs are based on the following essential principles, which also apply to the selection of any protective action during an incident:

- Prevent acute effects.
- Balance protection with other important factors and ensure that actions result in more benefit than harm.
- Reduce risk of chronic effects.

The PAG Manual is not a legally binding regulation or standard and does not supersede any environmental laws; PAGs are not intended to define "safe" or "unsafe" levels of exposure or contamination. As indicated by the use of non-mandatory language such as

"may," "should" and "can," the Manual only provides recommendations and does not confer any legal rights or impose any legally binding requirements upon any member of the public, states or any federal agency. Rather, the PAG Manual provides projected radiation dose levels at which specific actions are recommended in order to reduce or avoid that dose. The 2013 revised interim PAG Manual is designed to provide flexibility to be more or less restrictive as deemed appropriate by decision makers based on the unique characteristics of the incident and the local situation.

###### *D. What additional guidance is being proposed for the PAG Manual?*

The draft drinking water protective action guidance was developed by a multi-agency PAG Subcommittee of the Federal Radiological Preparedness Coordinating Committee and is published by the EPA with concurrence from the Department of Energy, the Department of Defense, the Department of Homeland Security (DHS), including the Federal Emergency Management Agency, the Nuclear Regulatory Commission, the Department of Health and Human Services, including both the Centers for Disease Control and Prevention and the Food and Drug Administration (FDA), the U.S. Department of Agriculture and the Department of Labor.

A large scale radiation contamination incident could impact the United States, driving the need for a pre-established drinking water PAG. EPA is proposing a two-tiered intermediate phase drinking water PAG of 100 mrem projected dose in the first year for infants, children and pregnant or nursing women and 500 mrem projected dose in the first year for the general population. The proposed PAG is designed to work in concert with the other Protective Action Guides currently in place for other media in the intermediate phase (*i.e.*, the Food and Drug Administration's 500 mrem PAG for ingestion of food) and provides an additional level of protection for the most sensitive life stages. Authorities have flexibility on how to apply the PAG. In some cases they may find it prudent to use a single PAG (*e.g.*, 100 mrem) as a target for the whole population, while in other circumstances, authorities may find that it makes sense to use both targets simultaneously. For example, emergency managers can use a two-tiered approach to focus on protecting the most sensitive population with limited, alternate water resources. Because the water and food PAGs are

designed to be used in concert, the appropriate protective actions will be influenced by the exposure scenario and factors that influence the viability of alternative approaches to reducing that dose.

This proposed, additional draft guidance recommends protective actions when drinking water may be impacted by a radiological or nuclear incident. The two-tier approach seeks to balance the goal of keeping radiation doses as low as possible with the practical and logistical challenges of providing alternative drinking water during the response to a disaster. EPA has included examples of estimated costs for selected drinking water protective actions in the Docket, ID No. EPA-HQ-OAR-2007-0268. In developing the drinking water PAG, the Agency considered potential cumulative exposure from a radiation incident. Ultimately, a PAG does not represent an "acceptable" routine exposure; a PAG is a dose at which protective action is advised in order to reduce or avoid that dose. Every PAG is developed with the same three principles: prevent acute effects, balance protection with other important factors and ensure that actions result in more benefit than harm, and reduce risk of chronic effects. Emergency management officials should consider all exposure routes when making protective action decisions in an emergency.

Under the Safe Drinking Water Act (SDWA), the Agency has established maximum contaminant levels (MCLs) for radiological contaminants in drinking water. The National Primary Drinking Water Regulations (NPDWR) for radionuclides are based on lifetime exposure criteria and assume 70 years of continued exposure to contaminants in drinking water. While the SDWA framework is appropriate for day-to-day normal operations, it may not provide the necessary tools to assist emergency responders with determining the need for an immediate protective action. EPA expects that any drinking water system adversely impacted during a radiation contamination incident will take action to return to compliance with MCLs as soon as practicable.

*E. How were comments received on the 2013 draft PAG Manual considered in developing this proposal?*

On April 15, 2013, EPA published a **Federal Register** notice requesting public comments on the appropriateness of developing and incorporating a drinking water PAG in the revised PAG Manual (78 FR 22257).

Regarding the specific issue of drinking water, the Agency received

about 50 comment letters from members of the public, state and local emergency response and health organizations, environmental advocates, industry associations, organizations opposed to nuclear power, and from national and international radiation protection organizations.

Several commenters from state emergency management agencies and radiation control programs expressed an urgent need for EPA to establish a drinking water PAG, pointing out that drinking water is the only media not currently addressed in the PAG Manual. Commenters stated that a drinking water PAG is a critical aspect of a coordinated emergency response after a radiation contamination incident.

Commenters representing states agencies from Ohio, Kansas, Pennsylvania, Illinois and Washington suggested that a drinking water PAG should be established at the 500 mrem level, to be consistent with the FDA food PAG and with the DHS guidance<sup>1</sup> for water. While EPA agrees with the need of establishing a drinking water PAG, which is consistent with currently available guidance, it is also important to note that EPA believes that when possible, PAG recommendations should provide an additional level of protection to sensitive life-stages. For short-term incidents, it is appropriate to consider a lower tier PAG level of 100 mrem for sensitive life-stages including pregnant women, nursing women and children 15 years old and under. This approach of setting a two-tier level of protection incorporates suggestions submitted by commenters regarding the adequate consideration of children and sensitive subpopulations. There is an abundant precaution built into the derivation of the drinking water PAG through a variety of assumptions, including amount of water consumed, exposure duration and dose-response modeling, using the dose-response for the most sensitive life stages to derive the PAG for children through age 15 years. Today's proposal ensures that protective measures are appropriate for all members of the public, including sensitive subpopulations.

In contrast, several commenters from environmental protection advocate organizations suggested that a drinking water PAG is not needed, and urged EPA to base any emergency response measures regarding drinking water solely on the NPDWR for Radionuclides MCLs. Some commenters expressed

concerns that establishing a drinking water PAG would weaken existing environmental standards and regulations. However, the drinking water standards are legal limits designed to prevent health effects from everyday exposure to low levels of radiation over long periods and they are not changing with this proposal.

Estimated risk of excess cancer cases for lifetime exposure (70 years) to radioactive contaminants in drinking water at 4 mrem/yr (the MCL) generally falls in a range of risks deemed acceptable by the Agency's regulations. Estimated risks associated with a shorter (one year) exposure to radioactivity in drinking water at the proposed PAG levels fall within a similar range. Emergency guides are temporary measures to minimize risk while enabling prioritization of limited resources during an emergency response.

The PAG levels are guidance for emergency situations; they do not supplant any standards or regulations, nor do they affect the stringency or enforcement of any standards or regulations. The PAG levels are intended to be used only in an emergency when radiation levels have already exceeded environmental standards. EPA expects that any drinking water system adversely impacted during a radiation incident will take action to return to compliance with Safe Drinking Water Act levels as soon as practicable.

*F. When will the PAG Manual be finalized?*

Once comments on this proposed, additional draft action have been addressed, EPA will add drinking water guidance to the full PAG Manual, which will then be issued in final form for incorporation into state, local, tribal and federal emergency response plans over a one-year implementation timeframe.

*G. What should I consider as I prepare my comments for EPA?*

When submitting comments, remember to:

- Identify the rulemaking by docket number, subject heading, **Federal Register** date and page number.
- Follow directions—the EPA may ask you to respond to specific questions or organize comments by referencing the chapter number of the draft action guide
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide technical information and data that you used.

<sup>1</sup> Guidance established by the Department of Homeland Security as an intermediate-level PAG for drinking water interdiction (73 FR 45029, April 1, 2008).

- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow it to be reproduced.

- Illustrate your concerns with specific examples and suggest alternatives.

- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

- Make sure to submit your comments by the comment period deadline identified.

#### *H. What specific comments are being sought?*

While all comments regarding any aspect of the draft drinking water PAG guidance will be considered, please comment on the following issues specifically:

- Please comment on the appropriateness of the drinking water PAG and the guidance for advance planning.

- Please comment on what implementation challenges might be associated with the two-tiered approach to the water PAG that EPA should consider, and suggest additional guidance that would be helpful.

- Please comment on whether (and if so why) EPA should reconsider using a single-tier drinking water PAG rather than tiered approach proposed in the draft action guide.

- Please suggest additional guidance that would aid pre-incident planning and implementation specific to your community's drinking water systems.

- Please comment on how this guidance should be implemented in emergency response and recovery plans at all levels of government, including considerations for public communications during an emergency.

In the future, calculations and derived response levels will be provided in the Federal Radiological Monitoring and Assessment Center (FRMAC) Assessment Manuals. Emergency planners are referred to FRMAC Monitoring and Sampling Methods to assess surface and drinking water impacts from a radiological emergency. See the Assessment and Monitoring & Sampling folders at <http://www.nv.doe.gov/nationalsecurity/homelandsecurity/frmac/manuals.aspx>. After considering public comments, EPA intends to issue a final PAG Manual, which will supersede the 1992 PAG Manual and the 2013 revised PAG Manual.

Dated: June 3, 2016.

**Joel Beauvais,**

*Deputy Assistant Administrator, Office of Water.*

[FR Doc. 2016-13786 Filed 6-9-16; 8:45 am]

**BILLING CODE 6560-50-P**

## **ENVIRONMENTAL PROTECTION AGENCY**

**[ER-FRL-9027-5]**

### **Environmental Impact Statements; Notice of Availability**

*Responsible Agency:* Office of Federal Activities, General Information (202) 564-7146 or <http://www2.epa.gov/nepa>. Weekly receipt of Environmental Impact Statements Filed 05/30/2016 Through 06/03/2016 Pursuant to 40 CFR 1506.9.

#### **Notice**

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: <http://www.epa.gov/compliance/nepa/eisdata.html>.

*EIS No. 20160124, Final, FERC, AK, Sweetheart Lake Hydroelectric Project, Review Period Ends: 07/11/2016, Contact: John Matkowski 202-502-8576*

*EIS No. 20160125, Final, BIA, NV, Aiya Solar Project, Review Period Ends: 07/11/2016, Contact: Charles Lewis 602-379-6782*

*EIS No. 20160126, Draft, USA, AZ, Lone Star Ore Body Development Project, Comment Period Ends: 07/25/2016, Contact: Michael Langley 602-230-6953*

*EIS No. 20160127, Final, NPS, CA, Restoration of Native Species in High Elevation Aquatic Ecosystems Plan, Review Period Ends: 07/11/2016, Contact: Woody Smeck 559-565-3100*

*EIS No. 20160128, Final, USACE, NC, Morehead City Harbor Integrated Dredged Material Management Plan, Review Period Ends: 07/11/2016, Contact: Jennifer Owens 910-251-4757*

*EIS No. 20160129, Draft, USFS, CA, Los Padres Tamarisk Removal, Comment Period Ends: 07/25/2016, Contact: Lloyd Simpson 805-646-4348 ex. 316*

*EIS No. 20160130, Draft, NOAA, TX, Flower Garden Banks National Marine Sanctuary Boundary Expansion, Comment Period Ends: 08/19/2016, Contact: Kelly Drinnen 409-621-5151 Ext.105*

*EIS No. 20160131, Third Final Supplemental, USFS, MT,*

*Beaverhead-Deerlodge National Forest Land and Resource Management Plan to comply with District of Mont Court Order, Review Period Ends: 07/20/2016, Contact: Jan Bowey 406-842-5432*

*EIS No. 20160132, Draft, FHWA, CO, US 50 Corridor East, Comment Period Ends: 07/29/2016, Contact: Patricia Sergeson 720-963-3073*

*EIS No. 20160133, Final, FTA, VA, Potomac Yard Metrorail Station, Review Period Ends: 07/11/2016, Contact: Dan Koenig 202-219-3528*

*EIS No. 20160134, Final, TVA, TN, PROGRAMMATIC—Ash Impoundment Closure, Review Period Ends: 07/11/2016, Contact: Ashley Farless 423-751-2361*

Dated: June 7, 2016.

**Dawn Roberts,**

*Management Analyst, NEPA Compliance Division, Office of Federal Activities.*

[FR Doc. 2016-13791 Filed 6-9-16; 8:45 am]

**BILLING CODE 6560-50-P**

## **FEDERAL COMMUNICATIONS COMMISSION**

**[CC Docket No. 92-237; DA 16-599]**

### **Next Meeting of the North American Numbering Council**

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice.

**SUMMARY:** In this document, the Commission released a public notice announcing the meeting and agenda of the North American Numbering Council (NANC). The intended effect of this action is to make the public aware of the NANC's next meeting and agenda.

**DATES:** Thursday, June 30, 2016, 10:00 a.m.

**ADDRESSES:** Requests to make an oral statement or provide written comments to the NANC should be sent to Carmell Weathers, Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission, Portals II, 445 12th Street SW., Room 5-C162, Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** Carmell Weathers at (202) 418-2325 or [Carmell.Weathers@fcc.gov](mailto:Carmell.Weathers@fcc.gov). The fax number is: (202) 418-1413. The TTY number is: (202) 418-0484.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's document in CC Docket No. 92-237, DA 16-599 released May 31, 2016. The complete text in this document is available for public inspection and copying during normal business hours

in the FCC Reference Information Center, Portals II, 445 12th Street SW., Room CY-A257, Washington, DC 20554. The document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street SW., Room CY-B402, Washington, DC 20554, telephone (800) 378-3160 or (202) 863-2893, facsimile (202) 863-2898, or via the Internet at <http://www.bcpweb.com>. It is available on the Commission's Web site at <http://www.fcc.gov>.

The North American Numbering Council (NANC) has scheduled a meeting to be held Thursday, June 30, 2016, from 10:00 a.m. until 2:00 p.m. The meeting will be held at the Federal Communications Commission, Portals II, 445 12th Street SW., Room TW-C305, Washington, DC. This meeting is open to members of the general public. The FCC will attempt to accommodate as many participants as possible. The public may submit written statements to the NANC, which must be received two business days before the meeting. In addition, oral statements at the meeting by parties or entities not represented on the NANC will be permitted to the extent time permits. Such statements will be limited to five minutes in length by any one party or entity, and requests to make an oral statement must be received two business days before the meeting.

**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](mailto:fcc504@fcc.gov) or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty). Reasonable accommodations for people with disabilities are available upon request. Include a description of the accommodation you will need, including as much detail as you can. Also include a way we can contact you if we need more information. Please allow at least five days advance notice; last minute requests will be accepted, but may be impossible to fill.

**Proposed Agenda:** Thursday, June 30, 2016, 10:00 a.m.\*

1. Announcements and Recent News
2. Approval of Transcript—March 24, 2016
3. Report of the North American Numbering Plan Administrator (NANPA)
4. Report of the National Thousands Block Pooling Administrator (PA)
5. Report of the Toll Free Number Administrator (TFNA)
6. Report of the Numbering Oversight Working Group (NOWG)

7. Report of the North American Numbering Plan Billing and Collection (NANP B&C) Agent
8. Report of the Billing and Collection Working Group (B&C WG)
9. Report of the North American Portability Management LLC (NAPM LLC)
10. Report of the Local Number Portability Administration (LNPA) Transition Oversight Manager (TOM)
11. Report of the Local Number Portability Administration Working Group (LNPA WG)
12. Report of the Future of Numbering Working Group (FoN WG)
13. Report of the Internet Protocol Issue Management Group (IP IMG)
14. Status of the Industry Numbering Committee (INC) activities
15. Summary of Action Items
17. Public Comments and Participation (maximum 5 minutes per speaker)
18. Other Business

Adjourn no later than 2:00 p.m.

\*The Agenda may be modified at the discretion of the NANC Chairman with the approval of the DFO.

Federal Communications Commission.

**Marilyn Jones,**

*Attorney, Wireline Competition Bureau.*

[FR Doc. 2016-13696 Filed 6-9-16; 8:45 am]

**BILLING CODE 6712-01-P**

## FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060-0710]

### Information Collection Being Reviewed by the Federal Communications Commission

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501-3520), the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the

quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

**DATES:** Written PRA comments should be submitted on or before August 9, 2016. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

**ADDRESSES:** Direct all PRA comments to Nicole Ongele, FCC, via email [PRA@fcc.gov](mailto:PRA@fcc.gov) and to [Nicole.Ongele@fcc.gov](mailto:Nicole.Ongele@fcc.gov).

**FOR FURTHER INFORMATION CONTACT:** For additional information about the information collection, contact Nicole Ongele at (202) 418-2991.

### SUPPLEMENTARY INFORMATION:

**OMB Control Number:** 3060-0710.

**Title:** Policy and Rules Under Parts 1 and 51 Concerning the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996—CC Docket No. 96-98.

**Form Number:** N/A.

**Type of Review:** Extension of a currently approved collection.

**Respondents:** Business or other for-profit entities.

**Number of Respondents and Responses:** 15,282 respondents;

1,067,987 responses.

**Estimated Time per Response:** .50 hours—4,000 hours.

**Frequency of Response:** On occasion reporting requirement, recordkeeping requirement and third party disclosure requirement.

**Obligation to Respond:** Required to obtain or retain benefits. Statutory authority for this information collection is contained in sections 1-4, 201-205, 214, 224, 251, 252, and 303(r) of the Communications Act of 1934, as amended, and section 601 of the Telecommunications Act of 1996. 47 U.S.C. 151-154, 201-205, 224, 251, 252, 303 (r), and 601.

**Total Annual Burden:** 645,798 hours.

**Total Annual Cost:** No cost.

**Privacy Impact Assessment:** No impact(s).

*Nature and Extent of Confidentiality:* The Commission is not requesting respondents to submit confidential information to the Commission. If the respondents wish confidential treatment of their information, they may request confidential treatment under 47 CFR 0.459 of the Commission's rules.

*Needs and Uses:* The Commission adopted rules to implement the First Report and Order on Reconsideration issued in CC Docket No. 96–98. That Order implemented parts of sections 251 and 252 of the Telecommunications Act of 1996 that affect local competition. Incumbent local exchange carriers (ILECs) are required to offer interconnection, unbundled network elements (UNEs), transport and termination, and wholesale rates for certain services to new entrants. Incumbent LECS must price such services and rates that are cost-based and just and reasonable and provide access to right-of-way as well as establish reciprocal compensation arrangements for the transport and termination of telecommunications traffic.

Federal Communications Commission.

**Sheryl D. Todd,**

*Deputy Secretary, Office of Secretary.*

[FR Doc. 2016–13708 Filed 6–9–16; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL DEPOSIT INSURANCE CORPORATION

### Notice of Termination 10328 CommunitySouth Bank and Trust Easley, South Carolina

The Federal Deposit Insurance Corporation (FDIC), as Receiver for 10328 CommunitySouth Bank and Trust, Easley, South Carolina (Receiver) has been authorized to take all actions necessary to terminate the receivership estate of CommunitySouth Bank and Trust (Receivership Estate); the Receiver has made all dividend distributions required by law.

The Receiver has further irrevocably authorized and appointed FDIC-Corporate as its attorney-in-fact to execute and file any and all documents that may be required to be executed by the Receiver which FDIC-Corporate, in its sole discretion, deems necessary; including but not limited to releases, discharges, satisfactions, endorsements, assignments and deeds.

Effective June 01, 2016, the Receivership Estate has been terminated, the Receiver discharged, and the Receivership Estate has ceased to exist as a legal entity.

Dated: June 6, 2016.

Federal Deposit Insurance Corporation.

**Robert E. Feldman,**

*Executive Secretary.*

[FR Doc. 2016–13683 Filed 6–9–16; 8:45 am]

**BILLING CODE 6714–01–P**

## FEDERAL DEPOSIT INSURANCE CORPORATION

### Notice of Termination; 10242 Bank of Florida—Southwest; Naples, Florida

The Federal Deposit Insurance Corporation (FDIC), as Receiver for 10242 Bank of Florida—Southwest, Naples, Florida (Receiver) has been authorized to take all actions necessary to terminate the receivership estate of Bank of Florida—Southwest (Receivership Estate); the Receiver has made all dividend distributions required by law.

The Receiver has further irrevocably authorized and appointed FDIC-Corporate as its attorney-in-fact to execute and file any and all documents that may be required to be executed by the Receiver which FDIC-Corporate, in its sole discretion, deems necessary; including but not limited to releases, discharges, satisfactions, endorsements, assignments and deeds.

Effective June 01, 2016, the Receivership Estate has been terminated, the Receiver discharged, and the Receivership Estate has ceased to exist as a legal entity.

Dated: June 6, 2016.

Federal Deposit Insurance Corporation.

**Robert E. Feldman,**

*Executive Secretary.*

[FR Doc. 2016–13689 Filed 6–9–16; 8:45 am]

**BILLING CODE 6714–01–P**

## FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

[BAC 6735–01]

### Sunshine Act Meeting

June 8, 2016.

**TIME AND DATE:** 10:00 a.m., Tuesday, July 12, 2016.

**PLACE:** The Richard V. Backley Hearing Room, Room 511N, 1331 Pennsylvania Avenue NW., Washington, DC 20004 (enter from F Street entrance).

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:** The Commission will hear oral argument in the matter *Secretary of Labor v. The American Coal Company*, Docket No. LAKE 2011–13 (Issues include whether the Judge erred by denying the

Secretary's motion to approve a proposed settlement because the Judge concluded that more information was needed.) Any person attending this oral argument who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and § 2706.160(d).

### CONTACT PERSON FOR MORE INFORMATION:

Emogene Johnson (202) 434–9935/(202) 708–9300 for TDD Relay/1–800–877–8339 for toll free.

**Sarah L. Stewart,**

*Deputy General Counsel.*

[FR Doc. 2016–13879 Filed 6–8–16; 4:15 pm]

**BILLING CODE P**

## FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

[BAC 6735–01]

### Sunshine Act Meeting

JUNE 8, 2016.

**TIME AND DATE:** 10:00 a.m., Thursday, July 14, 2016.

**PLACE:** The Richard V. Backley Hearing Room, Room 511N, 1331 Pennsylvania Avenue NW., Washington, DC 20004 (enter from F Street entrance).

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:** The Commission will consider and act upon the following in open session: *Secretary of Labor v. The American Coal Company*, Docket No. LAKE 2011–13 (Issues include whether the Judge erred by denying the Secretary's motion to approve a proposed settlement because the Judge concluded that more information was needed.) Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and § 2706.160(d).

### CONTACT PERSON FOR MORE INFORMATION:

Emogene Johnson (202) 434–9935/(202) 708–9300 for TDD Relay/1–800–877–8339 for toll free.

**Sarah L. Stewart,**

*Deputy General Counsel.*

[FR Doc. 2016–13880 Filed 6–8–16; 4:15 pm]

**BILLING CODE P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Agency for Healthcare Research and Quality

#### Scientific Information Request on Treatment Strategies for Patients With Lower Extremity Chronic Venous Disease (LECVD)

**AGENCY:** Agency for Healthcare Research and Quality (AHRQ), HHS.

**ACTION:** Request for scientific information submissions.

**SUMMARY:** The Agency for Healthcare Research and Quality (AHRQ) is seeking scientific information submissions from the public. Scientific information is being solicited to inform our review of *Treatment Strategies for Patients with Lower Extremity Chronic Venous Disease (LECVD)*, which is currently being conducted by the AHRQ's Evidence-based Practice Centers (EPC) Programs. Access to published and unpublished pertinent scientific information will improve the quality of this review. AHRQ is conducting this systematic review pursuant to Section 902(a) of the Public Health Service Act, 42 U.S.C. 299a(a).

**DATES:** *Submission Deadline* on or before July 11, 2016.

#### ADDRESSES:

*Email submissions:* [SIPS@epc-src.org](mailto:SIPS@epc-src.org).

*Print submissions:*

*Mailing Address:* Portland VA Research Foundation, Scientific Resource Center, Attn: Scientific Information Packet Coordinator, P.O. Box 69539, Portland, OR 97239.

*Shipping Address (FedEx, UPS, etc.):* Portland VA Research Foundation, Scientific Resource Center, Attn: Scientific Information Packet Coordinator, 3710 SW. U.S. Veterans Hospital Road, Mail Code: R&D 71, Portland, OR 97239.

**FOR FURTHER INFORMATION CONTACT:** Ryan McKenna, Telephone: 503-220-8262 ext. 51723 or Email: [SIPS@epc-src.org](mailto:SIPS@epc-src.org).

**SUPPLEMENTARY INFORMATION:** The Agency for Healthcare Research and Quality has commissioned the Evidence-based Practice Centers (EPC) Programs to complete a review of the evidence for *Treatment Strategies for Patients with Lower Extremity Chronic Venous Disease (LECVD)*. The EPC Program is dedicated to identifying as many studies as possible that are relevant to the questions for each of its reviews. In order to do so, we are supplementing the usual manual and electronic database searches of the

literature by requesting information from the public (e.g., details of studies conducted). We are looking for studies that report on *Treatment Strategies for Patients with Lower Extremity Chronic Venous Disease (LECVD)*, including those that describe adverse events. The entire research protocol, including the key questions, is also available online at: [http://www.AHRQ.gov/sites/default/files/wysiwyg/research/findings/ta/topicrefinement/lecvd\\_protocol.pdf](http://www.AHRQ.gov/sites/default/files/wysiwyg/research/findings/ta/topicrefinement/lecvd_protocol.pdf).

This notice is to notify the public that the EPC Program would find the following information on *Treatment Strategies for Patients with Lower Extremity Chronic Venous Disease (LECVD)* helpful:

□ A list of completed studies that your organization has sponsored for this indication. In the list, please *indicate whether results are available on ClinicalTrials.gov along with the ClinicalTrials.gov trial number.*

□ *For completed studies that do not have results on ClinicalTrials.gov*, please provide a summary, including the following elements: study number, study period, design, methodology, indication and diagnosis, proper use instructions, inclusion and exclusion criteria, primary and secondary outcomes, baseline characteristics, number of patients screened/eligible/enrolled/lost to follow-up/withdrawn/analyzed, effectiveness/efficacy, and safety results.

□ *A list of ongoing studies that your organization has sponsored for this indication.* In the list, please provide the ClinicalTrials.gov trial number or, if the trial is not registered, the protocol for the study including a study number, the study period, design, methodology, indication and diagnosis, proper use instructions, inclusion and exclusion criteria, and primary and secondary outcomes.

□ Description of whether the above studies constitute all Phase II and above clinical trials sponsored by your organization for this indication and an index outlining the relevant information in each submitted file.

Your contribution will be very beneficial to the EPC Program. The contents of all submissions will be made available to the public upon request. Materials submitted must be publicly available or can be made public. Materials that are considered confidential; marketing materials; study types not included in the review; or information on indications not included in the review cannot be used by the EPC Program. This is a voluntary request for information, and all costs for complying with this request must be borne by the submitter.

The draft of this review will be posted on AHRQ's EPC Program Web site and available for public comment for a period of 4 weeks. If you would like to be notified when the draft is posted, please sign up for the email list at: [https://subscriptions.ahrq.gov/accounts/USAHRQ/subscriber/new?topic\\_id=USAHRQ\\_18](https://subscriptions.ahrq.gov/accounts/USAHRQ/subscriber/new?topic_id=USAHRQ_18).

*The systematic review will answer the following questions. This information is provided as background. AHRQ is not requesting that the public provide answers to these questions.* The entire research protocol, is available online at: [http://www.AHRQ.gov/sites/default/files/wysiwyg/research/findings/ta/topicrefinement/lecvd\\_protocol.pdf](http://www.AHRQ.gov/sites/default/files/wysiwyg/research/findings/ta/topicrefinement/lecvd_protocol.pdf).

KQ 1: Narrative review of the diagnostic methods and diagnostic criteria for all adult patients (symptomatic and asymptomatic) with LE varicose veins, LE chronic venous insufficiency/incompetence/reflux, and/or LE chronic venous thrombosis/obstruction (including post-thrombotic syndrome).

KQ 2: Regarding treatments for all adult patients (symptomatic and asymptomatic) with LE varicose veins and/or LE chronic venous insufficiency/incompetence/reflux:

I. What is the comparative effectiveness of exercise, medical therapy, weight reduction, mechanical compression therapy, and invasive procedures (i.e., surgical and endovascular procedures) on health outcomes?

II. What diagnostic method(s) and criteria were used in each study?

III. How does the comparative effectiveness of treatment vary by patient characteristics, including age, sex, risk factors, comorbidities, characteristics of disease, anatomic segment affected, and characteristics of the therapy (e.g., exercise intensity, type of mechanical compression)?

IV. What are the comparative safety concerns associated with each treatment strategy (e.g., adverse drug reactions, bleeding)? Do the safety concerns vary by patient subgroup (age, sex, race, risk factors, comorbidities, anatomic segment, or disease severity)?

KQ 3: Regarding treatments for all adult patients (symptomatic and asymptomatic) with LE chronic venous thrombosis/obstruction (including post-thrombotic syndrome):

I. What is the comparative effectiveness of exercise, medical therapy, mechanical compression therapy, and invasive procedures (i.e., surgical and endovascular procedures) on health outcomes?

II. What diagnostic method(s) and criteria were used in each study?

III. How does the comparative effectiveness of treatment vary by patient characteristics, including age, sex, risk factors, comorbidities, characteristics of disease, anatomic segment affected, and characteristics of the therapy (e.g., exercise intensity, type of mechanical compression)?

IV. What are the comparative safety concerns associated with each treatment strategy (e.g., adverse drug reactions, bleeding)? Do the safety concerns vary by patient subgroup (age, sex, race, risk factors, comorbidities, anatomic segment, or disease severity)?

#### **PICOTS (Population, Intervention, Comparator, Outcome, Timing, Setting)**

##### *KQ 1: Diagnosis*

##### **I. Population(s):**

- A. Adults (over age 18) with the diagnosis of LE varicose veins, LE chronic venous insufficiency/incompetence/reflux, and/or LE chronic venous thrombosis/obstruction (including post-thrombotic syndrome)

##### **II. Diagnostic Measures:**

- A. Air plethysmography, LE venous duplex ultrasonography (with and without compression), invasive venography, magnetic resonance venography, computed tomographic venography, serum D-dimer testing, Villalta score

##### **III. Comparators:**

- A. Diagnostic modalities listed above (air plethysmography, LE duplex venous ultrasonography [with and without compression], invasive venography, magnetic resonance venography, computed tomographic venography, serum D-dimer testing, Villalta score) will be compared to one another

##### **IV. Outcomes:**

- A. Sensitivity, specificity, positive predictive value, negative predictive value, inter-rater reliability, internal consistency, test-retest reliability, false positives, false negatives, and positive and negative likelihood ratios for each diagnostic measure listed above will be compared

##### **V. Timing:**

- A. Not applicable

##### **VI. Settings:**

- A. All clinical settings, including inpatient and outpatient

##### *KQs 2–3: Treatment*

##### **I. Population(s):**

- A. KQ 2: A symptomatic or symptomatic adults (over age 18) with the diagnosis of LE varicose veins and/or LE chronic venous insufficiency/incompetence/reflux:

- i. Subgroup analysis: age, race/ethnicity, sex, body weight, CEAP classification, VCSS classification, severity of disease, anatomic segment affected (e.g., iliofemoral, infrainguinal), known malignancy, presence of LE ulcer

- A. KQ 3: A symptomatic or symptomatic adults (over age 18) with the diagnosis of LE chronic venous thrombosis/obstruction (including post-thrombotic syndrome):

- i. Subgroup analysis: age, race/ethnicity, sex, body weight, CEAP classification, VCSS classification, Villalta score, severity of disease, anatomic segment affected (e.g., iliofemoral, infrainguinal), known malignancy, presence of LE ulcer

##### **II. Interventions:**

- A. KQ 2: lifestyle interventions (e.g., smoking cessation, leg elevation, weight reduction, exercise), medical therapy, local skin care/wound care, mechanical compression therapy, and invasive procedures (i.e., surgical and endovascular procedures)

- i. Medical therapies: diuretics, aspirin, pentoxifylline, prostacyclins, zinc sulfate
- ii. Invasive surgical/endovascular procedures: sclerotherapy (liquid, foam, glue), radiofrequency ablation, thermal ablation, chemical ablation, ambulatory phlebectomy, transilluminated powered phlebectomy, venous ligation, venous excision

- B. KQ 3: lifestyle interventions (e.g., smoking cessation, leg elevation, weight reduction, exercise), medical therapy, local skin care/wound care, mechanical compression therapy, and invasive procedures (i.e., surgical and endovascular procedures)

- i. Medical therapies: anticoagulants including warfarin, apixaban, rivaroxaban, edoxaban, and dabigatran; diuretics
- ii. Invasive surgical/endovascular procedures: endovenous angioplasty/stenting, ultrasound accelerated thrombolysis for chronic DVT (EkoSonic® endovascular system), surgical thromboembolectomy

##### **III. Comparators:**

- A. Specific treatments will be compared to other included treatments as described above or to no treatment (placebo or usual care)

##### **IV. Outcomes:**

- A. Changes on standardized symptom scores (Villalta score, CEAP classification, AVVQ score, and VCSS score); qualitative reduction

in Ledema; qualitative reduction in LE pain; improvement in LE venous hemodynamics/reflux severity as measured by air plethysmography, duplex ultrasonography, or invasive venography; venous wound healing, recurrent ulceration, patient-reported quality of life (including AVVQ), repeat intervention, LE amputation E

- B. Adverse effects of treatment, including: adverse drug reactions; bleeding (including intracranial bleeding); venous wound infection; contrast nephropathy; radiation-related injuries; exercise-related harms; periprocedural complications (vessel dissection, vessel perforation, and AV fistula), thrombophlebitis, venous thrombosis (including stent thrombosis), venous thromboembolic events (including PE), and death

##### **V. Timing:**

- A. Studies with all durations of followup will be included in the review; for symptomatic patients, we will attempt to categorize studies into those that evaluate short-term ( $\leq 30$  days), intermediate-term (31 days to 6 months), and long-term ( $\geq 6$  months) events.

##### **VI. Settings:**

- A. Any

**Sharon B. Arnold,**  
*Deputy Director.*

[FR Doc. 2016–13761 Filed 6–9–16; 8:45 am]

**BILLING CODE 4160–90–P**

#### **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

##### **Agency for Healthcare Research and Quality**

##### **Agency Information Collection Activities: Proposed Collection; Comment Request**

**AGENCY:** Agency for Healthcare Research and Quality, HHS.

**ACTION:** Notice.

**SUMMARY:** This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) approve the proposed information collection project: “*Survey of Hospital Quality Leaders*.” In accordance with the Paperwork Reduction Act, 44 U.S.C. 3501–3521, AHRQ invites the public to comment on this proposed information collection.

This proposed information collection was previously published in the **Federal Register** on February 10, 2016 and

allowed 60 days for public comment. AHRQ received no substantive comments. The purpose of this notice is to allow an additional 30 days for public comment.

**DATES:** Comments on this notice must be received by July 11, 2016.

**ADDRESSES:** Written comments should be submitted to: AHRQ's OMB Desk Officer by fax at (202) 395-6974 (attention: AHRQ's desk officer) or by email at [OIRA\\_submission@omb.eop.gov](mailto:OIRA_submission@omb.eop.gov) (attention: AHRQ's desk officer).

**FOR FURTHER INFORMATION CONTACT:** Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427-1477, or by email at [doris.lefkowitz@AHRQ.hhs.gov](mailto:doris.lefkowitz@AHRQ.hhs.gov).

**SUPPLEMENTARY INFORMATION:**

**Proposed Project**

*Survey of Hospital Quality Leaders*

The Consumer Assessment of Healthcare Providers and Systems (CAHPS®) Hospital Survey (HCAHPS) was first implemented on a voluntary basis in 2006 to assess patients' experiences with care. Today, hospitals subject to the Inpatient Prospective Payment System (IPPS) annual payment update provisions are required to collect and submit HCAHPS data in order to receive their full annual payment update. In addition, HCAHPS performance was added to the calculation of the value-based incentive payment in the Hospital Value-Based Purchasing (Hospital VBP) program, beginning with discharges in October 2012. The FY 2015 Hospital VBP program links 30% of the Inpatient Prospective Payment System hospitals' payment from CMS to HCAHPS performance.

Despite the high stakes associated with HCAHPS scores, little is known about the ways in which hospitals are using HCAHPS data and supplemental information about patient experience to understand and improve their patients' experiences.

This research has the following goals:

(1) To characterize the role of HCAHPS in hospitals' efforts to improve patient experiences

(2) to identify the types of quality improvement activities that hospitals implement to improve their HCAHPS scores

(3) to describe hospitals' perspectives on HCAHPS

(4) to determine the types of information collected by hospitals beyond those required for Hospital VBP

This study is being conducted by AHRQ through its contractor, the RAND Corporation, pursuant to AHRQ's statutory authority to conduct and support research on healthcare and on systems for the delivery of such care, including activities with respect to the quality, effectiveness, efficiency, appropriateness and value of healthcare services and with respect to quality measurement and improvement. 42 U.S.C. 299a(a)(1) and (2).

**Method of Collection**

*Survey of Hospital Quality Leaders:* this survey will elicit information from approximately 500 hospital quality leaders in a variety of hospital settings, including high- and low-performing hospitals, facilities of varying sizes, and hospitals representing all nine geographic Census divisions. Hospital quality leaders will be asked to provide information about the use of HCAHPS in their hospital, with questions

addressing all of the substantive areas identified in the goals section above.

Characterizing hospitals' use of HCAHPS data will provide important insight into the activities hospitals conduct to improve patient experience scores. This information may be useful in supporting hospitals who lag behind their peers, learning from hospitals with outstanding records of patient experience, and providing recommendations that may be used to refine HCAHPS survey content.

**Estimated Annual Respondent Burden**

Table 1 shows the estimated annualized burden and cost for the respondents' time to participate in this data collection. These burden estimates are based on tests of data collection conducted on nine or fewer entities. As indicated below, the annual total burden hours are estimated to be 294 hours. The annual total cost associated with the annual total burden hours is estimated to be \$14,708.

Table 1 shows the estimated annualized burden for the respondents' time to participate in this data collection. The Survey of Hospital Quality Leaders will be administered to 500 individuals. Prior work suggests that 3–5 items can typically be completed per minute, depending on item complexity and respondent characteristics, (Hays & Reeve, 2010; Berry, 2009). We have calculated our burden estimate using a conservative estimate of 4.5 items per minute. The survey contains 159 items and is thus estimated to require an average administration time of 35 minutes. As indicated below, the annual total burden hours are estimated to be 294 hours.

TABLE 1—ESTIMATED ANNUALIZED BURDEN HOURS AND COST

Collection task	Number of respondents	Number of responses per respondent	Hours per response	Total burden hours	Average hourly wage rate*	Total cost burden
Survey of Hospital Quality Leaders .....	500	1	.59	294	\$49.96	\$14,708
Totals .....	.....	.....	.....	294	.....	14,708

\* Based upon mean hourly wages, "National Compensation Survey: All United States December 2009—January 2011," U.S. Department of Labor, Bureau of Labor Statistics.

**Request for Comments**

In accordance with the Paperwork Reduction Act, comments on AHRQ's information collection are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper performance of AHRQ health care research and health care information dissemination functions, including

whether the information will have practical utility; (b) the accuracy of AHRQ's estimate of burden (including hours and costs) of the proposed collection(s) 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 upon the respondents, including the use of

automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the Agency's subsequent request for OMB approval of the proposed information collection. All

comments will become a matter of public record.

**Sharon B. Arnold,**  
*Deputy Director.*

[FR Doc. 2016-13841 Filed 6-9-16; 8:45 am]

**BILLING CODE 4160-90-P**

## **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

### **Centers for Medicare & Medicaid Services**

**[CMS-6069-N]**

#### **Medicare Program; Pre-Claim Review Demonstration for Home Health Services**

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Notice.

**SUMMARY:** This notice announces a 3-year Medicare pre-claim review demonstration for home health services in the states of Illinois, Florida, Texas, Michigan, and Massachusetts where there have been high incidences of fraud and improper payments for these services.

**DATES:** This demonstration will begin in Illinois no earlier than August 1, 2016, in Florida no earlier than October 1, 2016, and in Texas no earlier than December 1, 2016. The demonstration will begin in Michigan and Massachusetts no earlier than January 1, 2017.

**FOR FURTHER INFORMATION CONTACT:**  
Jennifer McMullen, (410) 786-7635.

Questions regarding the Medicare Pre-Claim Review Demonstration for Home Health Services should be sent to [HHPreClaimDemo@cms.hhs.gov](mailto:HHPreClaimDemo@cms.hhs.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background and Legislative Authority**

Section 402(a)(1)(J) of the Social Security Amendments of 1967 (42 U.S.C. 1395b-1(a)(1)(J)) authorizes the Secretary to develop demonstration projects that “develop or demonstrate improved methods for the investigation and prosecution of fraud in the provision of care or services under the health programs established by the Social Security Act” (the Act). According to this authority, we will implement a Medicare demonstration that establishes a pre-claim review process for home health agencies (HHAs) to assist in developing improved procedures for the identification, investigation, and prosecution of Medicare fraud occurring among HHAs providing services to

Medicare beneficiaries. The proposed demonstration will begin in Illinois not earlier than August 1, 2016, will begin in Florida not earlier than October 1, 2016, and will begin in Texas not earlier than December 1, 2016. The demonstration will begin in Michigan and Massachusetts not earlier than January 1, 2017. Providers in each state will be notified by the appropriate Medicare Administrative Contractor prior to the start of the demonstration in the state. Additionally, CMS will utilize other educational efforts to announce the program to stakeholders.

This demonstration will evaluate an additional method that may assist with the investigation and prosecution of fraud in order to protect the Medicare Trust Funds from fraudulent actions and improper payments. We believe this demonstration will bolster the efforts that CMS and its partners have taken in implementing a series of anti-fraud initiatives in these states and will provide valuable data that CMS working with its law enforcement partners, can use to combat the submission of fraudulent claims to the Medicare program. One such anti-fraud initiative is the use of temporary moratoria on the enrollment of new home health providers that were put in place in the Miami and Chicago that and were subsequently expanded to the Fort Lauderdale, Detroit, Dallas, and Houston metropolitan areas. These temporary moratoria prohibit the new enrollment of home health providers to help CMS prevent and combat fraud, waste, and abuse in these locations.

We also believe the data collected from this demonstration will assist with a second initiative, the Health Care Fraud Prevention and Enforcement Action Team (HEAT) Task Force, created by the Department of Health and Human Services and the Department of Justice (DOJ), and the Heat Task Force’s ongoing fight against Medicare fraud. The HEAT Task Force uses resources across the government to help prevent and stop fraud, waste, and abuse in the Medicare and Medicaid programs. Since 2007, the HEAT Task Force of the DOJ has charged more than 2,300 defendants with defrauding Medicare of more than \$7 billion and convicted approximately 1,800 defendants of felony health care fraud offenses. In addition, the data resulting from this demonstration could provide investigators and law enforcement with important information to determine how to focus their investigation activities to identify and combat home health fraud, and in so doing, protect the Medicare Trust Funds from fraudulent actions and improper payments.

This demonstration may also help prevent improper payments in geographic areas where HHA providers are known to have a high incidence of fraud. The improper payment rate for HHA claims has been increasing over the past several years, and fraud is one factor contributing to the increase. It is important to note that while all payments made as a result of fraud are considered “improper payments,” not all improper payments constitute fraud. CMS’ Comprehensive Error Rate Testing (CERT) program, which measures Medicare’s improper payment rate, estimates the payments that did not meet Medicare coverage, coding, and billing rules. The fiscal year (FY) 2015 Department of Health and Human Services Agency Financial Report reported that the CERT program’s calculated 2015 improper payment rate for HHA claims increased to 59.0 percent from the 2014 rate of 51.4 percent and the 2013 rate of 17.3 percent. The increase in the 2015 improper payment rate was primarily due to “insufficient documentation” errors, specifically, insufficient documentation to support the medical necessity of the services. Similar documentation errors have also occurred in previous years. For example, the 2014 CERT report found that the majority of home health payment errors occurred when the narrative portion of the face-to-face encounter documentation did not sufficiently describe how the clinical findings from the encounter supported the beneficiary’s homebound status and need for skilled services.

Due to the substantial increase in improper payments and concerns raised by the home health industry, relating to implementation of the face-to-face encounter documentation requirement, we made Medicare HHA payment policy changes in an effort to simplify the face-to-face encounter regulations. Specifically, as of January 1, 2015, a separate narrative is no longer required as part of the face-to-face documentation. Rather, the certifying physician’s or the acute/post-acute care facility’s medical record(s) for the patient must contain sufficient documentation to substantiate eligibility for home health services.

Despite these recent changes, we continue to see cases in which the medical record does not support eligibility for the home health benefit, which constitute “insufficient documentation” errors. Moreover, we note that the recent regulatory changes do not address HHA errors in home health billing other than those related to the face-to-face narrative requirement.

Therefore, we also plan to use this demonstration to help make sure that all coverage and clinical documentation requirements are met before claims are submitted for final payment.

We also believe that this demonstration will enable us to—(1) test the level of resources needed to implement a permanent pre-claim review program for home health services; (2) determine the feasibility of performing pre-claim reviews to prevent payment for services that have historically had a high incidence of fraud; and (3) determine the return on investment of pre-claim review for home health claims. This demonstration will support our program integrity strategy of moving beyond a reactive “pay and chase” method toward a more effective, proactive strategy that identifies potential improper payments before payments are made. We will analyze data from the home health services pre-claim review demonstration to evaluate the impact on fraud in the demonstration states, which we believe will help assist in developing improved procedures for the identification, investigation, and prosecution of Medicare fraud occurring among HHAs providing services to Medicare beneficiaries and may consider if a more focused, risk based approach to pre-claim review is warranted in the future.

The pre-claim review demonstration does not create new documentation requirements, but simply requires currently mandated documentation earlier in the claims payment process. In addition, there are no changes to the home health service benefit for Medicare fee-for-service beneficiaries.

## II. Provisions of the Notice

This demonstration will implement a 3-year pre-claim review process for home health services in Illinois, Florida, Texas, Michigan, and Massachusetts. Prior to and during the demonstration, we will conduct outreach to and education of home health providers and Medicare beneficiaries using media such as webinars, open door forums, frequently asked questions pages on our Web site, other Web site postings, and educational materials issued by the Medicare Administrative Contractors (MACs) to provide guidance on the pre-claim review process. Additional information about the implementation of the pre-claim review demonstration will be available on the CMS Web site at: <https://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medicare-FFS-Compliance-Programs/Overview.html>. Questions regarding the Medicare Pre-Claim Review Demonstration for Home Health

Services should be sent to [HHPreClaimDemo@cms.hhs.gov](mailto:HHPreClaimDemo@cms.hhs.gov). Under this demonstration, a HHA provider, the entity billing on behalf of the HHA, or the beneficiary (known as the “submitter”) will be encouraged to submit to the relevant MAC a request for pre-claim review, along with all relevant documentation to support Medicare coverage of the applicable home health level of service. After receipt of all relevant documentation, the MAC will review the pre-claim review request to determine whether the service level complies with applicable Medicare coverage and clinical documentation requirements. The HHA provider should submit the Request for Anticipated Payment (RAP) before submitting the pre-claim review request and begin providing services while waiting for the decision from the MAC.

The MAC will communicate to the HHA and beneficiary a decision provisionally approving (or disapproving) payment after a submission of a request for pre-claim review. For the initial submission of a pre-claim review request, the MAC will make all reasonable efforts to make a determination and issue a notice of the decision within 10 business days.

If the MAC declines payment after review, the submitter may amend and resubmit it. A pre-claim review request may be resubmitted an unlimited number of times. For subsequent pre-claim review requests, CMS or its agents will conduct a complex medical review and make all reasonable efforts to postmark and notify the HHA and the beneficiary of its decision within 20 business days. These timeframes are consistent with the Prior Authorization of Power Mobility Devices (PMDs) Demonstration. Meeting these timeframes will be part of the contract performance metrics for the MACs that are involved in this demonstration at the time their contracts are modified to incorporate the demonstration’s work requirements (as well as the necessary funding).

If an applicable claim is submitted for payment without a pre-claim review decision, it will be stopped for prepayment review and documentation will be requested. After the first 3 months of the demonstration in a particular state, we will apply a payment reduction for claims that, after such prepayment review, are deemed payable, but did not first receive a pre-claim review decision. As evidence of compliance, the HHA must submit the pre-claim review number on the claim in order to avoid a 25-percent payment reduction. The 25-percent payment reduction cannot be recouped from or

otherwise charged to the beneficiary, and is not subject to appeal. The beneficiary would not be liable for more than he or she would otherwise be if the demonstration were not in place.

The following explains the various pre-claim review scenarios:

In each of the following scenarios, the HHA would conduct all required assessments, submit the RAP, and begin services for the beneficiaries.

- **Scenario 1:** When a submitter submits a pre-claim review request to the MAC with appropriate documentation, and all relevant Medicare coverage and documentation requirements are met for the home health service, the MAC will send a provisional affirmative pre-claim review decision to the HHA and the Medicare beneficiary. When the HHA submits the claim for payment to the MAC after delivering the home health level of service(s), the claim will include a unique tracking number that indicates it has been affirmed for pre-claim review and, as long as all Medicare coverage and documentation requirements continue to be met, the claim is paid.

- **Scenario 2:** When a submitter submits a pre-claim review request with documentation that does not meet all relevant Medicare coverage and clinical documentation requirements for the home health level of service, notification of a non-affirmative decision will be sent to the HHA and the beneficiary advising them that Medicare will not pay for the service. The submitter may then resubmit the request with additional documentation to support that the Medicare requirements have been met. Alternatively, the HHA could submit the claim to the MAC, at which point the MAC would deny the claim for lack of a provisional affirmative pre-claim review decision and recoup the payment made on the RAP following their standard procedures. Upon receiving the claim denial by the MAC, the HHA or the beneficiary would have the opportunity to appeal the claim denial if they believe Medicare coverage was denied inappropriately. Beneficiaries will continue to have the option of signing an Advance Beneficiary Notice of Noncoverage (ABN) in order to receive the services and be liable for payment.

- **Scenario 3:** When a submitter submits a pre-claim review request with incomplete documentation, the request, along with a detailed decision letter explaining what information is missing, is sent back to the submitter for resubmission. Both the HHA and the beneficiary are notified and the

submitter can resubmit the request with appropriate supporting documentation.

- **Scenario 4:** When the HHA provides the treatment to the beneficiary and submits the claim to the MAC for payment without submitting a pre-claim review request, the home health claim will be stopped for prepayment review and documentation will be requested. If the claim is determined to be not medically necessary or not sufficiently documented, the claim will be denied and all current policies and procedures regarding liability for payment will apply. The HHA, the beneficiary, or both can appeal the claim denial if they believe the claim was payable. If the claim is determined to be payable on appeal, it will be paid. After the first 3 months of the demonstration, we will reduce payment by 25 percent for claims that after such prepayment review are deemed payable but did not first receive a pre-claim review decision. This payment reduction is not subject to appeal. After a claim is submitted, processed, and denied, appeal rights for the claim denial would become available in accordance with 42 CFR part 405, subpart I. The 25-percent payment reduction cannot be charged to the beneficiary. The beneficiary would not be liable for more than he or she would otherwise be if the demonstration were not in place.

Additional information is available on the CMS' Web site at <https://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medicare-FFS-Compliance-Programs/Overview.html>.

### III. Collection of Information Requirements

We announced and solicited comments for the information collection requirements associated with the Medicare Prior Authorization of Home Health Services Demonstration in a 60-day **Federal Register** notice that published on February 5, 2016 (81 FR 6275). The information collection requirements do not take effect until they are approved by OMB and issued a valid OMB control number.

Dated: May 26, 2016.

**Andrew M. Slavitt,**

*Acting Administrator, Centers for Medicare & Medicaid Services.*

[FR Doc. 2016-13755 Filed 6-8-16; 4:15 pm]

**BILLING CODE 4120-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

[CFDA Number: 93.092]

#### Announcing the Intent To Award Single-Source Expansion Supplement Grants to Two Personal Responsibility Education Program Innovative Strategies (PREIS) Grantees

**AGENCY:** Family and Youth Services Bureau, ACYF, ACF.

**ACTION:** This notice announces the intent to award single-source expansion supplement grants under the Personal Responsibility Education Program Innovative Strategies (PREIS) program to Children's Hospital of Los Angeles in Los Angeles, CA and Education Development Center, Inc. in Newton, MA.

**SUMMARY:** The Administration for Children and Families (ACF), Administration on Children, Youth and Families (ACYF), Family and Youth Services Bureau (FYSB), Adolescent Pregnancy Prevention Program, announces its intent to award a single-source expansion supplement grant of up to \$151,265 to Children's Hospital of Los Angeles and up to \$55,917.20 to Education Development Center, Inc.

**DATES:** The period of support for the single-source expansion supplements is September 30, 2015, through September 29, 2016.

**FOR FURTHER INFORMATION CONTACT:** LeBretia White, Program Manager, Adolescent Pregnancy Prevention Program, Division of Adolescent Development and Support, Family and Youth Services Bureau, 330 C Street SW., Washington, DC 20201. Telephone: 202-205-9605; Email: [LeBretia.White@acf.hhs.gov](mailto:LeBretia.White@acf.hhs.gov).

**SUPPLEMENTARY INFORMATION:** Children's Hospital of Los Angeles is funded under the Personal Responsibility Education Program Innovative Strategies (PREIS) program to adapt an existing evidence-based pregnancy prevention program for pregnant and parenting teens and rigorously evaluate the program for its impact on reducing repeat pregnancy. The supplemental award will be used to review, code, and analyze digital recordings, employ intensive tracking and follow up efforts with participants to administer the 36-month follow-up survey, conduct additional advanced analyses, develop manuscripts and briefs based on additional analyses, and disseminate study findings.

Education Development Center, Inc. is funded under the Personal

Responsibility Education Program Innovative Strategies (PREIS) program to implement a parent education program for Latino youth (*Salud y Exito/Health and Success*) and to rigorously evaluate the intervention to determine impact on reducing sexual risk-taking behavior. The supplement award will be used to augment dissemination efforts for the intervention by developing a social media campaign to promote the intervention Web site and to analyze social media data to determine the campaign's reach.

**Statutory Authority:** The statutory authority for the award is Sec. 513 of the Social Security Act (42 U.S.C. 713). Sec. 2953 of the Patient Protection and Affordable Care Act of 2010 (Pub. L. 111-148) established PREP and funded it for FY 2010 through 2014. Sec. 206 of the Protecting Access to Medicare Act of 2014 (Pub. L. 113-93) extended that funding through FY 2015. Sec. 215 of the Medicare Access and CHIP Reauthorization Act of 2015 (Pub. L. 114-10) extended funding through FY 2017.

**Christopher Beach,**

*Senior Grants Policy Specialist, Division of Grants Policy, Office of Administration, Administration for Children and Families.*

[FR Doc. 2016-13698 Filed 6-9-16; 8:45 am]

**BILLING CODE 8414-37-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

#### Submission for OMB Review; Comment Request

**Title:** National Survey of Child and Adolescent Well-Being-Third Cohort (NSCAW III): Agency Recruitment.

**OMB No.:** 0970-0202.

**Description:** The Administration for Children and Families (ACF) within the U.S. Department of Health and Human Services (HHS) intends to collect data on a third cohort of children and families for the National Survey of Child and Adolescent Well-Being (NSCAW). NSCAW is the only source of nationally representative, longitudinal, firsthand information about the functioning and well-being, service needs, and service utilization of children and families who come to the attention of the child welfare system. The first two cohorts of NSCAW were collected beginning in 1999 and 2008 and studied children who had been the subject of investigation by Child Protective Services. Children were sampled from child welfare agencies nationwide.

The proposed data collection plan for the third cohort of NSCAW includes two phases: Phase 1 includes child

welfare agency recruitment and collection of files for sampling children, and Phase 2 includes baseline data collection and an 18-month follow-up data collection. The current data collection plan calls for selecting a new cohort of 4,565 children and families and repeating similar data collection

procedures as the previous two cohorts. This Notice is specific to Phase 1. The overall goal is to recruit child welfare agencies in 83 primary sampling units nationwide. Child welfare agencies will be selected with probability proportional to size, based on the current distributions in the child

welfare system. Child welfare agency recruitment will include: mail, email, phone calls, and site visits with child welfare agency administrators.

**Respondents:** Child welfare agency administrators and other personnel. Data collection will take place over a 2-year period.

#### ANNUAL BURDEN ESTIMATES

Instrument	Total number of respondents	Annual number of respondents	Number of responses per respondent	Average burden hours per response	Annual burden hours
Information package for agency administrators .....	114	57	1	0.25	14
Initial call with agency staff .....	114	57	1	1	57
In-person visit with agency staff .....	20	10	1	1	10
Visit or call with agency staff explaining the sample file process .....	83	42	1	2	84
Agency staff monthly sample file generation and transmission .....	83	42	15	1	630

*Estimated Total Annual Burden Hours:* 795.

**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, 330 C Street, SW., Washington, DC 20201, Attn: OPRE Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: [OPREinfocollection@acf.hhs.gov](mailto:OPREinfocollection@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, *Email: OIRA\_SUBMISSION@OMB.EOP.GOV*, Attn: Desk Officer for the Administration for Children and Families.

**Robert Sargis,**

*ACF Certifying Officer.*

[FR Doc. 2016-13682 Filed 6-9-16; 8:45 am]

**BILLING CODE 4184-01-P**

#### DEPARTMENT OF HEALTH AND HUMAN SERVICES

##### Food and Drug Administration

[Docket No. FDA-2016-N-0001]

##### Arthritis Advisory Committee; Notice of Meeting

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

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) announces a forthcoming public advisory committee meeting of the Arthritis Advisory Committee. The general function of the committee is to provide advice and recommendations to the Agency on FDA's regulatory issues. The meeting will be open to the public.

**DATES:** The meeting will be held on July 13, 2016, from 7:30 a.m. to 5 p.m.

**ADDRESSES:** FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31, Conference Center, the Great Room (Rm. 1503), Silver Spring, MD 20993-0002. Answers to commonly asked questions including information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: <http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm>.

##### FOR FURTHER INFORMATION CONTACT:

Moon Hee Choi, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993-0002, 301-796-9001, FAX: 301-847-8533, [AAC@fda.hhs.gov](mailto:AAC@fda.hhs.gov), or FDA Advisory Committee Information Line, 1-800-

741-8138 (301-443-0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site at <http://www.fda.gov/AdvisoryCommittees/default.htm> and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

##### SUPPLEMENTARY INFORMATION:

**Agenda:** The committee will discuss biologics license application 761042, for GP2015, a proposed biosimilar to Amgen Inc.'s ENBREL (etanercept) submitted by Sandoz, Inc. The proposed indications (uses) for this product are: (1) Reducing signs and symptoms, inducing major clinical response, inhibiting the progression of structural damage, and improving physical function in patients with moderately to severely active rheumatoid arthritis (in combination with methotrexate (MTX) or used alone); (2) reducing signs and symptoms of moderately to severely active polyarticular juvenile idiopathic arthritis in patients ages 2 and older; (3) reducing signs and symptoms, inhibiting the progression of structural damage of active arthritis, and improving physical function in patients with psoriatic arthritis (in combination with MTX in patients who do not respond adequately to MTX alone); (4) reducing signs and symptoms in patients with active ankylosing spondylitis; and (5) treatment of adult patients (18 years or older) with chronic

moderate to severe plaque psoriasis who are candidates for systemic therapy or phototherapy.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at <http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm>. Scroll down to the appropriate advisory committee meeting link.

**Procedure:** Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before June 28, 2016. Oral presentations from the public will be scheduled between approximately 1:30 p.m. and 3 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before June 20, 2016. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by June 21, 2016.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require accommodations due to a disability, please contact Moon Hee Choi at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at

<http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm> for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: June 6, 2016.

**Jill Hartzler Warner,**

*Associate Commissioner for Special Medical Programs.*

[FR Doc. 2016-13709 Filed 6-9-16; 8:45 am]

**BILLING CODE 4164-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA-2009-N-0511]

#### Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Medicated Feed Mill License Application

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

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

**DATES:** Fax written comments on the collection of information by July 11, 2016.

**ADDRESSES:** To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202-395-7285, or emailed to [oira\\_submission@omb.eop.gov](mailto:oira_submission@omb.eop.gov). All comments should be identified with the OMB control number 0910-0337. Also include the FDA docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** FDA PRA Staff, Office of Operations, Food and Drug Administration, 8455 Colesville Rd., COLE-14526, Silver Spring, MD 20993-0002, [PRAStaff@fda.hhs.gov](mailto:PRAStaff@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:** In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

#### Medicated Feed Mill License Application—21 CFR Part 515—OMB Control Number 0910-0337—Revision

Feed manufacturers that seek to manufacture feed using Category II, Type A medicated articles or manufacture certain liquid and free-choice feed, using Category I, Type A medicated articles that must follow proprietary formulas or specifications are required to obtain a facility license under section 512 of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 360b). Our regulations in part 515 (21 CFR part 515) establish the procedures associated with applying for a facility license. We require that a manufacturer seeking a facility license submit a completed medicated feed mill license application using Form FDA 3448 (21 CFR 515.10(b)). We use the information submitted to establish that the applicant has made the certifications required by section 512 of the FD&C Act, to register the mill, and to schedule a pre-approval inspection. We have made minor editorial revisions to Form FDA 3448, including the addition of a dedicated field for the submitter's email address in the contact information section. We estimate that the revisions will not change the amount of time necessary to complete the form.

We require the submission of a supplemental medicated feed mill license application for a change in facility ownership or a change in facility address (§ 515.11(b)). If a licensed facility is no longer manufacturing medicated animal feed under § 515.23, a manufacturer may request voluntary revocation of a medicated feed mill license. An applicant also has the right to file a request for hearing under § 515.30(c) to give reasons why a medicated feed mill license should not be refused or revoked.

In the **Federal Register** of March 9, 2016 (81 FR 12509), FDA published a 60-day notice requesting public comment on the proposed collection of information. FDA received one comment, which was not responsive to the comment request.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN <sup>1</sup>

21 CFR section and activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Medicated Feed Mill License Application using Form FDA 3448 (515.10(b)).	20	1	20	0.25 (15 minutes) .....	5
Supplemental Feed Mill License Application using Form FDA 3448 (515.11(b)).	40	1	40	0.25 (15 minutes) .....	10
Voluntary Revocation of Medicated Feed Mill License. (515.23) .....	40	1	40	0.25 (15 minutes) .....	10
Filing a Request for a Hearing on Medicated Feed Mill License (515.30(c)).	1	1	1	4 .....	4
<b>Total</b> .....					<b>29</b>

<sup>1</sup> There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN <sup>1</sup>

21 CFR section and activity	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
Maintenance of Records for Approved Labeling for Each "Type B" and "Type C" Feed (510.305).	890	1	890	0.03 (2 minutes) .....	27

<sup>1</sup> There are no capital costs or operating and maintenance costs associated with this collection of information.

These estimates are based on our experience with medicated feed mill license applications. We estimate that we will receive 20 medicated feed mill license applications, 40 supplemental applications, 40 requests for voluntary revocation, and that these submissions will take approximately 15 minutes per response, as shown in table 1, rows 1 through 3. We estimate that preparing a request for a hearing under § 515.30(c) takes approximately 4 hours, as shown in table 1, row 4. In table 2, we estimate that 890 licensees will keep the records required by 21 CFR 510.305 expending a total of 27 hours annually.

Dated: June 6, 2016.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2016–13790 Filed 6–9–16; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA–2016–D–1264]

#### Dissemination of Patient-Specific Information From Devices by Device Manufacturers; Draft Guidance for Industry and Food and Drug Administration Staff; Availability

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

**ACTION:** Notice of availability.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) is announcing the availability of the draft guidance entitled “Dissemination of Patient-Specific Information from Devices by Device Manufacturers.” The FDA developed this draft guidance to facilitate the appropriate and responsible dissemination of patient-specific information recorded, stored, processed, retrieved, and/or derived from medical devices from manufacturers to patients. This draft guidance provides recommendations to industry, healthcare providers, and FDA staff about the mechanisms and considerations for device manufacturers sharing such information with patients. This draft guidance is not final nor is it in effect at this time.

**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 of 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 August 9, 2016.

**ADDRESSES:** You may submit comments as follows:

#### Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <http://www.regulations.gov> will be posted to

the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <http://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

#### Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

**Instructions:** All submissions received must include the Docket No. FDA-2016-D-1264 for “Dissemination of Patient-Specific Information from Devices by Device Manufacturers.” Received comments will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <http://www.regulations.gov> or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions**—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <http://www.regulations.gov>. Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <http://www.fda.gov/regulatoryinformation/dockets/default.htm>.

**Docket:** For access to the docket to read background documents or the electronic and written/paper comments received, go to <http://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

An electronic copy of the guidance document is available for download from the Internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the draft guidance document entitled “Dissemination of

Patient-Specific Information from Devices by Device Manufacturers” to the Office of the Center Director, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist that office in processing your request.

**FOR FURTHER INFORMATION CONTACT:**

Sugato De, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 5435, Silver Spring, MD 20993-0002, 301-796-6270, [Sugato.De@fda.hhs.gov](mailto:Sugato.De@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Increasingly, patients seek to play an active role in their own healthcare. FDA believes that manufacturers providing patients with accurate, useable information about their healthcare (including the medical products they use and patient-specific information these products generate) will improve healthcare by empowering patients to participate fully with their healthcare providers in making sound medical decisions. For purposes of this guidance, patient-specific information is defined as any information unique to an individual patient or unique to that patient’s treatment or diagnosis that may be recorded, stored, processed, retrieved, and/or derived from a medical device. This information may include, but is not limited to, recorded patient data, device usage/output statistics, healthcare provider inputs, incidence of alarms, and/or records of device malfunctions or failures.

FDA developed this draft guidance to convey FDA’s policy regarding the dissemination of patient-specific information recorded, stored, processed, retrieved, and/or derived from a medical device and provided by the manufacturer to the patient who is either treated or diagnosed with that specific device. This draft guidance document also outlines considerations for the form in which this information is communicated to help to ensure clarity of content and appropriate context.

Manufacturers may share patient-specific information (recorded, stored, processed, retrieved, and/or derived from a medical device, consistent with the intended use of that medical device) with patients either on their own initiative or at the patient’s request, without obtaining additional premarket review before doing so. Any labeling, as

that term is defined in section 201(m) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act), that is provided to the patient by the manufacturer is subject to applicable requirements in the FD&C Act and FDA regulations.

**II. Significance of Guidance**

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 current thinking of FDA on “Dissemination of Patient-Specific Information from Devices by Device Manufacturers.” It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

**III. Electronic Access**

Persons interested in obtaining a copy of the draft guidance may do so by downloading an electronic copy from the Internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at <http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm>. Guidance documents are also available at <http://www.regulations.gov>. Persons unable to download an electronic copy of “Dissemination of Patient-Specific Information from Devices by Device Manufacturers” may send an email request to [CDRH-Guidance@fda.hhs.gov](mailto:CDRH-Guidance@fda.hhs.gov) to receive an electronic copy of the document. Please use the document number 1500067 to identify the guidance you are requesting.

**IV. Paperwork Reduction Act of 1995**

This guidance refers to previously approved collections of information found in FDA regulations and guidance. 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 parts 801 and 809, regarding device labeling, are approved under OMB control number 0910-0485.

Dated: June 6, 2016.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2016-13787 Filed 6-9-16; 8:45 am]

**BILLING CODE 4164-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Food and Drug Administration**

[Docket No. FDA-2016-N-0001]

**Dermatologic and Ophthalmic Drugs Advisory Committee; Notice of Meeting****AGENCY:** Food and Drug Administration, HHS.**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) announces a forthcoming public advisory committee meeting of the Dermatologic and Ophthalmic Drugs Advisory Committee. The general function of the committee is to provide advice and recommendations to the Agency on FDA's regulatory issues. The meeting will be open to the public.

**DATES:** The meeting will be held on July 19, 2016, from 8 a.m. to 5 p.m.

**ADDRESSES:** FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31, Conference Center, the Great Room (Rm. 1503), Silver Spring, MD 20993-0002. Answers to commonly asked questions including information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: <http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm>.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Shepherd, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993-0002, 301-796-9001, FAX: 301-847-8533, email: [DODAC@fda.hhs.gov](mailto:DODAC@fda.hhs.gov), or FDA Advisory Committee Information Line, 1-800-741-8138 (301-443-0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site at <http://www.fda.gov/AdvisoryCommittees/default.htm> and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

**SUPPLEMENTARY INFORMATION:**

**Agenda:** The committee will discuss biologics license application (BLA) 761032, brodalumab injection, a human monoclonal antibody, submitted by Valeant Pharmaceuticals Luxembourg

S.à.r.l, proposed for the treatment of moderate to severe plaque psoriasis in adult patients who are candidates for systemic therapy or phototherapy.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at <http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm>. Scroll down to the appropriate advisory committee meeting link.

**Procedure:** Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before July 5, 2016. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before June 24, 2016. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by June 27, 2016.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require accommodations due to a disability, please contact Jennifer Shepherd at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at <http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm> for procedures on

public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: June 6, 2016.

**Jill Hartzler Warner,**

*Associate Commissioner for Special Medical Programs.*

[FR Doc. 2016-13710 Filed 6-9-16; 8:45 am]

**BILLING CODE 4164-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Food and Drug Administration**

[Docket No. FDA-2016-D-1248]

**Oncology Drugs for Companion Animals; Draft Guidance for Industry; Availability****AGENCY:** Food and Drug Administration, HHS.**ACTION:** Notice of availability.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry (GFI) #237 entitled "Oncology Drugs for Companion Animals." The guidance provides recommendations for sponsors of investigational oncology drugs for use in companion animals (e.g., dogs, cats, and horses), discusses the contents of a new animal drug application (NADA) for certain oncology drugs, and provides recommendations on how to address human user safety concerns.

**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 August 9, 2016.

**ADDRESSES:** You may submit comments as follows:

*Electronic Submissions*

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <http://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or

anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <http://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

#### Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

*Instructions:* All submissions received must include the Docket No. FDA-2016-D-1248 for "Oncology Drugs for Companion Animals." Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <http://www.regulations.gov> or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- *Confidential Submissions*—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states, "This Document Contains Confidential Information." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <http://www.regulations.gov>. Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this

information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <http://www.fda.gov/regulatoryinformation/dockets/default.htm>.

*Docket:* For access to the docket to read background documents or the electronic and written/paper comments received, go to <http://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of the guidance to the Policy and Regulations Staff (HFV-6), Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

#### FOR FURTHER INFORMATION CONTACT:

Christopher Loss, Center for Veterinary Medicine (HFV-116), Food and Drug Administration, 7500 Standish Pl., Rm. N310, Rockville, MD 20855, 240-402-0619, [christopher.loss@fda.hhs.gov](mailto:christopher.loss@fda.hhs.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

FDA is announcing the availability of a draft guidance for industry #237 entitled "Oncology Drugs for Companion Animals." This guidance document makes recommendations to sponsors of investigational oncology drugs for use in companion animals (e.g., dogs, cats, and horses). The guidance discusses the contents of the target animal safety, effectiveness, and labeling technical sections of an NADA for oncology drugs administered as single agents. The guidance also includes recommendations on how to address human user safety concerns.

In the guidance, FDA recommends that sponsors of multi-drug regimens contact the Center for Veterinary Medicine (CVM) to discuss a product development plan. While sponsors may choose alternate pathways for approval, the Agency is recommending that sponsors first discuss their proposed study plans with CVM, especially if they choose to use an alternative pathway for approval. The Agency

encourages sponsors to schedule a presubmission conference with CVM as they begin to make their investigational plans to ensure that they are completely informed on the requirements contained in the statute and regulations.

##### II. Significance of Guidance

This level 1 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 current thinking of FDA on oncology drugs for companion animals. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

##### III. Electronic Access

Persons with access to the Internet may obtain the draft guidance at either <http://www.fda.gov/AnimalVeterinary/GuidanceComplianceEnforcement/GuidanceforIndustry/default.htm> or <http://www.regulations.gov>.

Dated: June 7, 2016.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2016-13789 Filed 6-9-16; 8:45 am]

BILLING CODE 4164-01-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket Nos. FDA-2014-E-1239; FDA-2015-E-0539]

#### Determination of Regulatory Review Period for Purposes of Patent Extension; POMALYST

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

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) has determined the regulatory review period for POMALYST and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of applications to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human drug product.

**DATES:** Anyone with knowledge that any of the dates as published (in the **SUPPLEMENTARY INFORMATION** section) are incorrect may submit either electronic or written comments and ask for a

redetermination by August 9, 2016. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by December 7, 2016. See “Petitions” in the **SUPPLEMENTARY INFORMATION** section for more information.

**ADDRESSES:** You may submit comments as follows:

#### *Electronic Submissions*

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <http://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <http://www.regulations.gov>.
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

#### *Written/Paper Submissions*

Submit written/paper submissions as follows:

- **Mail/Hand delivery/Courier (for written/paper submissions):** Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

**Instructions:** All submissions received must include the Docket Nos. FDA-2014-E-1239 and FDA-2015-E-0539 for “Determination of Regulatory Review Period for Purposes of Patent Extension; POMALYST.” Received comments will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly

viewable at <http://www.regulations.gov> or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions**—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <http://www.regulations.gov>. Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <http://www.fda.gov/regulatoryinformation/dockets/default.htm>.

**Docket:** For access to the docket to read background documents or the electronic and written/paper comments received, go to <http://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301-796-3600.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98-417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100-670) generally provide that a patent may be extended for a period of up to 5 years

so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human drug product POMALYST (pomalidomide). POMALYST is indicated for treatment of patients with multiple myeloma who have received at least two prior therapies including lenalidomide and bortezomib and have demonstrated disease progression on or within 60 days of completion of last therapy. Subsequent to this approval, the USPTO received patent term restoration applications for POMALYST (U.S. Patent Nos. 6,316,471 and 8,198,262) from Celgene Corporation, and the USPTO requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated May 11, 2015, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of POMALYST represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

##### **II. Determination of Regulatory Review Period**

FDA has determined that the applicable regulatory review period for POMALYST is 3,716 days. Of this time, 3,411 days occurred during the testing phase of the regulatory review period, while 305 days occurred during the

approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 355(i)) became effective:* December 9, 2002. The applicant claims December 14, 2002, as the date the investigational new drug application (IND) became effective. However, FDA records indicate that the IND effective date was December 9, 2002, which was the first date after receipt of the IND that the investigational studies were allowed to proceed.

2. *The date the application was initially submitted with respect to the human drug product under section 505(b) of the FD&C Act:* April 10, 2012. FDA has verified the applicant's claim that the new drug application (NDA) for POMALYST (NDA 204026) was initially submitted on April 10, 2012.

3. *The date the application was approved:* February 8, 2013. FDA has verified the applicant's claim that NDA 204026 was approved on February 8, 2013.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its applications for patent extension, this applicant seeks 5 years or 241 days of patent term extension.

### III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and ask for a redetermination (see **DATES**). Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must be timely (see **DATES**) and contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to <http://www.regulations.gov> at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Division of Dockets Management (HFA–

305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: June 3, 2016.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2016–13796 Filed 6–9–16; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA–2016–N–0001]

#### Request for Nominations for Individuals and Consumer Organizations for Advisory Committees

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

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is requesting that any consumer organizations interested in participating in the selection of voting and/or nonvoting consumer representatives to serve on its advisory committees or panels notify FDA in writing. FDA is also requesting nominations for voting and/or nonvoting consumer representatives to serve on advisory committees and/or panels for which vacancies currently exist or are expected to occur in the near future. Nominees recommended to serve as a voting or nonvoting consumer representative may be self-nominated or may be nominated by a consumer organization.

FDA seeks to include the views of women and men, members of all racial and ethnic groups, and individuals with and without disabilities on its advisory committees and, therefore, encourages nominations of appropriately qualified candidates from these groups.

**DATES:** Any consumer organization interested in participating in the selection of an appropriate voting or nonvoting member to represent consumer interests on an FDA advisory committee or panel may send a letter or email stating that interest to FDA (see **ADDRESSES**) by July 11, 2016, for vacancies listed in this notice.

Concurrently, nomination materials for

prospective candidates should be sent to FDA (see **ADDRESSES**) by July 11, 2016. Nominations will be accepted for current vacancies and for those that will or may occur through August 31, 2016.

**ADDRESSES:** All statements of interest from consumer organizations interested in participating in the selection process and consumer representative nominations should be submitted electronically to [kimberly.hamilton@fda.hhs.gov](mailto:kimberly.hamilton@fda.hhs.gov), by mail to Advisory Committee Oversight and Management Staff, 10903 New Hampshire Ave., Bldg. 32, Rm. 5103, Silver Spring, MD 20993–0002, or by FAX: 301–847–8640.

Consumer representative nominations should be submitted electronically by logging into the FDA Advisory Committee Membership Nomination Portal: <https://www.accessdata.fda.gov/scripts/FACTRSPortal/FACTRS/index.cfm>, by mail to Advisory Committee Oversight and Management Staff, 10903 New Hampshire Ave., Bldg. 32, Rm. 5103, Silver Spring, MD 20993–0002, or by FAX: 301–847–8640. Additional information about becoming a member on an FDA advisory committee can also be obtained by visiting FDA's Web site at <http://www.fda.gov/AdvisoryCommittees/default.htm>.

**FOR FURTHER INFORMATION CONTACT:** For questions relating to participation in the selection process: Kimberly Hamilton, Advisory Committee Oversight and Management Staff (ACOMS), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5103, Silver Spring, MD 20993–0002, 301–796–8220 email: [kimberly.hamilton@fda.hhs.gov](mailto:kimberly.hamilton@fda.hhs.gov).

For questions relating to specific advisory committees or panels, contact the appropriate Contact Person listed in table 1 in the **SUPPLEMENTARY INFORMATION** section:

#### SUPPLEMENTARY INFORMATION:

##### I. Background

FDA is requesting that any consumer organizations interested in participating in the selection of voting and/or nonvoting consumer representatives to serve on its advisory committees or panels notify FDA in writing (see table 1 for Contact Person).

TABLE 1—ADVISORY COMMITTEE CONTACTS

Contact person	Committee/panel
Janie Kim, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 6129, Silver Spring, MD 20993–0002, Phone: 301–796–9016, Email: <a href="mailto:Janie.Kim@fda.hhs.gov">Janie.Kim@fda.hhs.gov</a> .	Allergenic Products Advisory Committee.

TABLE 1—ADVISORY COMMITTEE CONTACTS—Continued

Contact person	Committee/panel
Shanika Craig, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1613, Silver Spring, MD 20993-0002, Phone: 301-796-6639, Email: <a href="mailto:Shanika.Craig@fda.hhs.gov">Shanika.Craig@fda.hhs.gov</a> .	Anesthesiology and Respiratory Therapy Devices Panel.
Patricio Garcia, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1611, Silver Spring, MD 20993-0002, Phone: 301-796-6875, Email: <a href="mailto:Patricio.Garcia@fda.hhs.gov">Patricio.Garcia@fda.hhs.gov</a> .	Gastroenterology and Urology Devices Panel; General and Plastic Surgery Devices Panel; Neurological Devices Panel.
Natasha Facey, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 3354, Silver Spring, MD 20993-0002, Phone: 301-796-5290, Email: <a href="mailto:Natasha.Facey@fda.hhs.gov">Natasha.Facey@fda.hhs.gov</a> .	Ophthalmic Devices Panel.
Evella Washington, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1535, Silver Spring, MD 20993-0002, Phone: 301-796-6683, Email: <a href="mailto:Evella.Washington@fda.hhs.gov">Evella.Washington@fda.hhs.gov</a> .	Molecular and Clinical Genetics Devices Panel.
Cindy Hong, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2430, Silver Spring, MD 20993-0002, Phone: 301-796-0889, Email: <a href="mailto:Cindy.Hong@fda.hhs.gov">Cindy.Hong@fda.hhs.gov</a> .	Gastrointestinal Drugs Advisory Committee.
Jennifer Shepherd, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2434, Silver Spring, MD 20993-0002, Phone: 301-796-4043, Email: <a href="mailto:Jennifer.Shepherd@fda.hhs.gov">Jennifer.Shepherd@fda.hhs.gov</a> .	Medical Imaging Advisory Committee; Pharmaceutical Science and Clinical Pharmacology Advisory Committee.

TABLE 2—COMMITTEE DESCRIPTIONS, TYPE OF CONSUMER REPRESENTATIVE VACANCY, AND APPROXIMATE

Committee/panel/areas of expertise needed	Type of vacancy	Approximate date needed
Allergenic Products Advisory Committee—Knowledgeable in the fields of allergy, immunology, pediatrics, internal medicine, biochemistry, and related specialties.	1—Voting .....	August 31, 2016.
Anesthesiology and Respiratory Therapy Devices Panel—Anesthesiologists, pulmonary medicine specialists, or other experts who have specialized interests in ventilator support, pharmacology, physiology, or the effects and complications of anesthesia.	1—Non-Voting .....	Immediately.
Gastroenterology and Urology Devices Panel Science Advisory Board to the National Center for Toxicological Research—Knowledgeable in the fields related to toxicological research.	1—Non-Voting .....	Immediately.
General and Plastic Surgery Devices Panel—Surgeons (general, plastic, reconstructive, pediatric, thoracic, abdominal, pelvic and endoscopic); dermatologists; experts in biomaterials, lasers, wound healing, and quality of life; and biostatisticians.	1—Non-Voting .....	Immediately.
Neurological Devices Panel—Neurosurgeons (cerebrovascular and pediatric), neurologists (stroke, pediatric, pain management, and movement disorders), interventional neuroradiologists, psychiatrists, and biostatisticians.	1—Non-Voting .....	Immediately.
Ophthalmic Devices Panel—Ophthalmologists with expertise in corneal-external disease, vitreo-retinal surgery, glaucoma, ocular immunology, ocular pathology; optometrists; vision scientists; and ophthalmic professionals with expertise in clinical trial design, quality of life assessment, electrophysiology, low vision rehabilitation, and biostatistics.	1—Non-Voting .....	Immediately.
Molecular and Clinical Genetics Devices Panel—Experts in human genetics and in the clinical management of patients with genetic disorders, e.g., pediatricians, obstetricians, neonatologists. The Agency is also interested in considering candidates with training in inborn errors of metabolism, biochemical and/or molecular genetics, population genetics, epidemiology and related statistical training. Additionally, individuals with experience in genetic counseling, medical ethics as well as ancillary fields of study will be considered.	1—Non-Voting .....	Immediately.
Gastrointestinal Drugs Advisory Committee—Knowledgeable in the fields of gastroenterology, endocrinology, surgery, clinical pharmacology, physiology, pathology, liver function, motility, esophagitis, and statistics.	1—Voting .....	June 30, 2016.
Medical Imaging Advisory Committee—Knowledgeable in the fields of nuclear medicine, radiology, epidemiology, statistics and related specialties.	1—Voting .....	June 30, 2016.
Pharmaceutical Science and Clinical Pharmacology Advisory Committee—Knowledgeable in the fields of pharmaceutical manufacturing, clinical pharmacology, pharmacokinetics, bioavailability and bioequivalence research, the design and evaluation of clinical trials, laboratory analytical techniques, pharmaceutical chemistry, physiochemistry, biochemistry, biostatistics and related biomedical and pharmacological specialties.	1—Voting .....	Immediately.

## II. Functions and General Description of the Committee Duties

### A. Allergenic Products Advisory Committee

Reviews and evaluates available data concerning the safety, effectiveness, and adequacy of labeling of marketed and investigational allergenic biological

products or materials that are administered to humans for the diagnosis, prevention, or treatment of allergies and allergic disease as well as the affirmation or revocation of biological product licenses, on the safety, effectiveness, and labeling of the product; on clinical and laboratory studies of such products; on

amendments or revisions to regulations governing the manufacture, testing, and licensing of allergenic biological products; and on the quality and relevance of FDA's research programs.

### *B. Certain Panels of the Medical Devices Advisory Committee*

Reviews and evaluates data on the safety and effectiveness of marketed and investigational devices and makes recommendations for their regulation. With the exception of the Medical Devices Dispute Resolution Panel, each panel, according to its specialty area, advises on the classification or reclassification of devices into one of three regulatory categories; advises on any possible risks to health associated with the use of devices; advises on formulation of product development protocols; reviews premarket approval applications for medical devices; reviews guidelines and guidance documents; recommends exemption of certain devices from the application of portions of the Federal Food, Drug, and Cosmetic Act; advises on the necessity to ban a device; and responds to requests from the Agency to review and make recommendations on specific issues or problems concerning the safety and effectiveness of devices. With the exception of the Medical Devices Dispute Resolution Panel, each panel, according to its specialty area, may also make appropriate recommendations to the Commissioner of Food and Drugs on issues relating to the design of clinical studies regarding the safety and effectiveness of marketed and investigational devices.

The Dental Products Panel also functions at times as a dental drug panel. The functions of the dental drug panel are to evaluate and recommend whether various prescription drug products should be changed to over-the-counter status and to evaluate data and make recommendations concerning the approval of new dental drug products for human use.

The Medical Devices Dispute Resolution Panel provides advice to the Commissioner on complex or contested scientific issues between FDA and medical device sponsors, applicants, or manufacturers relating to specific products, marketing applications, regulatory decisions and actions by FDA, and Agency guidance and policies. The Panel makes recommendations on issues that are lacking resolution, are highly complex in nature, or result from challenges to regular advisory panel proceedings or Agency decisions or actions.

### *C. Gastrointestinal Drugs Advisory Committee*

Reviews and evaluates available data concerning the safety and effectiveness of marketed and investigational human

drug products for use in the treatment of gastrointestinal diseases.

### *D. Medical Imaging Advisory Committee*

Reviews and evaluates data concerning the safety and effectiveness of marketed and investigational human drug products for use in diagnostic and therapeutic procedures using radioactive pharmaceuticals and contrast media used in diagnostic radiology.

### *E. Pharmaceutical Science and Clinical Pharmacology Advisory Committee*

Provide advice on scientific and technical issues concerning the safety and effectiveness of human generic drug products for use in the treatment of a broad spectrum of human diseases and, as required, any other product for which FDA has regulatory responsibility. The committee may also review Agency sponsored intramural and extramural biomedical research programs in support of FDA's generic drug regulatory responsibilities.

## **III. Criteria for Members**

Persons nominated for membership as consumer representatives on committees or panels should meet the following criteria: (1) Demonstrate ties to consumer and community-based organizations, (2) be able to analyze technical data, (3) understand research design, (4) discuss benefits and risks, and (5) evaluate the safety and efficacy of products under review. The consumer representative should be able to represent the consumer perspective on issues and actions before the advisory committee; serve as a liaison between the committee and interested consumers, associations, coalitions, and consumer organizations; and facilitate dialogue with the advisory committees on scientific issues that affect consumers.

## **IV. Selection Procedures**

Selection of members representing consumer interests is conducted through procedures that include the use of organizations representing the public interest and public advocacy groups. These organizations recommend nominees for the Agency's selection. Representatives from the consumer health branches of Federal, State, and local governments also may participate in the selection process. Any consumer organization interested in participating in the selection of an appropriate voting or nonvoting member to represent consumer interests should send a letter stating that interest to FDA (see **ADDRESSES**) within 30 days of publication of this document.

Within the subsequent 30 days, FDA will compile a list of consumer organizations that will participate in the selection process and will forward to each such organization a ballot listing at least two qualified nominees selected by the Agency based on the nominations received, together with each nominee's current curriculum vitae or resume. Ballots are to be filled out and returned to FDA within 30 days. The nominee receiving the highest number of votes ordinarily will be selected to serve as the member representing consumer interests for that particular advisory committee or panel.

## **V. Nomination Procedures**

Any interested person or organization may nominate one or more qualified persons to represent consumer interests on the Agency's advisory committees or panels. Self-nominations are also accepted. Nominations should include a cover letter and current curriculum vitae or resume for each nominee, including a current business and/or home address, telephone number, and email address if available, and a list of consumer or community-based organizations for which the candidate can demonstrate active participation.

Nominations should also specify the advisory committee(s) or panel(s) for which the nominee is recommended. In addition, nominations should include confirmation that the nominee is aware of the nomination, unless self-nominated. FDA will ask potential candidates to provide detailed information concerning such matters as financial holdings, employment, and research grants and/or contracts to permit evaluation of possible sources of conflicts of interest. Members will be invited to serve for terms up to 4 years.

FDA will review all nominations received within the specified timeframes and prepare a ballot containing the names of qualified nominees. Names not selected will remain on a list of eligible nominees and be reviewed periodically by FDA to determine continued interest. Upon selecting qualified nominees for the ballot, FDA will provide those consumer organizations that are participating in the selection process with the opportunity to vote on the listed nominees. Only organizations vote in the selection process. Persons who nominate themselves to serve as voting or nonvoting consumer representatives will not participate in the selection process.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14, relating to advisory committees.

Dated: June 3, 2016.

**Jill Hartzler Warner,**

*Associate Commissioner for Special Medical Programs.*

[FR Doc. 2016-13733 Filed 6-9-16; 8:45 am]

BILLING CODE 4164-01-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA-2014-E-2341]

#### Determination of Regulatory Review Period for Purposes of Patent Extension; TANZEUM

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

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) has determined the regulatory review period for TANZEUM and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human biological product.

**DATES:** Anyone with knowledge that any of the dates as published (in the **SUPPLEMENTARY INFORMATION** section) are incorrect may submit either electronic or written comments and ask for a redetermination by August 9, 2016. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by December 7, 2016. See "Petitions" in the **SUPPLEMENTARY INFORMATION** section for more information.

**ADDRESSES:** You may submit comments as follows:

#### *Electronic Submissions*

Submit electronic comments in the following way:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <http://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such

as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <http://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

#### *Written/Paper Submissions*

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

*Instructions:* All submissions received must include the Docket No. FDA-2014-E-2341

For Determination of Regulatory Review Period for Purposes of Patent Extension; TANZEUM. Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <http://www.regulations.gov> or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- *Confidential Submissions*—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION". The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <http://www.regulations.gov>. Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this

information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <http://www.fda.gov/regulatoryinformation/dockets/default.htm>.

*Docket:* For access to the docket to read background documents or the electronic and written/paper comments received, go to <http://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave. Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301-796-3600.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98-417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100-670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human biological products, the testing phase begins when the exemption to permit the clinical investigations of the biological becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human biological product and continues until FDA grants permission to market the biological product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the

length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human biological product TANZEUM (albiglutide). TANZEUM is indicated as an adjunct to diet and exercise to improve glycemic control in adults with type 2 diabetes mellitus. Subsequent to this approval, the U.S. Patent and Trademark Office (USPTO) received a patent term restoration application for TANZEUM (U.S. Patent No. 7,141,547) from Human Genome Sciences, Inc., and the USPTO requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated May 11, 2015, FDA advised the USPTO that this human biological product had undergone a regulatory review period and that the approval of TANZEUM represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

## II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for TANZEUM is 3,014 days. Of this time, 2,557 days occurred during the testing phase of the regulatory review period, while 457 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 355(i)) became effective:* January 15, 2006. FDA has verified the applicant's claim that the date the investigational new drug application (IND) became effective was on January 15, 2006.

2. *The date the application was initially submitted with respect to the human biological product under section 351 of the Public Health Service Act (42 U.S.C. 262):* January 14, 2013. The applicant claims January 11, 2013, as the date the biologics license application (BLA) for TANZEUM (BLA 125431) was initially submitted. However, FDA records indicate that BLA 125431 was received by FDA on January 14, 2013.

3. *The date the application was approved:* April 15, 2014. FDA has verified the applicant's claim that BLA 125431 was approved on April 15, 2014.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension.

In its application for patent extension, this applicant seeks 1,577 days of patent term extension.

## III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and ask for a redetermination (see **DATES**). Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must be timely (see **DATES**) and contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to <http://www.regulations.gov> at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: June 3, 2016.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2016–13797 Filed 6–9–16; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

#### Reproductive and Environmental Health Network

**AGENCY:** Health Resources and Services Administration, HHS.

**ACTION:** Notice of a Single-Award Deviation from Competition Requirements for the Reproductive and Environmental Health Network.

**SUMMARY:** HRSA announces the award of an extension in the amount of \$1,100,000 for the Reproductive and Environmental Health Network (REHN) cooperative agreement. The purpose of the REHN is to improve maternal and fetal health outcomes by providing evidence-based information on the safety of exposures in pregnancy and lactation. The extension will permit the Organization of Teratology Information Specialists (OTIS), the cooperative agreement awardee, during the budget period of 9/1/2016–8/31/2017, to continue to provide evidence-based information on the safety of exposures in pregnancy and lactation through

individualized risk-assessments and counseling services, developing and disseminating the most current education to providers and the public, improving access to information for hard-to-reach populations, and supporting a national network of resources with centers accessible to each of the 10 HRSA regions.

#### SUPPLEMENTARY INFORMATION:

*Intended Recipient of the Award:* Organization of Teratology Information Specialists.

*Amount of Non-Competitive Awards:* \$1,100,000.

*Period of Supplemental Funding:* 9/1/2016–8/31/2017.

*CFDA Number:* 93.110.

**Authority:** Social Security Act, Title V, § 501(a)(2); (42 U.S.C. 701(a)(2)).

*Justification:* REHN activities are essential to achieving HHS Healthy People 2020 goals related to improving preconception care, preventing maternal morbidity and mortality, reducing infant mortality, and reducing health disparities in perinatal health. During this extension period of the budget period (9/1/2016–8/31/2017), MCHB plans to issue a new FOA that will align HRSA's work in this area with work funded by the Environmental Protection Agency (EPA) and the Centers for Disease Control and Prevention's (CDC) through their jointly funded Pediatric Environmental Health Specialty Unit Program (PEHSU). Aligning REHN and PEHSU will result in a more comprehensive HHS initiative to expand access to services and maximize limited resources in this area. During this time, OTIS would continue to provide individualized risk-assessments and counseling services, developing and disseminating the most current education to providers and the public, improving access to information for hard-to-reach populations, and supporting a national network of resources with centers accessible to each of the 10 HRSA regions.

MCHB proposes to initiate a one-time 12 month extension for the budget period of 9/1/2016 to 8/31/2017 with \$1,100,000 in FY 2016 funds to the OTIS REHN cooperative agreement. The extension would allow the OTIS to continue to provide evidence-based information on the safety of exposures in pregnancy and lactation through individualized risk-assessments and counseling services, developing and disseminating the most current education to providers and the public, improving access to information for hard-to-reach populations, and supporting a national network of

resources with centers accessible to each of the 10 HRSA regions.

**FOR FURTHER INFORMATION CONTACT:**

Kathryn McLaughlin, MPH, Division of Services for Children with Special Health Needs, Maternal and Child Health Bureau, Health Resources and Services Administration, 5600 Fishers Lane, Room 18W08, Rockville, MD 20852, Phone: (301) 443-6829, Email: [KMcLaughlin@hrsa.gov](mailto:KMcLaughlin@hrsa.gov).

Dated: June 3, 2016.

**James Macrae,**

*Acting Administrator.*

[FR Doc. 2016-13784 Filed 6-9-16; 8:45 am]

**BILLING CODE 4165-15-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Health Resources and Services Administration**

**Agency Information Collection**

**Activities: Proposed Collection: Public Comment Request**

**AGENCY:** Health Resources and Services Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995), the Health Resources and Services Administration (HRSA) announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

**DATES:** Comments on this Information Collection Request must be received no later than August 9, 2016.

**ADDRESSES:** Submit your comments to [paperwork@hrsa.gov](mailto:paperwork@hrsa.gov) or mail the HRSA Information Collection Clearance Officer, Room 14A39, 5600 Fishers Lane, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email [paperwork@hrsa.gov](mailto:paperwork@hrsa.gov) or call the HRSA Information Collection Clearance Officer at (301) 443-1984.

**SUPPLEMENTARY INFORMATION:** When submitting comments or requesting information, please include the information collection request title for reference.

*Information Collection Request Title:* National Practitioner Data Bank (NPDB) Attestation of Reports by Hospitals, Medical Malpractice Payers, Health Plans, and Health Centers.

*OMB No.* 0915-xxxx—New.

*Abstract:* The NPDB plans to collect data from hospitals, medical malpractice payers, health plans, and certain other health care entities<sup>1</sup> that are subject to NPDB reporting requirements to assist these entities in understanding and meeting their reporting requirements to the NPDB. The NPDB currently collects similar data from state licensing boards on a regular basis, and this information collection request would expand beyond current reporting activities to include hospitals, medical malpractice payers, health plans, and certain health care entities.

The NPDB began operation on September 1, 1990. The statutory authorities establishing and governing the NPDB are title IV of Public Law (Pub. L.) 99-660, the Health Care Quality Improvement Act of 1986, as amended, section 5 of the Medicare and Medicaid Patient and Program Protection Act of 1987, Public Law 100-93, codified as section 1921 of the Social Security Act, and section 221(a) of the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, codified as section 1128E of the Social Security Act. Final regulations governing the NPDB are codified at 45 CFR part 60. Responsibility for NPDB implementation and operation resides in the Bureau of Health Workforce, Health Resources and Services Administration, Department of Health and Human Services (HHS).

The NPDB acts primarily as a flagging system; its principal purpose is to facilitate comprehensive review of practitioners' professional credentials and background. Information on medical malpractice payments, health-related civil judgments, adverse licensure actions, adverse clinical privileging actions, adverse professional society actions, and Medicare/Medicaid

<sup>1</sup> Unless otherwise noted, the term "health care entities" refers to health centers whose access and reporting obligations are addressed in the NPDB statutory and regulatory requirements for health care entities. In this document, "health center" refers to organizations that receive grants under the HRSA Health Center Program as authorized under section 330 of the Public Health Service Act, as amended (referred to as "grantees") and Federally Qualified Health Center (FQHC) Look-Alike organizations, which meet all the Health Center Program requirements but do not receive Health Center Program grants. It does not refer to FQHCs that are sponsored by tribal or Urban Indian Health Organizations, except for those that receive Health Center Program grants.

exclusions is collected from and disseminated to eligible entities such as licensing boards, hospitals, and other health care entities. It is intended that NPDB information should be considered with other relevant information in evaluating a practitioner's credentials.

The NPDB outlines specific reporting requirements for hospitals, medical malpractice payers, health plans, and health care entities; per 45 CFR 60.7, 60.12, 60.14, 60.15, and 60.16. These reporting requirements are further explained in chapter E of the NPDB e-Guidebook, which can be found at: <http://www.npdb.hrsa.gov/resources/aboutGuidebooks.jsp>.

Through a process called Attestation, hospitals, medical malpractice payers, health plans, and certain other health entities will be required to attest that they understand and have met their responsibility to submit all required reports to the NPDB. The Attestation process will be completely automated through the secure NPDB system (<https://www.npdb.hrsa.gov>), using both secure email messaging and system notifications to alert entities registered with the NPDB of their responsibility to attest. All entities with reporting requirements and querying access to the NPDB must register with the NPDB before gaining access to the secure NPDB system for all reporting and querying transactions.

Although the Attestation process and forms are new, the secure NPDB system currently used by hospitals, medical malpractice payers, health plans, and health care entities to conduct reporting and querying will not change, ensuring that these entities are familiar with the interface needed to complete the Attestation process. NPDB will ask these entities to attest their reporting compliance every 2 years. If the organization is responsible for privileging or credentialing individuals who provide services for other sites, those sites will be included in the Attestation process.

The Attestation forms will collect the following information: (1) Information regarding sub-sites and entity relationships; (2) contact information for the Attesting Official; and (3) a statement attesting whether or not all required reports have been submitted.

*Need and Proposed Use of the Information:* The NPDB engages in compliance activities to ensure the accuracy and completeness of the information in the NPDB. Through the Attestation process, the NPDB can better determine which hospitals, medical malpractice payers, health plans, and health care entities are meeting the reporting requirements, and which of

these entities may require additional outreach and assistance. The Attestation process will strengthen the robustness of the data in the NPDB, improving the accuracy of query responses for entities with access to NPDB reports.

**Likely Respondents:** Hospitals medical malpractice payers, health plans, health care entities, and their representatives.

**Burden Statement:** Burden in this context means the time expended by

persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and attesting information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to

a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this Information Collection Request are summarized in the table below.

Total Estimated Annualized burden hours:

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Health Care Entity Attestation .....	3,000	1	3,000	1	3,000
Medical Malpractice Payer Attestation .....	750	1	750	1	750
Health Plan Attestation .....	1,500	1	1,500	1	1,500
Hospital Attestation .....	7,500	1	7,500	1	7,500
Total .....	<sup>2</sup> 12,750	.....	12,750	.....	12,750

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

**Jason E. Bennett,**

*Director, Division of Executive Secretariat.*

[FR Doc. 2016-13735 Filed 6-9-16; 8:45 am]

**BILLING CODE 4165-15-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

#### National Advisory Council on Migrant Health Request for Nominations for Voting Members

**AGENCY:** Health Resources and Services Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Health Resources and Services Administration (HRSA) is

requesting nominations to fill vacancies on the National Advisory Council on Migrant Health (NACMH). The NACMH is authorized under 42 U.S.C. 218, section 217 of the Public Health Service (PHS) Act, as amended and governed by provisions of Public Law 92-463, as amended (5 U.S.C. Appendix 2).

**DATES:** The agency will receive nominations on a continuous basis.

**ADDRESSES:** All nominations should be addressed to the Designated Federal Official, NACMH, Strategic Initiatives and Planning Division, Office of Policy and Program Development, Bureau of Primary Health Care, HRSA, 16N38B, 5600 Fishers Lane, Rockville, Maryland 20857 or via email to: Esther Paul at [epaul@hrsa.gov](mailto:epaul@hrsa.gov) and/or Priscilla Charles at [PCharles@hrsa.gov](mailto:PCharles@hrsa.gov).

**FOR FURTHER INFORMATION CONTACT:** Esther Paul, MBBS, MA, MPH, Designated Federal Official, NACMH, phone number: (301) 594-4496 or via email at [epaul@hrsa.gov](mailto:epaul@hrsa.gov).

**SUPPLEMENTARY INFORMATION:** As authorized under section 217 of the Public Health Service Act, as amended, 42 U.S.C. 218, the Secretary established the NACMH. The NACMH is governed by the Federal Advisory Committee Act (5 U.S.C. Appendix 2), which sets forth standards for the formation and use of advisory committees.

The NACMH, consults with and makes recommendations to the Secretary of the Department of Health and Human Services (HHS) and the HRSA Administrator concerning the organization, operation, selection, and funding of migrant health centers and other entities under grants and contracts under section 330 of the PHS Act.

The NACMH Charter requires that the Council consist of 15 members, each serving a 4-year term. Twelve Council members are required to be governing board members of migrant health centers and other entities assisted under section 254(b) of the PHS Act. Of these 12, at least 9 must be patient board members. The remaining three must be individuals qualified by training and experience in the medical sciences or in the administration of health programs. New members filling a vacancy that occurred prior to expiration of a term may serve only for the remainder of such term. Members may serve after the expiration of their terms until their successors have taken office, but no longer than 120 days.

**Compensation:** Members who are not full-time Federal employees shall be paid at the rate of \$200 per day including travel time plus per diem and travel expenses in accordance with Standard Government Travel Regulations.

Specifically, HRSA is requesting nominations for:

- **Board Member/Patient (1 vacancy):**

A nominee *must be a member* or member-elect of a governing board of an organization receiving funding or look-alike designation under section 330(g) of the PHS Act. A board member nominee *must also be a patient* of the entity that he/she represents. Additionally, a board member nominee *must be familiar* with the delivery of primary health care to migratory and seasonal agricultural workers (MSAWs) and their families.

- **Administrator/Provider Representative (1 vacancy)**

A nominee *must be qualified* by training and experience in the medical

<sup>2</sup> There are approximately 6,800 hospitals, 575 medical malpractice payers, 1,400 health plans, and 2,200 health centers registered with the NPDB. However, the reporting entities may include multiple sites that are registered independently in the system, thereby increasing the total number of respondents. Therefore, we estimate there will be 7,500 respondents for hospitals, 750 respondents for medical malpractice payers, 1,500 respondents for health plans, and 3,000 respondents for health centers for 12,750 total respondents.

sciences or in the administration of health programs for MSAs and their families.

A complete nomination package should include the following information for each nominee:

(1) A NACMH Nomination form; (2) three letters of reference; and (3) a statement of prior service on the NACMH; and (4) a biographical sketch of the nominee or a copy of his/her curriculum vitae. The nomination package must also state that the nominee is willing to serve as a member of the NACMH and appears to have no conflict of interest that would preclude membership. An ethics review is conducted for each selected nominee. Please contact Esther Paul at [epaul@hrsa.gov](mailto:epaul@hrsa.gov) and/or Priscilla Charles at [PCharles@hrsa.gov](mailto:PCharles@hrsa.gov) to obtain a nomination form.

HHS strives to ensure that the membership of HHS federal advisory committees is balanced in terms of points of view represented, consistent with the committee's authorizing statute and charter. Appointment to the NACMH shall be made without discrimination on the basis of age, race, ethnicity, gender, sexual orientation, disability, and cultural, religious, or socioeconomic status. The Department encourages nominations of qualified candidates from all groups and locations.

**Jason E. Bennett,**

*Director, Division of the Executive Secretariat.*

[FR Doc. 2016-13767 Filed 6-9-16; 8:45 am]

**BILLING CODE 4165-15-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

#### Agency Information Collection Activities: Proposed Collection: Public Comment Request

**AGENCY:** Health Resources and Services Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995), the Health Resources and Services Administration (HRSA) announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and

Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

**DATES:** Comments on this Information Collection Request must be received no later than August 9, 2016.

**ADDRESSES:** Submit your comments to [paperwork@hrsa.gov](mailto:paperwork@hrsa.gov) or mail the HRSA Information Collection Clearance Officer, Room 10-29, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email [paperwork@hrsa.gov](mailto:paperwork@hrsa.gov) or call the HRSA Information Collection Clearance Officer at (301) 443-1984.

**SUPPLEMENTARY INFORMATION:** When submitting comments or requesting information, please include the information request collection title for reference.

*Information Collection Request Title:* Develop a Strategic Communication Plan for the Bureau of Primary Health Care (BPHC).

*OMB No. 0915-xxxx—New.*

*Abstract:* Health centers (which include those entities funded under Public Health Service Act section 330 and those designated as Health Center Program Look-Alikes) deliver comprehensive, high quality, cost-effective primary health care services to patients regardless of their ability to pay. Health centers have become an essential primary care provider for America's most vulnerable populations. Health centers advance the health care home model of coordinated, comprehensive, and patient-centered primary health care providing a wide range of medical, dental, behavioral, and social services. Nearly 1,400 health centers operate more than 9,800 service delivery sites that provide care in every state, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and the Pacific Basin.

The Health Center Program is administered by BPHC. BPHC provides accurate, timely, and valuable information to internal and external stakeholders in order to support its mission to improve the health of the Nation's underserved communities and vulnerable populations by assuring access to comprehensive, culturally competent, quality primary health care services.

BPHC will engage with key external stakeholder populations to collect data that will inform the creation of a data-driven strategic communication plan that serves BPHC's stakeholders and facilitates clear, timely, and well-coordinated communication. This comprehensive strategic plan will identify communication priorities for BPHC, leading to a more efficient and effective communication operations with a focus on establishing BPHC's capacity for leading external affairs activities.

*Need and Proposed Use of the Information:* Data collected from Health Center Program stakeholders are critical to the development of a communication plan and will be used to identify audiences and their preferences for communication; develop effective key messages regarding the Health Center Program grant and non-grant processes; increase health centers' and the public's understanding of the program requirements; develop BPHC communication goals, strategies, and tactics; and develop meaningful metrics for communication process improvement. This systematic exploration will inform the development of cost-efficient and effective business processes that will centralize and streamline external communication within BPHC.

*Likely Respondents:* Health Center Program grantees and Look-Alikes, entities with national cooperative agreements, and state and regional primary care associations.

*Burden Statement:* Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this Information Collection Request are summarized in the table below.

Total Estimated Annualized burden hours:

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Online Surveys .....	200	1	200	.2	40
Focus Groups .....	80	1	80	1.5	120
One-on-One Interviews .....	50	2	100	.75	75
Total .....	330	.....	380	.....	235

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

**Jason E. Bennett,**

*Director, Division of the Executive Secretariat.*

[FR Doc. 2016-13736 Filed 6-9-16; 8:45 am]

**BILLING CODE 4165-15-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Solicitation of Nominations for Appointment to the Advisory Committee on Minority Health

**AGENCY:** Office of Minority Health, Office of the Secretary, Department of Health and Human Services.

**ACTION:** Notice.

**Authority:** 42 U.S.C. 300u-6, Section 1707 of the Public Health Service Act, as amended. The Advisory Committee is governed by provisions of Public Law 92-463, as amended (5 U.S.C. Appendix 2), which sets forth standards for the formation and use of advisory committees.

**SUMMARY:** The Department of Health and Human Services (HHS), Office of Minority Health (OMH), is seeking nominations of qualified candidates to be considered for appointment as a member of the Advisory Committee on Minority Health (hereafter referred to as the "Committee or ACMH"). In accordance with Public Law 105-392, the Committee provides advice to the Deputy Assistant Secretary for Minority Health on improving the health of racial and ethnic minority groups, and on the development of goals and specific program activities of OMH designed to improve the health status and outcomes of racial and ethnic minorities. Nominations of qualified candidates are being sought to fill vacancies on the Committee.

**DATES:** Nominations for membership on the Committee must be received no later than 5:00 p.m. EST on September 8, 2016, at the address listed below.

**ADDRESSES:** All nominations should be mailed to Dr. Minh Wendt, Designated Federal Officer, Advisory Committee on Minority Health, Office of Minority Health, Department of Health and Human Services, 1101 Wootton Parkway, Suite 600, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Dr. Minh Wendt, Designated Federal Officer, Advisory Committee on Minority Health, Office of Minority Health, Department of Health and Human Services, Tower Building, 1101 Wootton Parkway, Suite 600, Rockville, Maryland 20852. Phone: 240-453-8222; fax: 240-453-8223.

A copy of the ACMH charter and list of the current membership can be obtained by contacting Dr. Wendt or by accessing the Web site managed by OMH at [www.minorityhealth.hhs.gov](http://www.minorityhealth.hhs.gov). Information about ACMH activities can be found on the OMH Web site under the heading About OMH.

**SUPPLEMENTARY INFORMATION:** Pursuant to Public Law 105-392, the Secretary of Health and Human Services established the ACMH. The Committee provides advice to the Deputy Assistant Secretary for Minority Health in carrying out the duties stipulated under Public Law 105-392. This includes providing advice on improving the health of racial and ethnic minority populations and in the development of goals and specific program activities of OMH, which are to:

(1) Establish short-range and long-range goals and objectives and coordinate all other activities within the Public Health Service that relate to disease prevention, health promotion, service delivery, and research impacting racial and ethnic minority populations;

(2) Enter into interagency agreements with other agencies of the Public Health Service;

(3) Support research, demonstrations, and evaluations to test new and innovative models;

(4) Increase knowledge and understanding of health risk factors;

(5) Develop mechanisms that support better information dissemination, education, prevention, and service delivery to individuals from disadvantaged backgrounds, including individuals who are members of racial or ethnic minority groups;

(6) Ensure that the National Center for Health Statistics collects data on the health status of each minority group;

(7) Enter into contracts with public and non-profit private providers of primary health services for the purpose of increasing the access of individuals who lack proficiency in speaking the English language by developing and carrying out programs to provide bilingual or interpretive services;

(8) Support a national minority health resource center which provides resources to the public such as information services and assistance in capacity building;

(9) Carry out programs to improve access to health care services for individuals with limited proficiency in speaking the English language; and

(10) Advise in matters related to the development, implementation, and evaluation of health professions education in decreasing disparities in health care outcomes, including cultural competency as a method of eliminating health disparities.

Management and support services for the ACMH are provided by OMH.

**Nominations:** The Committee is composed of 12 voting members. The Committee composition also can include non-voting *ex officio* members. This announcement is seeking nominations for voting members. Voting members of the Committee are appointed by the Secretary from individuals who are not officers or employees of the federal government and who have expertise regarding issues of minority health. To qualify for consideration of appointment to the Committee, an individual must possess demonstrated experience and expertise working on issues impacting the health of racial and ethnic minority populations. The Committee charter stipulates that the racial and ethnic minority groups shall be equally represented on the Committee membership. ACMH is comprised of

members who represent the health interest of Hispanics/Latinos; Blacks/African Americans; American Indians and Alaska Natives; and/or Asian Americans, Native Hawaiians, and other Pacific Islanders.

There are two impending vacancies on the ACMH that impact the representation for the health interests of Blacks/African Americans. OMH is particularly seeking nominations for individuals who can represent the health interests of this racial and ethnic minority group. Nominations that are received for individuals to represent other racial and ethnic minority groups also will be accepted. These applications will be retained in files that are maintained by OMH on potential candidates to be considered for the ACMH.

**Mandatory Professional/Technical Qualifications:** Nominees must meet all of the following mandatory qualifications to be eligible for consideration:

(1) Expertise in minority health and racial and ethnic health disparities;

(2) Expertise in developing or contributing to the development of science-based or evidence-based health policies and/or programs. This expertise may include experience in the analysis, evaluation, and interpretation of federal/state health or regulatory policy;

(3) Involvement in national, state, regional, tribal, and/or local efforts to improve the health status or outcomes among racial and ethnic minority populations;

(4) Educational achievement, professional certification(s) in health-related fields (e.g., health professions, allied health, behavioral health, public health, health policy, health administration/management, etc.), and professional experience that will support ability to give expert advice on issues related to improving minority health and eliminating racial and ethnic health disparities; and

(5) Expertise in population level health data for racial and ethnic minority groups. This expertise may include survey, administrative, and/or clinical data.

**Desirable Qualifications:**

(1) Knowledge and experience in health care systems, cultural and linguistic competency, social determinants of health, evidence-based research, data collection (e.g., federal, state, tribal, or local data collection), or health promotion and disease prevention.

(2) Nationally recognized via peer-reviewed publications, professional awards, advanced credentials, or

involvement in national professional organizations.

**Requirements for Nomination Submission:** Nominations should be typewritten (one nomination per nominator). Nomination package should include: (1) A letter of nomination that clearly states the name and affiliation of the nominee, the basis for the nomination (i.e., specific attributes which qualify the nominee for service in this capacity), and a statement from the nominee indicating a willingness to serve as a member of the Committee; (2) the nominee's contact information, including name, mailing address, telephone number, and email address; (3) the nominee's curriculum vitae which should not exceed 10 pages; and (4) a summary of the nominee's experience and qualification relative to the mandatory professional and technical criteria listed above. Federal employees should not be nominated for consideration of appointment to this Committee.

Individuals selected for appointment to the Committee shall be invited to serve a four-year term. Committee members will receive a stipend for attending Committee meetings and conducting other business in the interest of the Committee, including per diem and reimbursement for travel expenses incurred.

The Department makes every effort to ensure that the membership of a HHS federal advisory committee is fairly balanced in terms of points of view represented and the committee's function. Every effort is made to ensure that a broad representation of geographic areas, gender, racial and ethnic and minority groups, and the disabled are given consideration for membership on HHS federal advisory committees. Appointment to this Committee shall be made without discrimination because of a person's race, color, religion, sex (including pregnancy), national origin, age, disability, or genetic information. Nominations must state that the nominee is willing to serve as a member of ACMH and appears to have no conflict of interest that would preclude membership. An ethics review is conducted for each selected nominee; therefore, individuals selected for nomination will be required to provide detailed information concerning such matters as financial holdings, consultancies, and research grants or contracts to permit evaluation of possible sources of conflict of interest.

Individuals selected to serve on the ACMH through the nomination process will be posted on the OMH Web site once selections have been made.

Dated: May 31, 2016.

**Minh Wendt,**

*Designated Federal Officer, Advisory Committee on Minority Health.*

[FR Doc. 2016-13785 Filed 6-9-16; 8:45 am]

**BILLING CODE 4150-29-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

**Name of Committee:** National Cancer Institute Special Emphasis Panel; Small-Cell Lung Cancer (SCLC) Consortium: Innovative Approaches to the Prevention and Early Detection of Small Cell Lung Cancer (U01).

**Date:** July 18, 2016.

**Time:** 7:30 p.m. to 10:00 p.m.

**Agenda:** To review and evaluate grant applications.

**Place:** Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.

**Contact Person:** Timothy C. Meeker, MD, Ph.D., Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W624, Rockville, MD 20892-9750, 240-276-6464, [meekert@mail.nih.gov](mailto:meekert@mail.nih.gov).

**Name of Committee:** National Cancer Institute Special Emphasis Panel; Small-Cell Lung Cancer (SCLC) Consortium: Therapeutic Development and Mechanisms of Resistance (U01).

**Date:** July 19, 2016.

**Time:** 8:00 a.m. to 1:30 p.m.

**Agenda:** To review and evaluate grant applications.

**Place:** Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.

**Contact Person:** Timothy C. Meeker, MD, Ph.D., Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W624, Rockville, MD 20892-9750, 240-276-6464, [meekert@mail.nih.gov](mailto:meekert@mail.nih.gov).

**Name of Committee:** National Cancer Institute Special Emphasis Panel; Small-Cell Lung Cancer (SCLC) Consortium: Coordinating Center (U24).

*Date:* July 19, 2016.

*Time:* 1:30 p.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.

*Contact Person:* Timothy C. Meeker, MD, Ph.D., Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W624, Rockville, MD 20892-9750, 240-276-6464, [meekert@mail.nih.gov](mailto:meekert@mail.nih.gov).

*Name of Committee:* National Cancer Institute Special Emphasis Panel; Clinical Center Collaborative Research (U01).

*Date:* July 22, 2016.

*Time:* 9:00 a.m. to 2:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Cancer Institute, Shady Grove, 9609 Medical Center Drive, Room 2W914, Rockville, MD 20850 (Telephone Conference Call).

*Contact Person:* Caron A. Lyman, Ph.D., Chief, Scientific Review Officer, Research Programs Review, Branch Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W126, Rockville, MD 20892-9750, 240-276-6348, [lymanc@mail.nih.gov](mailto:lymanc@mail.nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: June 6, 2016.

**Melanie J. Gray,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2016-13725 Filed 6-9-16; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections, 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable, material, and personal information concerning individuals associated with the grant applications, the disclosure of which

would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Infectious, Reproductive, Asthma and Pulmonary Conditions and Social Sciences and Population Studies.

*Date:* July 6, 2016.

*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:* Ellen K Schwartz, EDD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3144, MSC 7770, Bethesda, MD 20892, 301-828-6146, [schwarel@mail.nih.gov](mailto:schwarel@mail.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, Topics in Microbial Pathogenesis.

*Date:* July 11, 2016.

*Time:* 8:00 a.m. to 5:00 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, 240-519-7808, [kostrikr@csr.nih.gov](mailto:kostrikr@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; PAR14-226: Limited Competition: National Primate Research Centers (P51).

*Date:* July 11-13, 2016.

*Time:* 8:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Silver Cloud Inn—Lake Union, 1150 Fairview Ave. N., Seattle, WA 98109.

*Contact Person:* Maribeth Champoux, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3170, MSC 7848, Bethesda, MD 20892, 301-594-3163, [champoum@csr.nih.gov](mailto:champoum@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Small Business—Hematology.

*Date:* July 11, 2016.

*Time:* 10:30 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.

*Contact Person:* Bukhtiar H Shah, DVM, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4120, MSC 7802, Bethesda, MD 20892, 301-806-7314, [shahb@csr.nih.gov](mailto:shahb@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; RFA-OD-16-006: Environmental Influences on Child Health Outcomes (ECHO) Coordinating Center.

*Date:* July 12, 2016.

*Time:* 8:00 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.

*Contact Person:* Heidi B Friedman, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1012A, MSC 7770, Bethesda, MD 20892, 301-379-5632, [hfriedman@csr.nih.gov](mailto:hfriedman@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; PAR-13-375: Nutrigenetics and Nutrigenomics Approaches for Nutrition Research.

*Date:* July 12, 2016.

*Time:* 8:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Gregory S Shelness, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6156, Bethesda, MD 20892-7892, (301) 435-0492, [shelnessgs@csr.nih.gov](mailto:shelnessgs@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Pediatric Diagnostic Biomarkers for Active Pulmonary TB Diseases.

*Date:* July 12-13, 2016.

*Time:* 9:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* George M Barnas, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4220, MSC 7818, Bethesda, MD 20892, 301-435-0696, [barnasg@csr.nih.gov](mailto:barnasg@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Fellowships: Synthetic and Biological Chemistry.

*Date:* July 12-13, 2016.

*Time:* 10:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Charles Selden, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5187 MSC 7840, Bethesda, MD 20892, 301-451-3388, [seldens@mail.nih.gov](mailto:seldens@mail.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: June 6, 2016.

**Sylvia L. Neal,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2016-13724 Filed 6-9-16; 8:45 am]

**BILLING CODE 4140-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****National Institutes of Health****Center for Scientific Review; Notice of Closed Meetings**

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; PAR Panel: Investigations on Primary Immunodeficiency Diseases.

*Date:* June 23, 2016.

*Time:* 1:00 p.m. to 4:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Jin Huang, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4095G, MSC 7812, Bethesda, MD 20892, 301-435-1230, [jh377p@nih.gov](mailto:jh377p@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:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Adaptive and Innate Immunity to Pathogens.

*Date:* June 30, 2016.

*Time:* 8:00 a.m. to 4:00 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 B. Winter, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4204, MSC 7812, Bethesda, MD 20892, 301-435-1152, [dwinter@csr.nih.gov](mailto:dwinter@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Pediatric Disorders.

*Date:* June 30, 2016.

*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:* Baishali Maskeri, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, 301-827-2864, [maskerib@mail.nih.gov](mailto:maskerib@mail.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Healthcare Delivery and Methodologies.

*Date:* June 30, 2016.

*Time:* 1:00 p.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:* Jessica Bellinger, Ph.D., Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3158, Bethesda, MD 20892, [bellingerjd@csr.nih.gov](mailto:bellingerjd@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; PAR-15-358-Molecular and Cellular Causal Aspects of Alzheimer's Disease.

*Date:* June 30, 2016.

*Time:* 12:45 p.m. to 1:45 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Carol Hamelink, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4192, MSC 7850, Bethesda, MD 20892, (301) 213-9887, [hamelinc@csr.nih.gov](mailto:hamelinc@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Pulmonary Hypertension.

*Date:* July 5-6, 2016.

*Time:* 9:00 a.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

*Contact Person:* George M Barnas, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4220, MSC 7818, Bethesda, MD 20892, 301-435-0696, [barnasg@csr.nih.gov](mailto:barnasg@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Respiratory Diseases.

*Date:* July 5-6, 2016.

*Time:* 9:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

*Contact Person:* George M Barnas, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4220, MSC 7818, Bethesda, MD 20892, 301-435-0696, [barnasg@csr.nih.gov](mailto:barnasg@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Small Business: Cancer Diagnostics and Treatments.

*Date:* July 6-7, 2016.

*Time:* 8:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

*Contact Person:* Zhang-Zhi Hu, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6186, MSC 7804, Bethesda, MD 20892, (301) 594-2414, [huzhuang@csr.nih.gov](mailto:huzhuang@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Elucidating HIV and HIV-treatment Associated Metabolic/Endocrine Dysfunction.

*Date:* July 6, 2016.

*Time:* 1:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

*Contact Person:* Jingsheng Tuo, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5207, Bethesda, MD 20892, 301-451-8754, [tuo@nei.nih.gov](mailto:tuo@nei.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Biochemistry and Biophysics of Biological Macromolecules Fellowship Applications.

*Date:* July 7-8, 2016.

*Time:* 8:00 a.m. to 4:00 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 4166, MSC 7806, Bethesda, MD 20892, (301) 437-7927, [jollieda@csr.nih.gov](mailto:jollieda@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Small Business: Risk, Prevention and Health Behavior.

*Date:* July 7-8, 2016.

*Time:* 8:30 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Ritz-Carlton Hotel at Pentagon City, 1250 South Hayes Street, Arlington, VA 22202.

*Contact Person:* Claire E Gutkin, Ph.D., MPH, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3106, MSC 7808, Bethesda, MD 20892, 301-594-3139, [gutkincl@csr.nih.gov](mailto:gutkincl@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Cellular Mechanisms of Metabolism, Obesity, and Diabetes.

*Date:* July 7, 2016.

*Time:* 1:00 p.m. to 3:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

*Contact Person:* Gary Hunnicutt, Ph.D., Scientific Review Officer, Center for

Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6164, MSC 7892, Bethesda, MD 20892, 301-435-0229, [gary.hunnicutti@nih.gov](mailto:gary.hunnicutti@nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Innovative Research in HIV in Kidney, Urology, and Hematology.

*Date:* July 7, 2016.

*Time:* 1:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

*Contact Person:* Jingsheng Tuo, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5207, Bethesda, MD 20892, 301-451-8754, [tuo@nei.nih.gov](mailto:tuo@nei.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; PAR16-027: Commercialization Readiness Pilot.

*Date:* July 8, 2016.

*Time:* 8:00 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.

*Contact Person:* Cristina Backman, Ph.D., Scientific Review Officer, ETTN IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5211, MSC 7846, Bethesda, MD 20892, [cbackman@mail.nih.gov](mailto:cbackman@mail.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; PAR-15-315: CounterAct Exploratory Grants.

*Date:* July 8, 2016.

*Time:* 8:00 a.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Hotel Monaco Baltimore, 2 North Charles Street, Baltimore, MD 21201.

*Contact Person:* Geoffrey G Schofield, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4040-A, MSC 7850, Bethesda, MD 20892, 301-435-1235, [geoffreys@csr.nih.gov](mailto:geoffreys@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:* June 3, 2016.

**Anna Snouffer,**

*Deputy Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2016-13723 Filed 6-9-16; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of General Medical Sciences Special Emphasis Panel, COBRE Phase I.

*Date:* July 15, 2016.

*Time:* 8:00 a.m. to 6:30 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:* Nina Sidorova, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3An.22, Bethesda, MD 20892-6200, 301-594-3663, [sidorova@nigms.nih.gov](mailto:sidorova@nigms.nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research, Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

*Dated:* June 6, 2016.

**Melanie J. Gray,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2016-13727 Filed 6-9-16; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### Submission for OMB Review; 30-Day Comment Request: Autism Spectrum Disorder (ASD) Research Portfolio Analysis, NIMH

**SUMMARY:** Under the provisions of Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Institute of Mental Health, the National Institutes of Health, has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below. This proposed information collection was previously published in

the **Federal Register** on March 23, 2016, Vol. 81 page 15541 and allowed 60-days for public comment. One public comment was received, requesting a copy of the data collection plans and instruments; the NIMH Office of Autism Research Coordination provided draft copies of the data collection plan and instrument to the requester. The purpose of this notice is to allow an additional 30 days for public comment. The National Institute of Mental Health (NIMH), National Institutes of Health, 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.

*Direct Comments to OMB:* Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, *OIRA\_submission@omb.eop.gov* or by fax to 202-395-6974, Attention: NIH Desk Officer.

*Comment Due Date:* Comments regarding this information collection are best assured of having their full effect if received within 30 days of the date of this publication.

**FOR FURTHER INFORMATION CONTACT:** To obtain a copy of the data collection plans and instruments, or request more information on the proposed project, contact: The Office of Autism Research Coordination, NIMH, NIH, Neuroscience Center, 6001 Executive Blvd., MSC 9663, Room 6184, Bethesda, Maryland 20892. Or you can Email your request, including your address to: [iaccpublicinquiries@mail.nih.gov](mailto:iaccpublicinquiries@mail.nih.gov). Formal requests for additional plans and instruments must be requested in writing.

*Proposed Collection:* NIMH Office of Autism Research Coordination (OARC) Autism Spectrum Disorder (ASD) Research Portfolio Analysis, 0925-0682, Expiration Date 09/30/2016—EXTENSION, National Institute of Mental Health (NIMH), National Institutes of Health (NIH).

*Need and Use of Information Collection:* The purpose of the ASD portfolio analysis is to collect research funding data from U.S. and international ASD research funders, to assist the Interagency Autism Coordinating Committee (IACC) in fulfilling the requirements of the Combating Autism Act, and to inform the committee and interested stakeholders of the funding landscape

and current directions for ASD research. Specifically, these analyses will continue to examine the extent to which current funding and research topics align with the IACC Strategic Plan for ASD Research. The findings will help

guide future funding priorities by outlining current gaps and opportunities in ASD research as well as serving to highlight annual activities and research progress.

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 520.

#### ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents (funders)	Number of respondents	Number of projects per respondent	Average time per response (in hours)	Total burden hours
U.S. Federal .....	22	63	15/60	347
U.S. Private .....	8	75	15/60	150
International Government .....	4	14	15/60	14
International Private .....	4	9	15/60	9

Dated: June 3, 2016.

**Melba Rojas,**

*Project Clearance Liaison, NIMH, NIH.*

[FR Doc. 2016-13722 Filed 6-9-16; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIH Support for Conferences and Scientific Meetings (Parent R13/U13).

*Date:* June 28-30, 2016.

*Time:* 8:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 5601 Fishers Lane, Rockville, MD 20892 (Virtual Meeting).

*Contact Person:* Thomas F. Conway, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, Room 3G51, National Institutes of Health, NIAID, 5601 Fishers Lane, MSC 9823, Bethesda, MD 20892-9823, 240-507-9685, [thomas.conway@nih.gov](mailto:thomas.conway@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: June 6, 2016.

**Natasha M. Copeland,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2016-13726 Filed 6-9-16; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Substance Abuse and Mental Health Services Administration

#### Center for Substance Abuse Treatment; Notice of Meeting

Pursuant to Public Law 92-463, notice is hereby given that the Substance Abuse and Mental Health Services Administration's (SAMHSA's) Center for Substance Abuse Treatment (CSAT) National Advisory Council will meet on June 29, 2016, 2:30 p.m.-3:30 p.m. (EDT) in a closed teleconference meeting.

The meeting will include discussions and evaluations of grant applications reviewed by SAMHSA's Initial Review Groups, and involve an examination of confidential financial and business information as well as personal information concerning the applicants. Therefore, the meeting will be closed to the public as determined by the Principal Deputy SAMHSA Administrator, in accordance with Title 5 U.S.C. 552b(c)(4), (6)(B) and Title 5 U.S.C. App. 2, Section 10(d).

Meeting information and a roster of Council members may be obtained by accessing the SAMHSA Committee Web site at <http://www.samhsa.gov/about-us/advisory-councils/csat-national-advisory-council> or by contacting the CSAT National Advisory Council

Designated Federal Officer; Tracy Goss (see contact information below).

*Council Name:* SAMHSA's Center for Substance Abuse Treatment National Advisory Council.

*Date/Time/Type:* June 29, 2016, 2:30 p.m.-3:30 p.m. EDT, CLOSED.

*Place:* SAMHSA, 5600 Fishers Lane, Rockville, Maryland 20857.

*Contact:* Tracy Goss, Designated Federal Officer, CSAT National Advisory Council, 5600 Fishers Lane, Rockville, Maryland 20857 (mail), Telephone: (240) 276-0759, Fax: (240) 276-2252, Email: [tracy.goss@samhsa.hhs.gov](mailto:tracy.goss@samhsa.hhs.gov).

**Summer King,**

*Statistician, SAMHSA.*

[FR Doc. 2016-13690 Filed 6-9-16; 8:45 am]

**BILLING CODE 4162-20-P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

[Docket ID FEMA-2016-0002; Internal Agency Docket No. FEMA-B-1628]

#### Changes in Flood Hazard Determinations

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Notice.

**SUMMARY:** This notice lists communities where the addition or modification of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or the regulatory floodway (hereinafter referred to as flood hazard determinations), as shown on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports, prepared by the Federal Emergency Management Agency (FEMA) for each

community, is appropriate because of new scientific or technical data. The FIRM, and where applicable, portions of the FIS report, have been revised to reflect these flood hazard determinations through issuance of a Letter of Map Revision (LOMR), in accordance with Title 44, Part 65 of the Code of Federal Regulations (44 CFR part 65). The LOMR will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents of those buildings. For rating purposes, the currently effective community number is shown in the table below and must be used for all new policies and renewals.

**DATES:** These flood hazard determinations will become effective on the dates listed in the table below and revise the FIRM panels and FIS report in effect prior to this determination for the listed communities.

From the date of the second publication of notification of these changes in a newspaper of local circulation, any person has 90 days in which to request through the community that the Deputy Associate Administrator for Mitigation reconsider the changes. The flood hazard determination information may be changed during the 90-day period.

**ADDRESSES:** The affected communities are listed in the table below. Revised flood hazard information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below.

Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at [www.msc.fema.gov](http://www.msc.fema.gov) for comparison.

Submit comments and/or appeals to the Chief Executive Officer of the community as listed in the table below.

**FOR FURTHER INFORMATION CONTACT:** Rick Sacbabit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646-7659, or (email) [patrick.sacbabit@fema.dhs.gov](mailto:patrick.sacbabit@fema.dhs.gov); or visit the FEMA Map Information eXchange (FMIX) online at [www.floodmaps.fema.gov/fhm/fmx\\_main.html](http://www.floodmaps.fema.gov/fhm/fmx_main.html).

**SUPPLEMENTARY INFORMATION:** The specific flood hazard determinations are not described for each community in this notice. However, the online location and local community map repository address where the flood hazard determination information is available for inspection is provided.

Any request for reconsideration of flood hazard determinations must be submitted to the Chief Executive Officer of the community as listed in the table below.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65.

The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to

adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

These flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The flood hazard determinations are in accordance with 44 CFR 65.4.

The affected communities are listed in the following table. Flood hazard determination information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at [www.msc.fema.gov](http://www.msc.fema.gov) for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: May 19, 2016.

**Roy E. Wright,**

*Deputy Associate Administrator for Insurance and Mitigation, Department of Homeland Security, Federal Emergency Management Agency.*

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Effective date of modification	Community No.
Colorado: Boulder .....	City of Boulder, (16-08-0026P).	Ms. Jane Brautigam, Manager, City of Boulder, 1777 Broadway Street, Boulder, CO 80302.	Park and Central Building, 1739 Broadway Street, Boulder, CO 80308.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 18, 2016 ....	080024
Colorado: .....	Unincorporated areas of Boulder County, (16-08-0026P).	The Honorable Elise Jones, Chair, Boulder County Board of Commissioners, 1325 Pearl Street, 3rd Floor, Boulder, CO 80302.	Boulder County Transportation Department, 2525 13th Street, Suite 203, Boulder, CO 80306.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 18, 2016 ....	080023
Florida: Bay .....	City of Panama City, (16-04-0407P).	The Honorable Greg Brudnicki, Mayor, City of Panama City, 9 Harrison Avenue, Panama City, FL 32401.	Public Works Engineering Division, 9 Harrison Avenue, Panama City, FL 32401.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 19, 2016 ....	120012
Bay .....	City of Panama City, (16-04-1535P).	The Honorable Greg Brudnicki, Mayor, City of Panama City, 9 Harrison Avenue, Panama City, FL 32401.	Public Works Engineering Division, 9 Harrison Avenue, Panama City, FL 32401.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 11, 2016 ....	120012
Bay .....	Unincorporated areas of Bay County, (16-04-0407P).	The Honorable Mike Nelson, Chairman, Bay County Board of Commissioners, 840 West 11th Street, Panama City, FL 32401.	Bay County Planning and Zoning Division, 840 West 11th Street, Panama City, FL 32401.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 19, 2016 ....	120004

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Effective date of modification	Community No.
Bay .....	Unincorporated areas of Bay County, (16-04-1535P).	The Honorable Mike Nelson, Chairman, Bay County Board of Commissioners, 840 West 11th Street, Panama City, FL 32401.	Bay County Planning and Zoning Division, 840 West 11th Street, Panama City, FL 32401.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 11, 2016 ....	120004
Brevard .....	City of Cocoa Beach, (16-04-3178X).	The Honorable Tim Tumulty, Mayor, City of Cocoa Beach, P.O. Box 322430, Cocoa Beach, FL 32932.	Development Services Department, 2 South Orlando Avenue, Cocoa Beach, FL 32931.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 10, 2016 ....	125097
Brevard .....	Unincorporated areas of Brevard County, (16-04-3178X).	The Honorable Jim Barfield, Chairman, Brevard County Board of Commissioners, 2575 North Courtenay Parkway, Suite 200, Merritt Island, FL 32953.	Brevard County Public Works Department, 2725 Judge Fran Jamieson Way, Melbourne, FL 32940.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 10, 2016 ....	125092
Broward .....	City of Hallandale Beach, (16-04-0173P).	The Honorable Joy F. Cooper, Mayor, City of Hallandale Beach, 400 South Federal Highway, Hallandale Beach, FL 33009.	Development Services Department, 400 South Federal Highway, Hallandale Beach, FL 33009.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 2, 2016 .....	125110
Broward .....	Unincorporated areas of Broward County, (16-04-0173P).	Ms. Bertha Henry, Broward County Administrator, 115 South Andrews Avenue, Fort Lauderdale, FL 33301.	Broward County Environmental Licensing and Building Permitting Division, 1 North University Drive, Plantation, FL 33324.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 2, 2016 .....	125093
Charlotte .....	Unincorporated areas of Charlotte County, (16-04-1533P).	The Honorable Bill Truex, Chairman, Charlotte County Board of Commissioners, 18500 Murdock Circle, Suite 536, Port Charlotte, FL 33948.	Charlotte County Community Development Department, 18500 Murdock Circle, Port Charlotte, FL 33948.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 11, 2016 ....	120061
Gulf .....	Unincorporated areas of Gulf County, (16-04-3116X).	The Honorable Ward McDaniel, Chairman, Gulf County Board of Commissioners, 1000 Cecil G. Costin, Sr. Boulevard, Port St. Joe, FL 32456.	Gulf County Planning Department, 1000 Cecil G. Costin, Sr. Boulevard, Port St. Joe, FL 32456.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 12, 2016 ....	120098
Manatee .....	Unincorporated areas of Manatee County, (15-04-9689P).	The Honorable Vanessa Baugh, Chair, Manatee County Board of Commissioners, 1112 Manatee Avenue West, Bradenton, FL 34205.	Manatee County Building and Development Services Department, 1112 Manatee Avenue West, Bradenton, FL 34205.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 24, 2016 ....	120153
Miami-Dade ....	Unincorporated areas of Miami-Dade County, (16-04-2319P).	The Honorable Carlos A. Gimenez, Mayor, Miami-Dade County, 111 Northwest 1st Street, Miami, FL 33128.	Miami-Dade County Regulatory and Economic Resources Water Management Division, 701 Northwest 1st Court, 5th Floor, Miami, FL 33136.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 2, 2016 .....	120635
Monroe .....	Unincorporated areas of Monroe County, (16-04-0996P).	The Honorable Heather Carruthers, Mayor, Monroe County Board of Commissioners, 500 Whitehead Street, Suite 102, Key West, FL 33040.	Monroe County Building Department, 2798 Overseas Highway, Suite 300, Marathon, FL 33050.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 2, 2016 .....	125129
Monroe .....	Unincorporated areas of Monroe County, (16-04-2190P).	The Honorable Heather Carruthers, Mayor, Monroe County Board of Commissioners, 500 Whitehead Street, Suite 102, Key West, FL 33040.	Monroe County Building Department, 2798 Overseas Highway, Suite 300, Marathon, FL 33050.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 4, 2016 .....	125129
Orange .....	City of Orlando, (16-04-0456P).	The Honorable Buddy Dyer, Mayor, City of Orlando, P.O. Box 4990, Orlando, FL 32802.	Public Works Department, Engineering Division, 400 South Orange Avenue, 8th Floor, Orlando, FL 32801.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 19, 2016 ....	120186
Orange .....	Unincorporated areas of Orange County, (16-04-0456P).	The Honorable Teresa Jacobs, Mayor, Orange County, 201 South Rosalind Avenue, 5th Floor, Orlando, FL 32801.	Orange County Stormwater Division, 4200 South John Young Parkway, Orlando, FL 32839.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 19, 2016 ....	120179

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Effective date of modification	Community No.
St. Johns .....	Unincorporated areas of St. Johns County, (16-04-0993P).	The Honorable Jeb Smith, Chairman, St. Johns County Board of Commissioners, 500 San Sebastian View, St. Augustine, FL 32084.	St. Johns County Building Services Division, 4040 Lewis Speedway, St. Augustine, FL 32084.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 11, 2016 ....	125147
St. Johns .....	Unincorporated areas of St. Johns County, (16-04-2611P).	The Honorable Jeb Smith, Chairman, St. Johns County Board of Commissioners, 500 San Sebastian View, St. Augustine, FL 32084.	St. Johns County Building Services Division, 4040 Lewis Speedway, St. Augustine, FL 32084.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 2, 2016 .....	125147
Georgia: Bryan .....	City of Richmond Hill, (16-04-2230P).	The Honorable E. Harold Fowler, Mayor, City of Richmond Hill, 40 Richard R. Davis Drive, Richmond Hill, GA 31324..	Planning and Zoning Department, 85 Richard R. Davis Drive, Richmond Hill, GA 31324.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 5, 2016 .....	130018
Bryan .....	Unincorporated areas of Bryan County, (16-04-2230P).	The Honorable Jimmy Burnsed, Chairman, Bryan County Board of Commissioners, 173 Davis Road, Richmond Hill, GA 31324.	Bryan County Planning and Zoning Department, 66 Captain Matthew Freeman Drive, Suite 201, Richmond Hill, GA 31324.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 5, 2016 .....	130016
Kentucky: Jefferson .....	Louisville-Jefferson County Metropolitan Government, (16-04-3003X).	The Honorable Greg Fischer, Mayor, City of Louisville, 527 West Jefferson Street, 4th Floor, Louisville, KY 40202.	Metropolitan Sewer District, 700 West Liberty Street, Louisville, KY 40203.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 1, 2016 .....	210120
Louisiana: Bossier .....	City of Bossier City, (15-06-2130P).	The Honorable Lorenz Walker, Mayor, City of Bossier City, P.O. Box 5337, Bossier City, LA 71171.	City Hall, 620 Benton Road, Bossier City, LA 71171.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 18, 2016 ....	220033
Bossier .....	Unincorporated areas of Bossier Parish, (15-06-2130P).	The Honorable William R. Altimus, Bossier Parish Administrator, P.O. Box 70, Benton, LA 71006.	Bossier Parish Courthouse, 204 Burt Boulevard, Benton, LA 71006.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 18, 2016 ....	220031
Massachusetts: Barnstable.	Town of Falmouth, (16-01-0373P).	The Honorable Doug Jones, Chairman, Town of Falmouth Board of Selectmen, 59 Town Hall Square, Falmouth, MA 02540.	Town Hall, 59 Town Hall Square, Falmouth, MA 02540.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 15, 2016 ....	255211
North Carolina: Buncombe .....	Unincorporated areas of Buncombe County, (15-04-8908P).	The Honorable David Gantt, Chairman, Buncombe County Board of Commissioners, 200 College Street, Suite 316, Asheville, NC 28801.	Buncombe County Planning Department, 46 Valley Street Asheville, NC 28801.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 5, 2016 .....	370031
Burke .....	Unincorporated areas of Burke County, (15-04-9342P).	The Honorable Wayne F. Abele, Sr, Chairman, Burke County Board of Commissioners, P.O. Box 219, Morganton, NC 28680.	Burke County Services Building, 110 North Green Street Morganton, NC 28680.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 1, 2016 .....	370034
Orange .....	Town of Chapel Hill, (16-04-4141X).	The Honorable Pam Hemminger, Mayor, Town of Chapel Hill, 405 Martin Luther King Jr. Boulevard, Chapel Hill, NC 27514.	Public Works Department, Stormwater Division, 405 Martin Luther King Jr. Boulevard, Chapel Hill, NC 27514.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 18, 2016 ....	370180
Oklahoma: Payne	Unincorporated areas of Payne County, (15-06-3395P).	The Honorable Kent Bradley, Chairman, Payne County Board of Commissioners, 506 Expo Circle South, Stillwater, OK 74074.	Payne County Floodplain Administrator's Office, 315 West 6th Avenue, Suite 203, Stillwater, OK 74074.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 22, 2016 ....	400493
Pennsylvania: Montgomery ...	Borough of Ambler, (15-03-2420P).	The Honorable Salvatore Pasceri, President, Borough of Ambler Council, 131 Rosemary Avenue, Ambler, PA 19002.	Borough Hall, 131 Rosemary Avenue, Ambler, PA 19002.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 1, 2016 .....	420947

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Effective date of modification	Community No.
Montgomery ...	Township of Lower Gwynedd, (15-03-2420P).	The Honorable Stephen J. Paccione, Chairman, Township of Lower Gwynedd Board of Supervisors, P.O. Box 625, Spring House, PA 19477.	Township Hall, 1130 North Bethlehem Pike, Spring House, PA 19477.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 1, 2016 .....	420953
Montgomery ...	Township of Upper Dublin, (15 03 2420P).	The Honorable Ira S. Tackel, President, Township of Upper Dublin Board of Commissioners, 801 Loch Alsh Avenue, Fort Washington, PA 19034.	Township Hall, 801 Loch Alsh Avenue, Fort Washington, PA 19034.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 1, 2016 .....	420708
Montgomery ...	Township of Whitemarsh, (15-03-2924P).	The Honorable Amy P. Grossman, Chair, Township of Whitemarsh Board of Supervisors, 616 Germantown Pike, Lafayette Hill, PA 19444.	Township Administrative Building, 616 Germantown Pike, Lafayette Hill, PA 19444.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 16, 2016 ....	420712
Montgomery ...	Township of Whitpain, (15-03-2420P).	The Honorable Adam Zucker, Chairman, Township of Whitpain Board of Supervisors, 960 Wentz Road, Blue Bell, PA 19422.	Township Hall, 960 Wentz Road, Blue Bell, PA 19422.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 1, 2016 .....	420713
Tennessee: Hamilton .....	City of Chattanooga, (15-04-3964P).	The Honorable Andy Berke, Mayor, City of Chattanooga, 101 East 11th Street, Chattanooga, TN 37402.	Planning Department, 1250 Market Street, Chattanooga, TN 37402.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 5, 2016 .....	470072
Hamilton .....	City of Chattanooga, (15-04-9959P).	The Honorable Andy Berke, Mayor, City of Chattanooga, 101 East 11th Street, Chattanooga, TN 37402.	Planning Department, 1250 Market Street, Chattanooga, TN 37402.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Jun. 6, 2016 .....	470072
Hamilton .....	City of East Ridge, (15-04-3964P).	The Honorable Brent Lambert, Mayor, City of East Ridge, 1517 Tombras Avenue, East Ridge, TN 37412.	Codes Division, 1517 Tombras Avenue, East Ridge, TN 37412.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 5, 2016 .....	475424
Sequatchie .....	City of Dunlap, (16-04-1892P).	The Honorable Dwain Land, Mayor, City of Dunlap, P.O. Box 546, Dunlap, TN 37327.	City Hall, 15595 Rankin Avenue, Dunlap, TN 37327.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Jul. 8, 2016 .....	470270
Texas: Bexar .....	City of San Antonio, (16-06-1080P).	The Honorable Ivy R. Taylor, Mayor, City of San Antonio, P.O. Box 839966, San Antonio, TX 78283.	Transportation and Capital Improvements Department, Storm Water Division, 1901 South Alamo Street, 2nd Floor, San Antonio, TX 78204.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 9, 2016 .....	480045
Bexar .....	Unincorporated areas of Bexar County, (15-06-3161P).	The Honorable Nelson W. Wolff, Bexar County Judge, Paul Elizondo Tower, 101 West Nueva Street, 10th Floor, San Antonio, TX 78205.	Bexar County Public Works Department, 233 North Pecos La Trinidad Street, Suite 420, San Antonio, TX 78207.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Jul. 22, 2016 .....	480035
Collin .....	Town of Westminster, (16-06-0644P).	Mr. Phil Goplin, President, Westminster Special Utility District, 409 East Houston Street, Westminster, TX 75485.	Town Hall, 309 West Houston Street, Westminster, TX 75069.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Jul. 17, 2016 .....	480758
Collin .....	Unincorporated areas of Collin County, (16-06-0644P).	The Honorable Keith Self, Collin County Judge, 2300 Bloomdale Road, Suite 4192, McKinney, TX 75071.	Collin County Engineering Department, 4690 Community Avenue, Suite 200, McKinney, TX 75071.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Jul. 17, 2016 .....	480130
Comal .....	City of Fair Oaks Ranch, (15-06-3044P).	The Honorable Cheryl Landman, Mayor, City of Fair Oaks Ranch, 7286 Dietz Elkhorn Road, Fair Oaks Ranch, TX 78015.	Public Works Department, 7286 Dietz Elkhorn Road, Fair Oaks Ranch, TX 78015.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 15, 2016 ....	481644

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Effective date of modification	Community No.
Dallas .....	City of Dallas, (15-06-4110P).	The Honorable Michael S. Rawlings, Mayor, City of Dallas, 1500 Marilla Street, Room 5EN, Dallas, TX 75201.	Engineering Department, 320 East Jefferson Boulevard, Room 200, Dallas, TX 75203.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 8, 2016 .....	480171
Denton .....	City of Carrollton, (15-06-2940P).	The Honorable Matthew Marchant, Mayor, City of Carrollton, P.O. Box 110535, Carrollton, TX 75011.	Engineering Department, 1945 East Jackson Road, Carrollton, TX 75011.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 22, 2016 ....	480167
Fort Bend .....	Unincorporated areas of Fort Bend County, (16-06-1119P).	The Honorable Robert Hebert, Fort Bend County Judge, 401 Jackson Street, Richmond, TX 77469.	Fort Bend County Engineering Department, 301 Jackson Street, 4th Floor, Richmond, TX 77469.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 18, 2016 ....	480228
Harris .....	Unincorporated areas of Harris County, (16-06-1373P).	The Honorable Edward M. Emmett, Harris County Judge, 1001 Preston Street, Suite 911, Houston, TX 77002.	Harris County Permit Office, 10555 Northwest Freeway, Suite 120, Houston, TX 77092.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 9, 2016 .....	480287
Tarrant .....	City of Colleyville, (15-06-4177P).	The Honorable David Kelly, Mayor, City of Colleyville, 100 Main Street, Colleyville, TX 76034.	Public Works Department, 100 Main Street, Colleyville, TX 76034.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 11, 2016 ....	480590
Utah: Davis .....	City of North Salt Lake, (15-08-1306P).	The Honorable Len Arave, Mayor, City of North Salt Lake, 10 East Center Street, North Salt Lake, UT 84054.	City Hall, 10 East Center Street, North Salt Lake, UT 84054.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 5, 2016 .....	490048
Virginia: Prince William	City of Manassas, (15-03-2702P).	The Honorable Harry J. Parrish II, Mayor, City of Manassas, 9027 Center Street, Manassas, VA 20110.	City Hall, 9027 Center Street, Manassas, VA 20110.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 11, 2016 ....	510122
Prince William	Unincorporated areas of Prince William County, (15-03-1042P).	The Honorable Christopher E. Martino, Acting Prince William County Executive, 1 County Complex Court, Prince William, VA 22192.	Prince William County Department of Public Works, 5 County Complex Court, Prince William, VA 22192.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 4, 2016 .....	510119
Prince William	Unincorporated areas of Prince William County, (15-03-2702P).	The Honorable Christopher E. Martino, Acting Prince William County Executive, 1 County Complex Court, Prince William, VA 22192.	Prince William County Department of Public Works, 5 County Complex Court, Prince William, VA 22192.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Aug. 11, 2016 ....	510119

[FR Doc. 2016-13807 Filed 6-9-16; 8:45 am]

BILLING CODE 9110-12-P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

[Docket ID FEMA-2016-0002]

#### Final Flood Hazard Determinations

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Final notice.

**SUMMARY:** Flood hazard determinations, which may include additions or modifications of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone

designations, or regulatory floodways on the Flood Insurance Rate Maps (FIRMs) and where applicable, in the supporting Flood Insurance Study (FIS) reports have been made final for the communities listed in the table below.

The FIRM and FIS report are the basis of the floodplain management measures that a community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the Federal Emergency Management Agency's (FEMA's) National Flood Insurance Program (NFIP). In addition, the FIRM and FIS report are used by insurance agents and others to calculate appropriate flood insurance premium rates for buildings and the contents of those buildings.

**DATES:** The effective date of June 15, 2016 which has been established for the

FIRM and, where applicable, the supporting FIS report showing the new or modified flood hazard information for each community.

**ADDRESSES:** The FIRM, and if applicable, the FIS report containing the final flood hazard information for each community is available for inspection at the respective Community Map Repository address listed in the tables below and will be available online through the FEMA Map Service Center at [www.msc.fema.gov](http://www.msc.fema.gov) by the effective date indicated above.

**FOR FURTHER INFORMATION CONTACT:** Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646-7659, or (email) [patrick.sacbibit@fema.dhs.gov](mailto:patrick.sacbibit@fema.dhs.gov); or visit

the FEMA Map Information eXchange (FMIX) online at [www.floodmaps.fema.gov/fhm/fmx\\_main.html](http://www.floodmaps.fema.gov/fhm/fmx_main.html).

**SUPPLEMENTARY INFORMATION:** The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the new or modified flood hazard information for each community listed. Notification of these changes has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Mitigation has

resolved any appeals resulting from this notification.

This final notice is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67. FEMA has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the new or revised FIRM and FIS report available at the address cited below for each community or online through the

FEMA Map Service Center at [www.msc.fema.gov](http://www.msc.fema.gov).

The flood hazard determinations are made final in the watersheds and/or communities listed in the table below. (Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: May 19, 2016.

**Roy E. Wright,**

*Deputy Associate Administrator for Insurance and Mitigation, Department of Homeland Security, Federal Emergency Management Agency.*

I. Non-watershed-based studies:

Community	Community map repository address
<b>Douglas County, Nevada, and Incorporated Areas</b>	
<b>Docket No.: FEMA-B-1535</b>	
Unincorporated Areas of Douglas County .....	Community Development, 1594 Esmeralda Avenue, Minden, NV 89423.

[FR Doc. 2016-13812 Filed 6-9-16; 8:45 am]

BILLING CODE 9110-12-P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

[Docket ID FEMA-2016-0002; Internal Agency Docket No. FEMA-B-1629]

### Proposed Flood Hazard Determinations

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Notice.

**SUMMARY:** Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified

for participation in the National Flood Insurance Program (NFIP). In addition, the FIRM and FIS report, once effective, will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents of those buildings.

**DATES:** Comments are to be submitted on or before September 8, 2016.

**ADDRESSES:** The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at [www.msc.fema.gov](http://www.msc.fema.gov) for comparison.

You may submit comments, identified by Docket No. FEMA-B-1629, to Rick Sacibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646-7659, or (email) [patrick.sacibit@fema.dhs.gov](mailto:patrick.sacibit@fema.dhs.gov).

**FOR FURTHER INFORMATION CONTACT:** Rick Sacibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646-7659, or (email) [patrick.sacibit@fema.dhs.gov](mailto:patrick.sacibit@fema.dhs.gov); or visit the FEMA Map Information eXchange (FMIX) online at [www.floodmaps.fema.gov/fhm/fmx\\_main.html](http://www.floodmaps.fema.gov/fhm/fmx_main.html).

**SUPPLEMENTARY INFORMATION:** FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings built after the FIRM and FIS report become effective.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of

experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at [http://floodsrp.org/pdfs/srp\\_fact\\_sheet.pdf](http://floodsrp.org/pdfs/srp_fact_sheet.pdf).

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each

community are accessible online through the FEMA Map Service Center at [www.msc.fema.gov](http://www.msc.fema.gov) for comparison. (Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: May 19, 2016.

**Roy E. Wright,**

*Deputy Associate Administrator for Insurance and Mitigation, Department of Homeland Security, Federal Emergency Management Agency.*

I. Watershed-based studies:

Community	Community map repository address
<b>Carroll County, Iowa, and Incorporated Areas</b>	
Maps Available for Inspection Online at: <a href="http://www.fema.gov/preliminaryfloodhazarddata">http://www.fema.gov/preliminaryfloodhazarddata</a>	
<b>Project: 15-07-0901S Preliminary Date: June 8, 2015</b>	
City of Arcadia .....	City Hall, 205 West Front Street, Arcadia, IA 51430.
City of Carroll .....	City Hall, 112 East 5th Street, Carroll, IA 51401.
City of Coon Rapids .....	City Hall, 123 3rd Avenue, Coon Rapids, IA 50058.
City of Dedham .....	City Hall, 210 Main Street, Dedham, IA 51440.
City of Halbur .....	City Hall, 238 West 2nd Street, Halbur, IA 51444.
City of Lanesboro .....	City Hall, 210 East Main Street, Lanesboro, IA 51451.
City of Manning .....	City Hall, 717 3rd Street, Manning, IA 51455.
Unincorporated Areas of Carroll County .....	Carroll County Building, 114 East 6th Street, Carroll, IA 51401.

[FR Doc. 2016-13808 Filed 6-9-16; 8:45 am]

BILLING CODE 9110-12-P

## DEPARTMENT OF HOMELAND SECURITY

### Office for Interoperability and Compatibility

[Docket No. DHS-2016-0037]

### Office for Interoperability and Compatibility Seeks Nominations for the Project 25 Compliance Assessment Program Advisory Panel—Single Position

**AGENCY:** Science and Technology Directorate, DHS.

**ACTION:** Notice.

**SUMMARY:** The Department of Homeland Security (DHS) is seeking nominations and expressions of interest for replacing an open position on the Project 25 Compliance Assessment Program Advisory Panel (P25 CAP AP). The P25 CAP AP holds quarterly meetings with the public on topics related to P25 CAP. The next meeting is scheduled for August 2016 timeframe.

The Project 25 Compliance Assessment Program is a standard which enables interoperability among digital two-way land mobile radio communications products created by and for public safety professionals. The

P25 CAP is a formal, independent process created by DHS and operated in collaboration with the National Institute of Standards and Technology (NIST), to ensure that communications equipment that is declared by the supplier to be P25 compliant, is in fact tested against the standards with publicly published results. The P25 CAP AP provides a resource by which DHS gains insight into the collective interest of organizations that procure P25-compliant equipment and a resource for DHS to continue to establish the policies of the P25 CAP, along with assisting the DHS Office for Interoperability and Compatibility (OIC) in the administration of the Program.

**DATES:** All responses must be received within 30 days from the date of this notice at the address listed below.

**ADDRESSES:** Expressions of interest and nominations shall be submitted to [SandTFRG@hq.dhs.gov](mailto:SandTFRG@hq.dhs.gov).

• **Instructions:** All submissions received must include the words "Department of Homeland Security" and DHS-2016-0037, the docket number for this action.

**FOR FURTHER INFORMATION CONTACT:** John Merrill, Director, Office for Interoperability and Compatibility, Science and Technology Directorate, Department of Homeland Security, 202-254-5604, [John.Merrill@hq.dhs.gov](mailto:John.Merrill@hq.dhs.gov).

**SUPPLEMENTARY INFORMATION:**

## Background

The TIA-102/Project 25 (P25) is a standards development process for the design, manufacture, and evaluation of interoperable digital two-way land mobile radio communications products created by and for public safety professionals. The goal of P25 is to specify formal standards for interfaces and features between the various components of a land mobile radio system commonly used by public safety agencies in portable handheld and mobile vehicle-mounted devices. The P25 standard enables interoperability among different suppliers' products.

The P25 CAP was developed by DHS and the National Institute of Standards and Technology (NIST) to test equipment designed to comply with P25 standards. The program provides public safety agencies with evidence that the communications equipment they are purchasing is tested against and complies with the P25 standards for performance, conformance, and interoperability.

The P25 CAP is a voluntary system that provides a mechanism for the recognition of testing laboratories based on internationally accepted standards. It identifies competent P25 CAP testing laboratories for DHS-recognition through a robust assessment process and promotes the acceptance of compliant test results from these laboratories.

As a voluntary program, P25 CAP allows suppliers to publicly attest to their products' compliance with a selected group of requirements through Summary Test Report (STR) and Supplier's Declaration of Compliance (SDOC) documents based on the Detailed Test Report (DTR) from the DHS-recognized laboratory (ies) that performed the product testing. In turn, P25 CAP makes these documents available to the first response community to inform their purchasing decisions via the *FirstResponder.gov/P25CAP* Web site.

### Membership

The Science and Technology Directorate (S&T) of DHS formed the P25 CAP Advisory Panel to provide S&T with the views of active State, local, tribal, territorial and Federal government officials who use or whose offices use portable handheld and mobile vehicle-mounted radios. Those government officials selected to participate in the P25 CAP AP are selected based on their experience with the management and procurement of land mobile radio systems or knowledge of conformity assessment programs and methods. The OIC selection process balances viewpoints required to effectively address P25 CAP issues under consideration. To fill an open position on the P25 CAP AP, OIC is particularly interested in receiving nominations and expressions of interest from individuals in the following categories:

- State, local, tribal, or territorial government agencies and organizations with expertise in communications issues and technologies.
- Federal government agencies with expertise in communications or homeland security matters.

While OIC can call for a meeting of the P25 CAP AP as it deems necessary and appropriate, for member commitment and planning purposes, it is anticipated that the P25 CAP AP will meet approximately 3–4 times annually in their role of providing guidance and support to the P25 CAP.

Those selected to serve on the P25 CAP AP will be required to sign a gratuitous services agreement and will not be paid or reimbursed for their participation; however, DHS S&T will, subject to the availability of funds, reimburse the travel expenses associated with the participation of non-Federal members in accordance with Federal Travel Regulations. The OIC reserves the right to select primary and alternate members to the P25 CAP AP for terms appropriate for the accomplishment of

the Board's mission. Members serve at the pleasure of the OIC Director.

Registered lobbyists pursuant to the Lobbying Disclosure Act of 1995 are not eligible for membership on the P25 CAP AP and will not be considered.

### Roles and Responsibilities

The duties of the P25 CAP AP will include providing recommendations of its individual members to OIC regarding actions and steps OIC could take to promote the P25 CAP. The duties of the P25 CAP AP may include but are not limited to its members reviewing, commenting on, and advising on:

- The laboratory component of the P25 CAP under established, documented laboratory recognition guidelines.
- Proposed Compliance Assessment Bulletins (CABs).
- Proposed updates to previously approved CABs, as Notices of Proposed CABs, to enable comment and input on the proposed CAB modifications.
- OIC updates to existing test documents or establishing new test documents for new types of P25 equipment.
- Best practices associated with improvement of the policies and procedures by which the P25 CAP operates.
- Existing test documents including but not limited to Supplier Declarations of Compliance (SDOCs) and Summary Test Reports (STRs) posted on the *FirstResponder.gov/P25CAP* Web site.
- Proposed P25 user input for improving functionality through the standards-making process.

### Nominations/Expressions of Interest Procedures and Deadline

Nominations and expressions of interest shall be received by OIC no later than 30 days from the date of this notice at the address: (*SandTFRG@hq.dhs.gov*). Nominations and expressions of interest received after this date shall not be considered. Each nomination and expression of interest must provide the following information as part of the submission:

- A cover letter that highlights a history of proven leadership within the public safety community including, if applicable, a description of prior experience with law enforcement, fire response, emergency medical services, emergency communications, National Guard, or other first responder roles and how the use of communications in those roles qualifies the nominee to participate on the P25 CAP AP.
- Name, title, and organization of the nominee.
- A résumé summarizing the nominee's contact information

(including the mailing address, phone number, facsimile number, and email address), qualifications, and expertise to explain why the nominee should be appointed to the P25 CAP AP.

- The résumé must demonstrate a minimum of ten years (10) years of experience directly using P25 systems in an operational environment in support of established public safety communications or from a system implementer/administrator perspective; a bachelor's or associate degree with an emphasis in communications and engineering may be substituted for three (3) years, a master's/professional certification for seven (7) years, and a Ph.D. for ten (10) years of the requirement.

- The resume must discuss the nominee's familiarity with the current P25 CAP, including documents that are integral to the process such as the SDOCs, STRs, and CABs referenced in this notice.

- A letter from the nominee's supervisor indicating the nominee's agency's support for the nominee to participate on the P25 CAP AP as a representative from their respective agency.

- Disclosure of Federal boards, commissions, committees, task forces, or work groups on which the nominee currently serves or has served within the past 12 months.

- A statement confirming that the nominee is not registered as a lobbyist pursuant to the Lobbying Disclosure Act of 1995.

Additional information can be found as follows: Project 25 Compliance Assessment Program and Compliance Assessment Bulletins <http://www.dhs.gov/science-and-technology/p25-cap>.

Dated: June 6, 2016.

**Reginald Brothers,**  
Under Secretary, DHS Science and Technology Directorate.

[FR Doc. 2016–13730 Filed 6–9–16; 8:45 am]

**BILLING CODE 9110–9F–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5907–N–24]

### Federal Property Suitable as Facilities To Assist the Homeless

**AGENCY:** Office of the Assistant Secretary for Community Planning and Development, HUD.

**ACTION:** Notice.

**SUMMARY:** This Notice identifies unutilized, underutilized, excess, and

surplus Federal property reviewed by HUD for suitability for use to assist the homeless.

**FOR FURTHER INFORMATION CONTACT:**

Juanita Perry, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7266, Washington, DC 20410; telephone (202) 402-3970; TTY number for the hearing- and speech-impaired (202) 708-2565 (these telephone numbers are not toll-free), or call the toll-free Title V information line at 800-927-7588.

**SUPPLEMENTARY INFORMATION:** In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless v. Veterans Administration*, No. 88-2503-OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, and suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Where property is described as for "off-site use only" recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to: Ms. Theresa M. Ritta, Chief Real Property Branch, the Department of Health and Human Services, Room 5B-17, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857, (301) 443-2265 (This is not a toll-free number). HHS will mail to the

interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1-800-927-7588 for detailed instructions or write a letter to Ann Marie Oliva at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (*i.e.*, acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: AIR FORCE: Mr. Robert E. Moriarty, P.E., AFCEC/CI, 2261 Hughes Avenue, Ste. 155, JBSA Lackland TX 78236-9853; ARMY: Ms. Veronica Rines, Office of the Assistant Chief of Staff for Installation Management, Department of Army, Room 5A128, 600 Army Pentagon, Washington, DC 20310, (571) 256-8145 (These are not toll-free numbers).

Dated: June 2, 2016.

**Brian P. Fitzmaurice,**

*Director, Division of Community Assistance, Office of Special Needs Assistance Programs.*

**TITLE V, FEDERAL SURPLUS PROPERTY PROGRAM FEDERAL REGISTER REPORT FOR 06/10/2016**

**Suitable/Available Properties**

*Building*

Alabama

4 Buildings

Bldg. 30815 AL 85 Peters St.

Doleville AL 36362

Landholding Agency: Army

Property Number: 21201620022

Status: Unutilized

Directions: 4011T:RPUID:186097 (720 sq.);

414:RPUID:186545 (288 sq.);

30815:RPUID:671439 (144 sq.); 4513:

RPUID:186563 (400 sq.)

Comments: Off-site removal only; no future agency need 24+-47+ yrs. old; sq. ft. above; storage; rec shelter; flam mat; 1+-6+ mos. vacant; poor & fair condition; contact Army for more information.

Colorado

Building R005F

Range 5 Specker Avenue

Fort Carson CO 80913

Landholding Agency: Army

Property Number: 21201620003

Status: Unutilized

Comments: off-site removal only; 13+ yrs. old; 800 sq. ft.; storage; 6+ mos. vacant; repairs required; contact Army for more information.

6 Buildings

Fort Carson

Fort Carson CO 80913

Landholding Agency: Army

Property Number: 21201620014

Status: Unutilized

Directions: 02554:RPUID:572361 (22,441 sq.);

02552:RPUID:591052 (22,441 sq.);

01950:RPUID:606520 (11,819 sq.);

01954:RPUID:583977 (22,386 sq.);

01951:RPUID:576840 (22,386 sq.);

02551:RPUID:576791 (22,441 sq.)

Comments: off-site removal only; 38+-42+ yrs. old; sq. ft. above; barracks; 2+ mos. vacant; repairs required; contact Army for more information.

Georgia

5 Buildings

Fort Benning

Fort Benning GA 31905

Landholding Agency: Army

Property Number: 21201620006

Status: Unutilized

Directions: Building 00485:RPUID:281444

(148 sq.); 08848:RPUID:282680 (288 sq.);

08830:RPUID:282664; (288 sq.)

08020:RPUID:282782; (192 sq.);

04022:RPUID:1006195 (144 sq.)

Comments: off-site removal only; 7+-74+ yrs. old; veh; toil/shower; storage; poor conditions; contact Army for more information.

Kentucky

2 Buildings

Fort Campbell

Fort Campbell KY 42223  
Landholding Agency: Army  
Property Number: 21201620004  
Status: Underutilized  
Directions: A0127: RPUID: 582404 (400 sq. ft.); B0127: RPUID: 320594 (783 sq. ft.)  
Comments: 25+—27+ yrs. old; heating plant; refrig/AC building; fair condition; prior approval needed to gain access; contact Army for more information.

#### Missouri

Building 319A  
Intersection of Headquarters and Illonoise Ave.  
Fort Leonard Wood MO 65473  
Landholding Agency: Army  
Property Number: 21201620023  
Status: Unutilized  
Directions: RPUID: 1239157  
Comments: 4+ yrs. old; 384 sq. ft.; recreation; adequate condition; contact Army for more information.

#### Oklahoma

7 Buildings  
Fort Sill  
Fort Sill OK 73503  
Landholding Agency: Army  
Property Number: 21201620020  
Status: Unutilized  
Directions: 3336 (8,883 sq.); 1620 (800 sq.); 2598 (3,670 sq.); 2599 (3,670 sq.); 1608 (108 sq.); 3602 (8,883 sq.); 4744 (2,108 sq.)  
Comments: off-site removal only; no future agency need; 21+-82+ yrs. old; sq. ft. above; warehouse; admin.; toilet/shower; instruction bldg.; 6+mos. vacant; contact Army for more information.

#### Virginia

Building 9046  
Battle Drive in the Marine Complex Area  
Fort Lee VA 23801  
Landholding Agency: Army  
Property Number: 21201620024  
Status: Unutilized  
Comments: 39+ yrs. old; 120 sq. ft.; storage; 3+ mos. vacant; poor condition; contact Army for more information.

#### Unsuitable Properties

##### Building

#### Alabama

6 Buildings  
Anniston Army Depot  
Anniston AL 36207  
Landholding Agency: Army  
Property Number: 21201620009  
Status: Unutilized  
Directions: Building 00072: RPUID: 235554; 0027A: RPUID: 235396; 00663: RPUID: 234486; 00198: RPUID: 237626 00656: RPUID: 237503; 00602: RPUID: 237280  
Comments: public access denied and no alternative method to gain access without compromising national security.  
Reasons: Secured Area  
5 Buildings  
Military Ocean Terminal Concord  
Concord AL 94520  
Landholding Agency: Army  
Property Number: 21201620018

Status: Unutilized  
Directions: 00350: RPUID: 95946; 00352: RPUID: 959488; 00100: RPUID: 959345; 00262: RPUID: 1039404; 00283: RPUID: 959484

Comments: public access denied and no alternative method to gain access without compromising national security.

Reasons: Secured Area

Building 30908  
Bldg. 30908 AL 85 Specker St.  
Daleville AL 36362  
Landholding Agency: Army  
Property Number: 21201620021  
Status: Unutilized  
Directions: RPUID: 598532  
Comments: property located within an airport runway clear zone or military airfield.  
Reasons: Within airport runway clear zone  
California

Defense Distribution San Joaquin #1; 26500 S. Chrisman Road  
Tracy CA 95304  
Landholding Agency: Army  
Property Number: 21201620008  
Status: Unutilized  
Comments: public access denied and no alternative method to gain access without compromising national security.

Reasons: Secured Area

6 Buildings  
Sierra Army Depot  
Herlong CA 96113  
Landholding Agency: Army  
Property Number: 21201620010  
Status: Unutilized  
Directions: 00180: RPUID: 197379; 00182: RPUID: 197381; 00319: RPUID: 197415; 00176: RPUID: 197375; 0179: RPUID: 197378; 00181: RPUID: 197380

Comments: public access denied and no alternative method to gain access without compromising national security.

Reasons: Secured Area

8 Buildings  
Sierra Army Depot  
Herlong CA 96113  
Landholding Agency: Army  
Property Number: 21201620011  
Status: Unutilized  
Directions: 00019: RPUID: 200744; 00018: RPUID: 200743; 00016: RPUID: 200741; 00015: RPUID: 200740; 00025: RPUID: 200750; 00024: RPUID: 200749; 00022: RPUID: 200747; 00021: RPUID: 200746

Comments: public access denied and no alternative method to gain access without compromising national security.

Reasons: Secured Area

5 Buildings  
Military Ocean Terminal Concord  
Military Ocean Termin CA 94520  
Landholding Agency: Army  
Property Number: 21201620012  
Status: Unutilized  
Directions: Building 00E61: RPUID: 959953; 00A31: RPUID: 1039399; 00S51: RPUID: 960038; 00S45: RPUID: 960035;

Comments: public access denied and no alternative method to gain access without compromising national security.

Reasons: Secured Area

00IA2: RPUID: 1039398  
Military Ocean Terminal Concord  
Concord CA 94520  
Landholding Agency: Army  
Property Number: 21201620016  
Status: Unutilized  
Comments: public access denied and no alternative method to gain access without compromising national security.  
Reasons: Secured Area  
4 Buildings  
5604 Exercise Street  
Dublin CA 94568  
Landholding Agency: Army  
Property Number: 21201620026  
Status: Unutilized  
Directions: 985: RPUID: 376808; 986: RPUID: 376809; 987: RPUID: 376810; 984: RPUID: 376807

Comments: public access denied and no alternative method to gain access without compromising national security.

Reasons: Secured Area

#### Colorado

2 Buildings  
Fort Carson  
Fort Carson CO 80913  
Landholding Agency: Army  
Property Number: 21201620002  
Status: Unutilized  
Directions: Building 00300 & 00301  
Comments: public access denied and no alternative method to gain access without compromising national security; property located within floodway, which has not been correct or contained.

Reasons: Secured Area

#### Georgia

Savannah HHIAP  
Fac. 1907 & 1914 XDQU  
1401 Robert B. Miller Dr.  
Garden City GA  
Landholding Agency: Air Force  
Property Number: 18201620010  
Status: Underutilized  
Comments: public access denied and no alternative without compromising national security

Reasons: Secured Area

2 Buildings  
Fort Benning  
Fort Benning GA 31905  
Landholding Agency: Army  
Property Number: 21201620007  
Status: Excess  
Directions: Building 02831: RPUID: 282470 & 02836: RPUID: 282475  
Comments: public access denied and no alternative method to gain access without compromising national security.  
Reasons: Secured Area

#### Illinois

3 Buildings  
Rock Island Arsenal  
Rock Island IL 61299  
Landholding Agency: Army  
Property Number: 21201620015  
Status: Underutilized  
Directions: 0030G: RPUID: 366331; 31: RPUID: 610280; 30: RPUID: 610255

Comments: property located within floodway, which has not been correct or contained.

Reasons: Floodway

#### Kentucky

10 Buildings

Porter River Road

Fort Knox KY 40121

Landholding Agency: Army

Property Number: 21201620028

Status: Unutilized

Directions: 9606:RPUID:310162;

9475:RPUID:286869; 9322:RPUID:182117;

9679:RPUID:309686; 9395:RPUID:293399;

9676:RPUID:286480; 9353:RPUID:310217;

9671:RPUID:1104885; 9342:RPUID:309470;

9660:RPUID:308904

Comments: public access denied and no alternative method to gain access without compromising national security.

Reasons: Secured Area

10 Buildings

Main Range Road

Fort Knox KY 40121

Landholding Agency: Army

Property Number: 21201620029

Status: Unutilized

Directions: 9282:RPUID:286483;

9240:RPUID:286705; 9284:RPUID:309690;

9241:RPUID:309683; 9290:RPUID:309737;

9242:RPUID:310425; 9234:RPUID:310217;

9258:RPUID:309480; 9265:RPUID:309473;

9235:RPUID:310418

Comments: public access denied and no alternative method to gain access without compromising national security.

Reasons: Secured Area

13 Buildings

Ft. Knox

Ft. Knox KY 40121

Landholding Agency: Army

Property Number: 21201620036

Status: Unutilized

Directions: 9697 (310446); 9701 (310071);

9702 (310072); 9704 (309327); 9751

(178549); 9682 (309486); 9684 (310449);

9685 (309485); 9686 (309483); 9687

(309484); 9694 (310043); 9695 (310444);

9696 (310445)

Comments: public access denied and no alternative method to gain access without compromising national security

Reasons: Secured Area

#### Maryland

6 Buildings

Aberdeen Proving Ground

APG MD 21010

Landholding Agency: Army

Property Number: 21201620031

Status: Unutilized

Directions: E5181 (235839); E4655 (235019);

E6882 (234049); E5286 (236064); E5920

(237899); E3966 (237859)

Comments: public access denied and no alternative method to gain access without compromising national security

Reasons: Secured Area

10 Buildings

Aberdeen Proving Ground

APG MD 21010

Landholding Agency: Army

Property Number: 21201620032

Status: Unutilized

Directions: E3965 (237858); E2300 (236780); E3334 (225912); E3335 (225913); E3346 (225915); E3508 (236906); E3727 (237181); E3860 (237205); E3951 (237844); E3955 (237848)

Comments: public access denied and no alternative method to gain access without compromising national security

Reasons: Secured Area

10 Buildings

Aberdeen Proving Ground

APG MD 21010

Landholding Agency: Army

Property Number: 21201620033

Status: Unutilized

Directions: E1421 (230356); E1425 (230360);

5608E (233610); E1467 (231217); 1128

(230958); 1149A (233364); 1169 (231805);

4303 (230771); 4725 (231020); E1406

(230345)

Comments: public access denied and no alternative method to gain access without compromising national security

Reasons: Secured Area

10 Buildings

Aberdeen Proving Ground

APG MD 21005

Landholding Agency: Army

Property Number: 21201620034

Status: Unutilized

Directions: 1076B(1197700); 1101A

(2333334); 714D (231385); 718 (233262);

783 (229636); 852A (232469); 798 (229642);

806 (229846); 807 (229847); 808 (229848)

Comments: public access denied and no alternative method to gain access without compromising national security

Reasons: Secured Area

10 Buildings

Aberdeen Proving Ground

APG MD 21005

Landholding Agency: Army

Property Number: 21201620035

Status: Unutilized

Directions: 303 (233151); 312 (957898); 335A

(233192); 347A (229683); 457 (231108); 526

(232983); 527 (232984); 700h (251369);

00036 (232287); 279 (233148)

Comments: public access denied and no alternative method to gain access without compromising national security

Reasons: Secured Area

E5950 (RPUID:237908)

Callahan St.

Aberdeen Proving Ground

APG MD 21010

Landholding Agency: Army

Property Number: 21201620038

Status: Unutilized

Comments: public access denied and no alternative method to gain access without compromising national security

Reasons: Secured Area

Massachusetts

2 Buildings

Soldier Systems Center Natick

Natick MA 01760

Landholding Agency: Army

Property Number: 21201620013

Status: Underutilized

Directions: T0024:RPUID:206927 &

T0025:RPUID:206928

Comments: Public access denied and no alternative method to gain access without compromising national security.

Reasons: Secured Area

New York

Building 697

697 Washington Road

West Point NY 10996

Landholding Agency: Army

Property Number: 21201620030

Status: Unutilized

Comments: Documented deficiencies:

extensive structural damage; wall coming apart; bricks are dislodged which may cause the building to collapse; located on a landfill.

Reasons: Extensive deterioration

North Carolina

12 Buildings

Fort Bragg

Fort Bragg NC 28310

Landholding Agency: Army

Property Number: 21201620001

Status: Underutilized

Directions: D2609:RPUID:577998;

D2815:RPUID:614614;

D3225:RPUID:594582;

D3637:RPUID:586751;

E1739:RPUID:605961;

N5204:RPUID:304497;

D2509:RPUID:597728;

D2212:RPUID:604181;

D2211:RPUID:297376; D2113:

RPUID:584535; D2111:RPUID:611859;

D1911:RPUID:604178

Comments: Public access denied and no alternative method to gain access without compromising national security.

Reasons: Secured Area

2 Buildings

Fort Bragg

Fort Bragg NC 28310

Landholding Agency: Army

Property Number: 21201620005

Status: Unutilized

Directions: Building D2105 & 280

Comments: Public access denied and no alternative method to gain access without compromising national security.

Reasons: Secured Area

South Carolina

Building 5715

5715 Imboden Street

Fort Jackson SC 29207

Landholding Agency: Army

Property Number: 21201620025

Status: Unutilized

Directions: RPUID:308163

Comments: Public access denied and no alternative method to gain access without compromising national security.

Reasons: Secured Area

8 Buildings

2545 ESSAYONS WAY

Fort Jackson SC 29207

Landholding Agency: Army

Property Number: 21201620027

Status: Unutilized

Directions: 2557:RPUID:308587;

2545:RPUID:310534; 2539:RPUID:310640;

12625:RPUID:604053; 2584:RPUID:180421;

2561:RPUID:310641; 4475:RPUID:307769;

2548:RPUID:308585;

Comments: Public access denied and no alternative method to gain access without compromising national security.

## Reasons: Secured Area

5713(RPUID: 308428)

Imoden St.

Ft. Jackson SC 29207

Landholding Agency: Army

Property Number: 21201620037

Status: Unutilized

Comments: public access denied and no alternative method to gain access without compromising national security

Reasons: Secured Area

## Unsuitable Properties

## Land

Alabama

5 Buildings

Ft. McClellan

Alexandria AL 36250

Landholding Agency: Army

Property Number: 21201620017

Status: Unutilized

Directions: R8434:RPUID:299453;

R8437:RPUID:303405;

C1395:RPUID:175953;

C1312:RPUID:299704;

C1320:RPUID:176206

Comments: Public access denied and no alternative method to gain access without compromising national security.

Reasons: Secured Area

[FR Doc. 2016-13428 Filed 6-9-16; 8:45 am]

BILLING CODE 4210-67-P

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

[FWS-R7-R-2016-N099; FF07RKDK00-FVRS80810700000-XXX]

**Information Collection Request Sent to the Office of Management and Budget (OMB) for Approval; Kodiak National Wildlife Refuge Bear Viewing Survey**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice; request for comments.

**SUMMARY:** We (U.S. Fish and Wildlife Service) have sent an Information Collection Request (ICR) to OMB for review and approval. We summarize the ICR below and describe the nature of the collection and the estimated burden and cost. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

**DATES:** You must submit comments on or before July 11, 2016.

**ADDRESSES:** Send your comments and suggestions on this information collection to the Desk Officer for the Department of the Interior at OMB-OIRA at (202) 395-5806 (fax) or [OIRA\\_Submission@omb.eop.gov](mailto:OIRA_Submission@omb.eop.gov) (email).

Please provide a copy of your comments to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS BPHC, 5275 Leesburg Pike, Falls Church, VA 22041-3803 (mail), or [hope\\_grey@fws.gov](mailto:hope_grey@fws.gov) (email). Please include "1018-Kodiak bear viewing" in the subject line of your comments.

**FOR FURTHER INFORMATION CONTACT:** To request additional information about this ICR, contact Hope Grey at [hope\\_grey@fws.gov](mailto:hope_grey@fws.gov) (email) or 703-358-2482 (telephone). You may review the ICR online at <http://www.reginfo.gov>. Follow the instructions to review Department of the Interior collections under review by OMB.

## SUPPLEMENTARY INFORMATION:

## Information Collection Request

*OMB Control Number:* 1018-XXXX.

*Title:* Kodiak National Wildlife Refuge Bear Viewing Survey.

*Service Form Number:* None.

*Type of Request:* Request for a new OMB control number.

*Description of Respondents:* Visitors to Kodiak National Wildlife Refuge who come for the purpose of viewing bears.

*Respondent's Obligation:* Voluntary.

*Frequency of Collection:* One time.

Activity	Number of responses	Completion time per response (minutes)	Total annual burden hours
Initial Contact .....	1,520	2	51
Online Survey .....	730	15	183
Totals .....	2,250	.....	234

*Estimated Annual Nonhour Burden Cost:* None.

**Abstract:** The Kodiak National Wildlife Refuge has partnered with Utah State University to conduct a public survey of visitors to the Kodiak National Wildlife Refuge who participate in bear viewing at structured and unstructured sites. Questions will address logistical aspects of bear viewing (including the amount of money visitors are willing to spend on viewing and amenities), satisfaction with current experiences (based on number of bears, density of other visitors, length of stay, and education received), and reported changes in attitudes and behavior related to bear conservation based on visitors' experiences on the refuge. Survey results are crucial to understanding public demands for and expectations for bear viewing, so that the refuge can better facilitate bear viewing opportunities and better convey

educational messages on bear management.

## Comments Received and Our Responses

On November 3, 2015, we published in the **Federal Register** (80 FR 67784) a notice of our intent to request that OMB approve this information collection. In that notice, we solicited comments for 60 days, ending on January 4, 2016. We received two comments in response to that notice.

**Comment:** The first comment from an individual protested the entire survey and stated that the national survey conducted across the country every 5 years already contributes to Government overreach and mispending of tax dollars without preserving wildlife.

**Response:** The National Survey of Fishing, Hunting, and Wildlife-Associated recreation, conducted every 5 years, does not address the Kodiak-specific questions of this study. The proposed study will provide information that allows Kodiak Refuge

Management to make informed decisions on how to facilitate bear viewing in a way that protects bear populations while creating positive educational experiences for visitors.

**Comment:** The second comment from the State of Alaska's Alaska National Interest Lands Conservation Act (ANILCA) Implementation Program generally supported the proposed information collection to better inform decisionmakers and rejuvenate quality bear viewing on the refuge. The commenter made three suggestions:

- Consult with the Alaska Department of Fish and Game and other stakeholders in the development of the survey.

- Consider surveying all refuge visitors rather than just bear viewers to provide a more holistic view of refuge usage.

- Conduct the survey onsite for higher response rates and more accurate recall among participants.

*Response:* We thank the ANILCA Implementation Program for their comments. Throughout survey development, we conducted interviews with stakeholders to address key concerns and issues to be addressed in the survey. This included the Alaska Department of Fish and Game area biologist for the Kodiak Archipelago, the Kodiak Brown Bear Center (owned and operated by the Koniag Native Corporation), and commercial air taxi operators and guides. We sincerely appreciate the insights from all of these groups. Unfortunately, surveying all refuge visitors is not within financial and time feasibility of the current study. While hunting and fishing patterns are well understood due to the purchase of licenses and close regulation in partnership with the State of Alaska, an equally detailed understanding of bear viewing activity and satisfaction is lacking, making it the current priority for social science research. Finally, the primary survey is being conducted online instead of onsite due to affordability, logistics (weather on Kodiak is often not conducive to sitting outside for 10–20 minutes to complete a printed survey in wind and rain), and proven success with past online surveys. Our intent is to minimize onsite burden hours for visitors traveling from around the world for expensive and sometimes short viewing experiences.

#### Request for Public Comments

We again invite comments concerning this information collection on:

- Whether or not the collection of information is necessary, including whether or not the information will have practical utility;
- The accuracy of our estimate of the burden for this collection of information;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and
- Ways to minimize the burden of the collection of information on respondents.

Comments that you submit in response to this notice are a matter of public record. 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 OMB and us in your comment to withhold your personal identifying information from public review, we cannot guarantee that it will be done.

Dated: June 7, 2016.

**Tina A. Campbell,**

*Chief, Division of Policy, Performance, and Management Programs, U.S. Fish and Wildlife Service.*

[FR Doc. 2016–13750 Filed 6–9–16; 8:45 am]

**BILLING CODE 4333–15-P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLWYR05000.L16100000.XP0000; WYW 168593]**

#### Notice of Proposed Withdrawal and Notification of a Public Meeting for the Johnny Behind the Rocks Recreation Zone, Wyoming

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice.

**SUMMARY:** On behalf of the Bureau of Land Management (BLM), the Assistant Secretary for Land and Minerals Management proposes to withdraw, subject to valid existing rights, 4,964.75 acres of public land from location and entry under the United States mining laws, but not from leasing under the mineral or geothermal leasing laws, for a period of 20 years. The proposed withdrawal is needed to protect cultural and recreational resources of the Johnny Behind the Rocks Recreation Zone in Fremont County, Wyoming. This notice temporarily segregates the land for up to 2 years from location and entry under the United States mining laws, while the application is processed. This notice also gives an opportunity to comment on the proposed withdrawal, and announces a public meeting date, time, and location.

**DATES:** Comments on the proposed withdrawal must be received on or before September 8, 2016. A public meeting will be held on July 25, 2016.

**ADDRESSES:** Please mail or hand deliver all comments concerning the proposed withdrawal to Kristin Yannone, Planner, BLM Lander Field Office, 1335 Main, Lander, Wyoming, 82520.

The public meeting will be held at the Fremont County Library, 220 North 2nd Street, Lander, Wyoming.

**FOR FURTHER INFORMATION CONTACT:** Kristin Yannone, Planner, by mail at the BLM Lander Field Office, 1335 Main Street, Lander, Wyoming, 82520; by phone at 307–332–8400; or by email at [kyannone@blm.gov](mailto:kyannone@blm.gov). Persons who use a telecommunications device for the deaf may call the Federal Information Relay Service (FIRS) at 800–877–8339 to contact Ms. Yannone. The FIRS is available 24 hours a day, seven 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 BLM filed an application requesting the Assistant Secretary for Land and Minerals Management withdraw, subject to valid existing rights, the following described public land from location and entry under the United States mining laws, but not from leasing under the mineral or geothermal leasing laws, to protect the cultural and recreational resources of the Johnny Behind the Rocks Recreation Zone:

#### Sixth Principal Meridian

T. 31 N., R. 98 W.,

Sec. 3, lots 3 and 4;

Sec. 4, lot 1;

Sec. 5, lot 1.

T. 32 N., R. 98 W.,

Sec. 17, SW1/4, NW1/4SE1/4, and S1/2SE1/4;

Sec. 18, lots 9 thru 12, and SE1/4;

Sec. 19, lots 5 thru 10, and E1/2;

Sec. 20;

Sec. 21, SW1/4NW1/4, W1/2SW1/4, and SE1/4SW1/4;

Sec. 28, SW1/4NE1/4, W1/2, NW1/4SE1/4, and S1/2SE1/4;

Sec. 29;

Sec. 30, NE1/4;

Sec. 32, N1/2, NE1/4SW1/4, and SE1/4;

Sec. 33;

Sec. 34, SW1/4NW1/4, SW1/4, and W1/2SE1/4.

T. 32 N., R. 99 W.,

Sec. 13, E1/2SE1/4;

Sec. 24, SE1/4NE1/4.

The area described contains approximately 4,964.75 acres in Fremont County.

The Assistant Secretary for Land and Minerals Management approved the BLM's petition/application. Therefore, the petition/application constitutes a withdrawal proposal of the Secretary of the Interior (43 CFR 2310.1–3(e)).

The purpose of the proposed withdrawal is to protect the cultural and recreational resources of the Johnny Behind the Rocks Recreation Zone.

The use of a right-of-way, interagency, or cooperative agreement would not adequately constrain nondiscretionary uses which could result in permanent loss of significant values and irreplaceable resources.

There are no suitable alternative sites since the lands contain cultural and recreational resources that are unique to the area proposed for withdrawal.

No additional water rights will be needed to fulfill the purpose of the requested withdrawal.

Records relating to the application may be examined by contacting the BLM at the above addresses and phone numbers.

For a period until September 8, 2016, all persons who wish to submit comments, suggestions or objections in connection with the proposed withdrawal may present their views in writing to Kristin Yannone, Planner, BLM Lander Field Office, 1335 Main, Lander, Wyoming, 82520.

Comments, including names, street addresses and other contact information of respondents, will be available for public review at the BLM Lander Field Office during regular business hours, 8:00 a.m. to 4:30 p.m., Monday through Friday, except Federal holidays. Before including your address, phone number, email address, or other personal identifying information in your comment, be advised that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask in your comment to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

A public meeting will be held on July 25, 2016, at the Fremont County Library, 220 North 2nd Street, Lander, Wyoming, from 4:30–5:30 p.m. A notice of the meeting will be published in at least one local newspaper no less than 30 days before the scheduled meeting date. Interested parties may make oral statements and may file written statements at the meeting.

For a period until June 11, 2018, the public land described in this notice will be segregated from location and entry under the United States mining laws, but not from leasing under the mineral or geothermal leasing laws, unless the application is denied or canceled or the withdrawal is approved prior to that date.

Licenses, permits, cooperative agreements or discretionary land use authorizations of a temporary nature that would not impact the site may be allowed with the approval of an authorized officer of the BLM during the temporary segregative period.

This withdrawal proposal will be processed in accordance with the regulations set forth in 43 CFR part 2300.

**Michael G. Valle,**

*Acting BLM Wyoming State Director.*

[FR Doc. 2016–13762 Filed 6–9–16; 8:45 am]

**BILLING CODE 4310–22–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

[LLCA930000.L1440000.EU0000.  
16XL1109AF; CACA 54031]

### Notice of Realty Action: Direct Sale of Reversionary Interest in San Bernardino County, California

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice.

**SUMMARY:** The Bureau of Land Management (BLM), Needles Field Office, proposes to sell the United States' reversionary interest in 2.31 acres of land in San Bernardino County, California to the City of Needles (City) at not less than fair market value in the amount of \$139,994. The land was conveyed out of Federal ownership in 1966 subject to a reversionary interest which is now proposed for sale under the authority of the Federal Land Policy and Management Act (FLPMA) of 1976, as amended.

**DATES:** Comments regarding the proposed sale must be received by the BLM on or before July 25, 2016.

**ADDRESSES:** You may submit written comments concerning the proposed sale to the Field Manager, BLM, Needles Field Office, 1303 South Highway 95, Needles, California 92363.

**FOR FURTHER INFORMATION CONTACT:** William Webster, Realty Specialist, BLM Needles Field Office, telephone 760–326–7006; address 1303 South Highway 95, Needles, California 92363. 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 reversionary interest in the following land is proposed for direct sale in accordance with Section 203 of the FLPMA, as amended (43 U.S.C. 1713).

#### San Bernardino Meridian, California

T. 9 N., R. 23 E., sec. 31, lot 6.

The area described contains 2.31 acres.

The area described above is part of 50 acres conveyed in 1966 to the City in patent 04–67–0018 under the authority of the Recreation and Public Purposes Act (R&PP Act) of June 14, 1926, as amended. The land was conveyed for park and recreational purposes for \$2.50 per acre. The United States (U.S.)

retained an interest in the land in which title could revert back to the U.S. if the land is not used for purposes authorized under the R&PP Act or if the land is transferred to another party without the BLM's approval. In 1971, the BLM approved a change in use to allow the City to construct the Needles Municipal Hospital on 2.31 acres of the land conveyed in patent 04–67–0018. In 2010, the voters of Needles approved Measure Q, which effectively required the City to sell the Needles Municipal Hospital to a qualified non-profit corporation. The sale has been complicated by the fact that the Needles Municipal Hospital is located on 2.31 acres owned by the City subject to the reversionary interest and approximately 3.36 acres owned by the City which is not subject to a reversionary interest. The City agreed to sell the land occupied by the Needles Municipal Hospital to Community Healthcare Partner, Inc., a non-profit corporation. The sale is contingent on the BLM selling the reversionary interest in the 2.31 acres of land occupied by the Needles Municipal Hospital so the City can convey the land free of any reversionary interest. The sale would allow for possible future commercial use of the 2.31 acres, including a for-profit hospital, and allow for future transfers of the land without the BLM's approval.

The reversionary interest in the 2.31 acres of land described above is proposed for sale to the City for \$139,994, which represents the appraised fair market value of \$140,000, less \$6.00 paid to the BLM to purchase the land in 1966. The reversionary interest is difficult and uneconomic to manage as part of the public lands because it is surrounded by private land and is not contiguous to any public land administered by the BLM. The BLM has concluded that a competitive sale is not appropriate and that the public interest would best be served by a direct sale to the City, which currently owns the land subject to the reversionary interest. The reversionary interest was not identified for sale in the 1980 California Desert Conservation Area (CDCA) Plan. On January 14, 2015, the BLM approved an amendment to the 1980 CDCA Plan, which identified the reversionary interest in the 50 acres conveyed to the City in 1966 in patent 04–67–0018 as suitable for sale pursuant to section 203 of FLPMA.

The reversionary interest would not be sold until at least August 9, 2016. Any conveyance document issued would convey only the reversionary interest retained by the U.S. in patent 04–67–0018 and would contain the

following terms, conditions, and reservations:

1. A condition that the conveyance be subject to all valid existing rights of record.

2. A condition that the conveyance would be subject to all reservations, conditions and restrictions in patent 04-67-0018, except the reversionary interest which is being conveyed.

3. An appropriate indemnification clause protecting the United States from claims arising out of the patentee's use, occupancy, or operations on the patented lands.

4. Additional terms and conditions that the authorized officer deems appropriate.

Detailed information concerning the proposed sale including the appraisal, planning and environmental document are available for review at the location identified in the **ADDRESSES** section above.

Public comments regarding the proposed sale may be submitted in writing to the attention of the BLM Needles Field Manager (see **ADDRESSES** above) on or before July 25, 2016. Comments received in electronic form, such as email will not be considered. Any adverse comments regarding the proposed sale will be reviewed by the BLM State Director or other authorized official of the Department of the Interior, who may sustain, vacate, or modify this realty action in whole or in part. In the absence of timely filed objections, this realty action will become the final determination of the Department of the Interior.

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:** 43 CFR 2711.1-2(a) and (c).

**Thomas Pogacnik,**

*Deputy State Director, Resources.*

[FR Doc. 2016-13773 Filed 6-9-16; 8:45 am]

**BILLING CODE 4310-40-P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

[LLCON06000 L1610000.DP0000]

### Notice of Intent To Solicit Nominations for the Dominguez-Escalante National Conservation Area Advisory Council, Colorado

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice.

**SUMMARY:** The purpose of this notice is to solicit public nominations for eight positions on the Dominguez-Escalante National Conservation Area (D-E NCA) Advisory Council (Council). The Secretary of the Interior (Secretary) was directed by the Omnibus Public Lands Management Act of 2009 to establish the D-E NCA Council. The 10-member Council was formed in December 2010 to provide recommendations to the Secretary through the Bureau of Land Management (BLM) during the development of a resource management plan (RMP) for the D-E NCA. The appointments of eight members of the Council are scheduled to expire in November 2016. This call for nominations is to fill those eight expiring appointments.

**DATES:** Submit nomination packages on or before July 11, 2016.

**ADDRESSES:** Send completed Council nominations to Collin Ewing, D-E NCA Interim Manager, Grand Junction Field Office, 2815 H Road, Grand Junction, CO 81506. Nomination forms may be obtained at the Grand Junction Field Office at the above address; at the BLM Uncompahgre Field Office, 2465 S. Townsend Ave., Montrose, CO 81401; or online at [http://www.blm.gov/co/st/en/nca/denca/denca\\_rmp/DENCA\\_Resource\\_Advisory\\_Council.html](http://www.blm.gov/co/st/en/nca/denca/denca_rmp/DENCA_Resource_Advisory_Council.html).

#### FOR FURTHER INFORMATION CONTACT:

Collin Ewing, D-E NCA Manager, 970-244-3049, [cewing@blm.gov](mailto:cewing@blm.gov). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, seven days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

**SUPPLEMENTARY INFORMATION:** The D-E NCA and Dominguez Canyon Wilderness, located within the D-E NCA, were established by the Omnibus Public Land Management Act of 2009, Public Law 111-11 (Act). The D-E NCA is comprised of approximately 210,172

acres of public land, including approximately 66,280 acres designated as Dominguez Canyon Wilderness, located in Delta, Montrose and Mesa counties, Colorado. The purpose of the D-E NCA is to conserve and protect the land's unique resources for the benefit and enjoyment of present and future generations. These values include the geological, cultural, archaeological, paleontological, natural, scientific, recreational, wilderness, wildlife, riparian, historical, educational, and scenic resources of the public lands as well as the water resources of area streams based on seasonally available flows that are necessary to support aquatic, riparian, and terrestrial species and communities. According to the Act, the 10-member council must include, to the extent practicable:

1. One member appointed after considering the recommendations of the Mesa County Commission;

2. One member appointed after considering the recommendations of the Montrose County Commission;

3. One member appointed after considering the recommendations of the Delta County Commission;

4. One member appointed after considering the recommendations of the permittees holding grazing allotments within the D-E NCA or the wilderness; and

5. Six members who reside in or within reasonable proximity to Mesa, Delta or Montrose counties with backgrounds that reflect:

a. The purposes for which the D-E NCA or wilderness was established; and

b. The interests of the stakeholders that are affected by the planning and management of the D-E NCA and wilderness.

Appointments for a position based on the recommendations of the Delta County Commission and a position representing wildlife interests have already been filled and will not expire this year. The BLM is soliciting nominations for the other eight positions on the Council. Nominees should reside in or within close proximity to Mesa, Delta, or Montrose counties. Any individual or organization may nominate one or more persons to serve on the Council. Individuals may nominate themselves for Council membership. The Obama Administration prohibits individuals who are currently federally-registered lobbyists from serving on all Federal Advisory Committee Act (FACA) and non-FACA boards, committees or councils. Nomination forms may be obtained from the BLM Grand Junction or Uncompahgre field offices, or may be downloaded from the following Web

site: [http://www.blm.gov/co/st/en/nca/denca/denca\\_rmp/DENCA\\_Resource\\_Advisory\\_Council.html](http://www.blm.gov/co/st/en/nca/denca/denca_rmp/DENCA_Resource_Advisory_Council.html).

Nomination packages must include a completed nomination form, letters of reference from the represented interests or organizations, and any other information relevant to the nominee's qualifications. Letters of reference can be from an organization or from anyone who is familiar with the nominee's qualifications to serve on the Council. Appointments are open to new and currently seated members. The Grand Junction and Uncompahgre field offices will review the nomination packages in coordination with the affected counties and the Governor of Colorado before forwarding recommendations to the Secretary, who will make the appointments.

The Council shall be subject to the FACA, 5 U.S.C. App. 2; and the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 *et seq.* This notice is being provided pursuant to 43 CFR 1784.4-1.

**Ruth Welch,**

*BLM Colorado State Director.*

[FR Doc. 2016-13772 Filed 6-9-16; 8:45 am]

**BILLING CODE 4310-JB-P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

[LLCAD01000 L12100000.MD0000  
16XL1109AF]

#### Call for Nominations for the California Desert District Advisory Council

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice.

**SUMMARY:** The Bureau of Land Management's (BLM) California Desert District is soliciting nominations from the public for four members of its District Advisory Council to serve a three-year term. Council members provide advice and recommendations to the BLM on the management of public lands in Southern California.

**DATES:** All nominations must be received no later than July 25, 2016.

**ADDRESSES:** Nominations should be sent to Teresa Raml, District Manager, Bureau of Land Management, California Desert District Office, 22835 Calle San Juan De Los Lagos, Moreno Valley, CA 92553.

**FOR FURTHER INFORMATION CONTACT:** Stephen Razo, BLM California Desert District External Affairs, (951) 697-5217. Persons who use a telecommunications device for the deaf

(TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 to leave a message or question for the above individual. The FIRS is available 24 hours a day, 7 days a week. Replies are provided during normal business hours.

**SUPPLEMENTARY INFORMATION:** The California Desert District Advisory Council is comprised of 15 private individuals who represent an array of diverse interests whose purpose is to advise BLM officials on policies and programs concerning the management of over 10 million acres of public land in Southern California. The Council meets in formal session three to four times each year in various locations throughout the California Desert District. Council members serve without compensation other than travel expenses. Members serve three-year terms and may be nominated for reappointment for an additional three-year term.

Section 309 of the Federal Land Policy and Management Act directs the Secretary of the Interior to involve the public in planning and issues related to management of BLM-administered lands. The Secretary also selects Council nominees consistent with the requirements of the Federal Advisory Committee Act (FACA), which requires nominees appointed to the Council be balanced in terms of points of view and representative of the various interests concerned with the management of the public lands.

The BLM will seek qualified representatives from areas throughout the California Desert District to have balanced representation. The District covers portions of eight counties, and includes more than 10 million acres of public land in the California Desert Conservation Area of Mono, Inyo, Kern, Los Angeles, San Bernardino, Riverside, and Imperial counties, as well as 300,000 acres of scattered parcels in San Diego, western Riverside, western San Bernardino, and Los Angeles counties (known as the South Coast).

Public notice begins with the publication date of this notice and nominations will be accepted for 45 days from the date of this notice. The four positions to be filled include: One representative of non-renewable resources groups or organizations, one representative of environmental protection groups or organizations, one representative of transportation/rights-of-way groups or organizations, and one representative of the public-at-large.

Any group or individual may nominate a qualified person, based upon education, training, and

knowledge of the BLM, the California Desert, and the issues involving BLM-administered public lands throughout Southern California. Qualified individuals also may nominate themselves.

The nomination form may be found on the Desert Advisory Council Web page: <http://www.blm.gov/ca/st/en/info/rac/dac.html>. The following must accompany the nomination form for all nominations:

- Letters of reference from represented interests or organizations;
- A completed background information nomination form; and
- Any other information that addresses the nominee's qualifications.

Nominees unable to download the nomination form may contact the BLM California Desert District External Affairs staff at 951-697-5217 to request a copy.

Advisory Council members are appointed by the Secretary of the Interior. The Obama Administration prohibits individuals who are currently federally registered lobbyists to serve on all FACA and non-FACA boards, committees or councils.

**Authority:** 43 CFR 1784.4-1.

**Teresa A. Raml,**

*California Desert District Manager.*

[FR Doc. 2016-13771 Filed 6-9-16; 8:45 am]

**BILLING CODE 4310-40-P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

[15XL1109AF.LLWY930000.L12200000.  
MD0000]

#### Notice of Final Supplementary Rules for the Killpecker Sand Dunes Recreation Site, Wyoming

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Final supplementary rules.

**SUMMARY:** The Bureau of Land Management (BLM) is finalizing supplementary rules for the Killpecker Sand Dunes Recreation Site located within the Greater Sand Dunes Area of Critical Environmental Concern (ACEC) Eastern Portion managed by the Rock Springs Field Office (RSFO) in Rock Springs, Wyoming. This action improves the safety of visitors in the open play sand dunes area by providing better visual identification of off-highway vehicles (OHVs), implementing a speed limit, and prohibiting the possession and use of glass containers in the OHV recreation area.

**DATES:** The final supplementary rules are effective July 11, 2016.

**ADDRESSES:** Email [blm\\_wy\\_rsfo\\_sand\\_dunes@blm.gov](mailto:blm_wy_rsfo_sand_dunes@blm.gov) with "Supplementary Rules" in the subject line; fax (307) 352-0329; or mail to BLM Rock Springs Field Office, Attn: Supplementary Rules, 280 Highway 191 North, Rock Springs, WY 82901.

**FOR FURTHER INFORMATION CONTACT:** For information on the substance of the rule, please contact Jo Foster, RSFO Outdoor Recreation Planner, (307) 352-0327. Persons who use a telecommunications device for the deaf may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 to speak with Georgia Foster 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:**

##### **I. Background**

Conditions of use for OHVs are defined under 43 CFR subpart 8341. Rules of conduct on public land are defined under 43 CFR subpart 8365. On December 11, 2014, the BLM proposed supplementary rules (79 FR 73623), in accordance with 43 CFR 8365.1-6, which authorizes state directors to establish supplementary rules for the protection of persons, property, and public lands and resources. The public comment period ended February 9, 2015.

The Killpecker Sand Dunes Recreation Site is managed in accordance with the 2006 Record of Decision and Jack Morrow Hills Coordinated Activity Plan/Green River Resource Management Plan Amendment, which designates 10,020 acres as open to OHV travel on the active sand dunes. These supplementary rules implement key decisions in the March 12, 2013, Killpecker Sand Dunes Recreation Site Facility Improvement Environmental Assessment (WY-040-EA13-098) Decision Record, which is in compliance with the 2006 Record of Decision.

The final supplementary rules apply to public lands administered by the BLM Rock Springs Field Office. The active sand dunes within the Killpecker Sand Dunes Recreation Site consist of approximately 10,500 acres of public lands within Sweetwater County, Wyoming in the following described township:

##### **Sixth Principal Meridian, Wyoming**

T. 23 N., R. 103 W., sec.16, SE $\frac{1}{4}$ SW $\frac{1}{4}$  and SW $\frac{1}{4}$ SE $\frac{1}{4}$ .

The rules require safety flags on all vehicles in the OHV open area, prohibit

speeds in excess of 15 miles per hour within 500 feet of access roads, and prohibit the use of glass containers within the OHV recreation area.

##### **II. Discussion of Public Comment and Final Supplementary Rules**

One substantive comment was received during the public comment period. The comment expressed no objection to the supplementary rules as they will promote public safety and a safer environment for OHV recreation by providing for better visual identification of OHVs, by implementing a speed limit, and by prohibiting the possession and use of glass containers.

No changes have been made to the supplementary rules in response to this public comment. However, the BLM has revised the wording of the first and second prohibited acts in order to clarify that they apply to all vehicles, including but not limited to OHVs. In addition, the paragraph labeled, "Penalties" has been replaced with a paragraph labeled, "Enforcement," in accordance with BLM policy. While that paragraph has been re-worded, it cites the same statutory and regulatory authorities as the paragraph that was in the proposed rule.

##### **III. Procedural Matters**

###### *Executive Order 12866, Regulatory Planning and Review*

These final supplementary rules are not a significant regulatory action and are not subject to review by the Office of Management and Budget under Executive Order 12866. They will not have an effect of \$100 million or more on the economy and will not adversely affect, in a material way, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities. They will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. They will not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the right or obligations of their recipients; nor do they raise novel legal or policy issues. They will not affect legal commercial activity, but merely impose limitations on certain recreational activities on certain public lands to protect natural resources and human health and safety.

###### *National Environmental Policy Act*

The final supplementary rules were analyzed in and will implement key decisions in the March 12, 2013, Killpecker Sand Dunes Recreation Site Facility Improvement Environmental

Assessment (WY-040-EA13-098) Decision Record. This decision record is in compliance with the actions identified for this area in the 2006 Record of Decision and Jack Morrow Hills Coordinated Activity Plan/Green River Resource Management Plan Amendment.

###### *Regulatory Flexibility Act*

Congress enacted the Regulatory Flexibility Act of 1980 (RFA), as amended, 5 U.S.C. 601-612, to ensure that government regulations do not unnecessarily or disproportionately burden small entities. The RFA requires a regulatory flexibility analysis if rules would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. The final supplementary rules do not pertain specifically to commercial or governmental entities of any size, but contain rules to protect the health and safety of individuals, property, and resources on the public lands. Therefore, the BLM has determined under the RFA that these final supplementary rules will not have a significant economic impact on a substantial number of small entities.

###### *Small Business Regulatory Enforcement Fairness Act*

These final supplementary rules do not constitute a "major rule" as defined at 5 U.S.C. 804(2). These final supplementary rules merely impose reasonable restrictions on certain recreational activities on certain public lands to protect natural resources and human health and safety. The final supplementary rules have no effect on business, commercial, or industrial use of the public lands.

###### *Unfunded Mandates Reform Act*

These final supplementary rules do not impose an unfunded mandate on state, local, or tribal governments or the private sector of more than \$100 million per year; nor do these final supplementary rules have a significant or unique effect on state, local, or tribal governments or the private sector. The final supplementary rules do not require anything of state, local, or tribal governments. The final supplementary rules merely impose reasonable restrictions on certain recreational activities on certain public lands to protect natural resources and the environment and human health and safety. Therefore, the BLM is not required to prepare a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1501-1571).

*Executive Order 12630, Governmental Actions and Interference With Constitutionally Protected Property Rights (Takings)*

The final supplementary rules do not constitute a government action capable of interfering with constitutionally protected property rights. The final supplementary rules do not address property rights in any form and do not cause the impairment of constitutionally protected property rights. Therefore, the BLM has determined that the final supplementary rules will not cause a taking of private property or require further discussion of takings implications under this Executive Order.

*Executive Order 13132, Federalism*

The final supplementary rules will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The final supplementary rules apply only in Wyoming and do not address jurisdictional issues involving the Wyoming State government. Therefore, in accordance with Executive Order 13132, the BLM has determined that these final supplementary rules do not have sufficient Federalism implications to warrant preparation of a Federalism Assessment.

*Executive Order 12988, Civil Justice Reform*

Under Executive Order 12988, the BLM Wyoming State Director has determined that these final supplementary rules will not unduly burden the judicial system and that they meet the requirements of sections 3(a) and 3(b)(2) of the Order.

*Executive Order 13175, Consultation and Coordination With Indian Tribal Governments*

In accordance with Executive Order 13175, the BLM has found that these final supplementary rules do not include policies that have tribal implications and will have no bearing on trust lands or on lands for which title is held in fee status by Indian tribes or U.S. Government owned lands managed by the Bureau of Indian Affairs.

*Executive Order 13352, Facilitation of Cooperative Conservation*

In accordance with Executive Order 13352, the BLM has determined that the final supplementary rules will not impede facilitating cooperative conservation; will take appropriate account of and consider the interests of

persons with ownership or other legally recognized interests in land or other natural resources; will properly accommodate local participation in the Federal decision-making process; and will provide that the programs, projects, and activities are consistent with protecting public health and safety.

*Information Quality Act*

In developing these final supplementary rules, the BLM did not conduct or use a study, experiment, or survey requiring peer review under the Information Quality Act (Section 515 of Pub. L. 106–554).

*Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

These final supplementary rules do not comprise a significant energy action. The rules will not have an adverse effect on energy supply, production, or consumption and have no connection with energy policy.

*Paperwork Reduction Act*

These final supplementary rules do not contain information collection requirements that the Office of Management and Budget must approve under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521.

*Author*

The principal author of these supplementary rules is Georgia Foster, Outdoor Recreation Planner, BLM Wyoming, High Desert District, RSFO, Rock Springs, Wyoming.

#### IV. Final Supplementary Rules

*Definitions*

*Off-Highway Vehicle (OHV)* means any motorized vehicle capable of, or designed for, travel on or immediately over land, water, or other natural terrain.

*Vehicle* means any motorized transportation conveyance designed and licensed for use on roadways, such as an automobile, bus, or truck, and any motorized conveyance originally equipped with safety belts. This includes two-wheeled motorcycles.

*Prohibited Acts*

1. You must not operate any vehicle or OHV within the Killpecker Sand Dunes Recreation Site without an appropriate safety flag. All vehicles and OHVs must be equipped with a whip mast and a 6 inch × 12 inch red or orange flag. A whip mast is any pole, rod, or antenna mounted on the vehicle that extends at least eight feet from the surface of the ground to the mast tip. It

must stand upright when the vehicle is stationary. Masts must be securely mounted on the vehicle. Safety flags must be attached within 10 inches of the tip of the whip mast with other flags mounted below the safety flag or on another whip. Flags may be of pennant, triangle, square, or rectangular shape.

2. You must not operate a vehicle or OHV in excess of 15 miles per hour on public lands within 500 feet of access roads within the Killpecker Sand Dunes Recreation Site.

3. You must not possess or use any glass container within the Killpecker Sand Dunes Recreation Site.

*Exemptions*

The following persons are exempt from these supplementary rules: Any Federal, State, local, and/or military employees acting within the scope of their official duties; members of any organized rescue or firefighting forces acting within the scope of their official duties; and persons who are expressly authorized or otherwise officially approved by the BLM.

*Enforcement*

Any person who violates any of these supplementary rules may be tried before a United States Magistrate and fined in accordance with 18 U.S.C. 3571, imprisoned no more than 12 months under 43 U.S.C. 1733(a) and 43 CFR 8360.0–7, or both. In accordance with 43 CFR 8365.1–7, State or local officials may also impose penalties for violations of Wyoming law.

Mary Jo Rugwell,

BLM Wyoming State Director.

[FR Doc. 2016–13757 Filed 6–9–16; 8:45 am]

BILLING CODE 4310–22–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

[15X.LLAK941000.L54200000.FR0000.  
LVDIL15L0520; AA094010]

#### Notice of Application for a Recordable Disclaimer of Interest for Lands Owned by the Corporation of the Catholic Archbishop of Anchorage, AK

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice.

**SUMMARY:** The Corporation of the Catholic Archbishop of Anchorage (Archdiocese) has filed an application with the Bureau of Land Management (BLM) for a Recordable Disclaimer of Interest (RDI) from the United States for lands the Archdiocese owns at the confluence of the Tazlina River and

Copper River, near the village of Tazlina, Alaska. This notice is intended to notify the public of the Archdiocese's application and its supporting rationale.

**DATES:** All comments to this action should be received on or before September 8, 2016.

**ADDRESSES:** Written comments on the Archdiocese's application or the BLM Draft Summary Report for the Corporation of Archbishop of Anchorage, Inc. (Archdiocese of Anchorage) application for RDI must be filed with the RDI Program Manager (AK-942), Division of Lands and Cadastral, BLM Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, AK 99513.

**FOR FURTHER INFORMATION CONTACT:**

Angie Nichols, RDI Program Manager, at 222 West 7th Avenue, #13, Anchorage, AK 99513; 907-271-3359; or [anichols@blm.gov](mailto:anichols@blm.gov); or visit the BLM RDI Web site at <http://www.blm.gov/ak/st/en/prog/rdi.html>. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay System (FIRS) at 1-800-877-8339 to contact the above individual during normal business hours. The FIRS is available 24 hours of a day, seven 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 Archdiocese has filed an application for an RDI pursuant to Section 315 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1745), as amended, and the regulations contained in 43 CFR subpart 1864 for the surface estate of the following lands:

**Copper River Meridian, Alaska**

T. 3 N., R. 1 W.,

Sec. 10, lots 6 and 7, NW $\frac{1}{4}$ SW $\frac{1}{4}$ , S $\frac{1}{2}$ SW $\frac{1}{4}$ ;

Sec. 15, lots 2, 3, 4, 7, and 8, N $\frac{1}{2}$ NW $\frac{1}{4}$ , SE $\frac{1}{4}$ NW $\frac{1}{4}$ .

The areas described aggregate 461.67 acres. In the application, the Archdiocese asserts that the United States has no interest in the property.

The lands were patented under Private Law 151. Both the law and patent have language stating that the land is for use as a mission school. The Archdiocese believes that the clause for use as a mission school casts a cloud on the title and believes that cloud serves as an impediment to any future use or sale of the land. If the BLM approves the application and issues an RDI, it would confirm that the United States has no valid interest in the subject lands.

By this notice the BLM is informing the public of the Archdiocese's

application and its supporting rationale. A final decision on the merits of the Archdiocese's application will not be made before September 8, 2016. During the 90-day period, interested parties may comment on the Archdiocese's application, AA-094010, and supporting evidence. Interested parties may comment during this time on the BLM's Draft Summary Report for the Corporation of Archbishop of Anchorage, Inc. (Archdiocese of Anchorage) Application for Recordable Disclaimer of Interest.

Comments, including names and street addresses, will be available for public review at the Alaska State Office (see **ADDRESSES** above), during regular business hours, 7:30 a.m. to 4:30 p.m., Monday through Friday, except Federal holidays.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you 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.

If the evidence is sufficient to find a favorable determination and neither the records nor a valid objection disclose a reason not to disclaim, then the application may be approved.

**Authority:** 43 CFR 1864.

**Erika L. Reed,**

*Acting Deputy State Director, Division of Lands and Cadastral.*

[FR Doc. 2016-13763 Filed 6-9-16; 8:45 am]

**BILLING CODE 4310-JA-P**

## INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-956]

### Certain Recombinant Factor VIII Products

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the presiding administrative law judge (ALJ) has issued a final initial determination on May 27, 2016, and a recommended determination on remedy and bonding on June 3, 2016.

The ALJ found no violation of Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337). Should the Commission, however, find a violation of Section 337, the ALJ recommends

that the Commission issue a limited exclusion order that excludes from importation into the United States certain recombinant factor VIII products manufactured by processes that infringe certain claims of U.S. Patent Nos. 6,100,061 and 8,084,252. The respondents are Novo Nordisk A/S of Bagsvaerd, Denmark, and Novo Nordisk Inc. of Plainsboro, N.J. Upon a finding of a violation, the ALJ further recommends that cease and desist orders issue to respondents and be directed to respondents' domestic inventories.

This notice is soliciting public interest comments only from the public. Parties are to file public interest submissions pursuant to 19 CFR 210.50(a)(4) within 30 days from service of the recommended determination.

**FOR FURTHER INFORMATION CONTACT:** Ron Traud, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, (202) 205-3427. The public version of the complaint can be accessed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>, and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, (202) 205-2000.

General information concerning the Commission may also be obtained at <http://www.usitc.gov>. The public record for this investigation may be viewed on EDIS at <http://edis.usitc.gov>. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal at (202) 205-1810.

**SUPPLEMENTARY INFORMATION:** Section 337 of the Tariff Act of 1930 provides that if the Commission finds a violation it shall exclude the articles concerned from the United States:

unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.

19 U.S.C. 1337(d)(1). A similar provision applies to cease and desist orders. 19 U.S.C. 1337(f)(1).

Therefore, the Commission is interested in further developing the record on the public interest in this investigation. Accordingly, members of the public are invited to file submissions of no more than five pages, inclusive of attachments, concerning the

public interest in light of the ALJ's recommended determination on remedy and bonding issued in this investigation on June 3, 2016. Comments should address whether the issuance of a limited exclusion order and cease and desist order would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the recommended orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the recommended orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the recommended exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the limited exclusion order and cease and desist order would impact consumers in the United States.

Written submissions must be filed no later than by close of business on June 29, 2016.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit eight true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the investigation number (Inv. No. 337-TA-956) in a prominent place on the cover page, the first page, or both. See Handbook for Electronic Filing Procedures, [http://www.usitc.gov/secretary/fed\\_reg\\_notices/rules/handbook\\_on\\_electronic\\_filing.pdf](http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf). Persons with questions regarding filing should contact the Secretary at (202) 205-2000.

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See 19 CFR 201.6. Documents

for which confidential treatment by the Commission is properly sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with any confidential filing. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

This action is taken under the authority of Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of sections 201.10, 210.46, and 210.50 of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.46, 210.50).

By order of the Commission.

Issued: June 6, 2016.

**Lisa R. Barton,**

*Secretary to the Commission.*

[FR Doc. 2016-13688 Filed 6-9-16; 8:45 am]

**BILLING CODE 7020-02-P**

## DEPARTMENT OF JUSTICE

### Executive Office for Immigration Review

[OMB 1125-0002]

#### Agency Information Collection Activities; Proposed eCollection; eComments Requested; Notice of Appeal From a Decision of an Immigration Judge (EOIR-26)

**AGENCY:** Executive Office for Immigration Review, Department of Justice.

**ACTION:** 30-Day notice.

**SUMMARY:** The Department of Justice (DOJ), Executive Office for Immigration Review, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. This proposed collection was previously published in **Federal Register** at 81 FR 19639, on April 5, 2016, allowing for a 60 day comment period.

**DATES:** Comments are encouraged and will be accepted for an additional 30 days until July 11, 2016.

**FOR FURTHER INFORMATION CONTACT:** If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Jean King, General Counsel, Executive Office for Immigration Review, U.S. Department of Justice, Suite 2600, 5107 Leesburg Pike, Falls Church, Virginia

22041; telephone: (703) 305-0470. Written comments and/or suggestions can also be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503 or sent to [OIRA\\_submissions@omb.eop.gov](mailto:OIRA_submissions@omb.eop.gov).

**SUPPLEMENTARY INFORMATION:** Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Executive Office for Immigration Review, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

#### Overview of This Information Collection

1. *Type of Information Collection:* Extension of a currently approved collection.

2. *The Title of the Form/Collection:* Notice of Appeal from a Decision of an Immigration Judge.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form number is EOIR-26, Executive Office for Immigration Review, United States Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* A party (either the U.S. Immigration and Customs Enforcement of the Department of Homeland Security or the respondent/applicant) who appeals a decision of an Immigration Judge to the Board of Immigration Appeals (Board). A party affected by a decision of an Immigration Judge may appeal that decision to the Board, provided that the Board has jurisdiction pursuant to 8 CFR 1003.1(b). An appeal

from an Immigration Judge's decision is taken by completing the Form EOIR-26 and submitting it to the Board.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 17,627 respondents will complete the form annually with an average of thirty minutes per response.

6. *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 8,813.5 total burden hours associated with this collection annually.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., 3E.405B, Washington, DC 20530.

Dated: June 7, 2016.

**Jerri Murray,**

*Department Clearance Officer for PRA, U.S. Department of Justice.*

[FR Doc. 2016-13738 Filed 6-9-16; 8:45 am]

**BILLING CODE 4410-30-P**

## DEPARTMENT OF JUSTICE

[Docket No. OLP 157]

### Notice of Public Comment Period on Proposed Uniform Language for Testimony and Reports

**AGENCY:** Department of Justice.

**ACTION:** Notice.

**SUMMARY:** This notice announces the opening of the public comment period on the Proposed Uniform Language for Testimony and Reports (Proposed Uniform Language) documents for the forensic disciplines of fiber, footwear and tire treads, general chemistry, glass, latent prints, serology, and toxicology.

**DATES:** Written public comment regarding the Proposed Uniform Language should be submitted through [www.regulations.gov](http://www.regulations.gov) before July 8, 2016.

**FOR FURTHER INFORMATION CONTACT:** The Office of Legal Policy, 950 Pennsylvania Avenue NW., Washington, DC 20530, by phone at 202-514-4601 or via email at [ULTR.OLP@usdoj.gov](mailto:ULTR.OLP@usdoj.gov).

**SUPPLEMENTARY INFORMATION:** As part of the Department's continued efforts to advance the practice of forensic science by ensuring Department forensic examiners are testifying and reporting consistent with applicable scientific standards and across Department components including the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the Drug Enforcement

Administration (DEA), and the Federal Bureau of Investigation (FBI), the Department is developing Proposed Uniform Language that would apply to all Department forensic laboratory personnel. The Proposed Uniform Language documents are based on the Federal Bureau of Investigation's (FBI) Approved Scientific Standards for Testimony and Reports (ASSTRs) but differ substantially. As a primary matter, the ASSTRs are currently in effect for FBI personnel, while the Proposed Uniform Language documents are merely proposed and have not been adopted. After adjudication of public comment and the incorporation of appropriate edits, it is anticipated that each Proposed Uniform Language document will be forwarded to the Deputy Attorney General. If one or more are adopted by the Deputy Attorney General, they would become effective for Department forensic laboratory personnel.

The Department plans to seek comment on the Proposed Uniform Language documents in two phases with Proposed Uniform Language documents for seven forensic science disciplines being posted now and the remaining documents posted in July 2016.

**PROPOSED UNIFORM LANGUAGE:** The Department is posting the Proposed Uniform Language document for each of the following forensic science disciplines on [www.regulations.gov](http://www.regulations.gov) and seeking public comment: Fiber, footwear and tire treads, general chemistry, glass, latent prints, serology, and toxicology. Each Proposed Uniform Language document contains two primary sections: Statements approved for use in examination testimony and/or laboratory reports and statements not approved for use in examination testimony and/or laboratory reports. We ask that you review and provide comment on each Proposed Uniform Language document separately.

**Review Sheet:** In order to assist commenters in evaluating each Proposed Uniform Language document, the Department has provided a review sheet that identifies certain criteria. Commenters may find it helpful to use a format similar to that provided by the review sheet to frame their responses. Use of the review sheet is optional but would be helpful to provide consistency in commentary.

**Supporting Documentation:** Each Proposed Uniform Language document is accompanied by supporting documentation (posted separately) that provides additional scientific background and policy considerations to support the statements approved for use and statements not approved in

examination testimony and/or laboratory reports. The Department is not seeking public comment on the supporting documentation, however, commenters are welcome to provide thoughts and suggestions on these documents but notes that only each Proposed Uniform Language document will be forwarded to the Deputy Attorney General for review and potential adoption by Department personnel.

**Posting of Public Comments:** To ensure proper handling of comments, please reference "Docket No. OLP 157" on all electronic and written correspondence. The Department encourages all comments on this framework be submitted electronically through [www.regulations.gov](http://www.regulations.gov). Paper comments that duplicate the electronic submission are not necessary as all comments submitted to [www.regulations.gov](http://www.regulations.gov) will be posted for public review and are part of the official docket record.

In accordance with the Federal Records Act, please note that all comments received are considered part of the public record, and shall be made available for public inspection online at [www.regulations.gov](http://www.regulations.gov). The comments to be posted may include personally identifiable information (such as your name, address, etc.) and confidential business information voluntarily submitted by the commenter.

The Department will post all comments received on [www.regulations.gov](http://www.regulations.gov) without making any changes to the comments or redacting any information, including any personally identifiable information provided. It is the responsibility of the commenter to safeguard personally identifiable information. You are not required to submit personally identifying information in order to comment on the Proposed Uniform Language and the Department recommends that commenters not include personally identifiable information such as Social Security Numbers, personal addresses, telephone numbers, and email addresses that they do not want made public in their comments as such submitted information will be available to the public via [www.regulations.gov](http://www.regulations.gov). Comments submitted through [www.regulations.gov](http://www.regulations.gov) will not include the email address of the commenter unless the commenter chooses to include that information as part of his or her comment.

Dated: June 2, 2016.

**Kira Antell,**

*Senior Counsel, Office of Legal Policy.*

[FR Doc. 2016-13635 Filed 6-9-16; 8:45 am]

**BILLING CODE 4410-18-P**

## DEPARTMENT OF JUSTICE

[OMB Number 1190-NEW]

### **Civil Rights Division; Agency Information Collection Activities; Proposed eCollection; eComments Requested; Requirement That Movie Theaters Provide Notice as to the Availability of Closed Movie Captioning and Audio Description**

**AGENCY:** Civil Rights Division, Department of Justice.

**ACTION:** 60-Day notice.

**SUMMARY:** The Department of Justice (the Department), Civil Rights Division, Disability Rights Section (DRS), will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA).

**DATES:** Comments are encouraged and will be accepted for 60 days until August 9, 2016.

**FOR FURTHER INFORMATION CONTACT:** If you have additional comments (especially on the estimated public burden or associated compliance time) or need additional information, please contact Rebecca B. Bond, Chief, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, by any one of the following methods: By email at [DRS.PRA@usdoj.gov](mailto:DRS.PRA@usdoj.gov); by regular U.S. mail at Disability Rights Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 2885, Fairfax, VA 22031-0885; by overnight mail, courier, or hand delivery at Disability Rights Section, Civil Rights Division, U.S. Department of Justice, 1425 New York Avenue NW., Suite 4039, Washington, DC 20005; or by phone at (800) 514-0301 (voice) or (800) 514-0383 (TTY) (the Division's Information Line). Include in the subject line of all comments the title of this proposed collection: "Requirement that Movie Theaters Provide Notice as to the Availability of Closed Movie Captioning and Audio Description."

You may obtain copies of this notice in an alternative format by calling the Americans with Disabilities Act (ADA) Information Line at (800) 514-0301 (voice) or (800) 514-0383 (TTY).

**SUPPLEMENTARY INFORMATION:** Written comments and suggestions from the

public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Civil Rights Division, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

### **Overview of Information Collection**

1. *Type of information collection:* New information collection.

2. *The title of the form/collection:* Requirement That Movie Theaters Provide Notice as to the Availability of Closed Movie Captioning and Audio Description.

The agency form number, if any, and the applicable component of the Department sponsoring the collection:

*Form Number:* None.

*Component:* The applicable component within the Department of Justice is the Disability Rights Section in the Civil Rights Division.

3. *Affected public who will be required to comply, as well as a brief abstract:*

*Affected Public (Primary):* Businesses and not-for-profit institutions that own, operate, or lease a movie theater that has one or more auditoriums showing movies with closed movie captioning and audio description, and that provide notice of movie showings and times. For purposes of the proposed rule and this notice, "movie theater" means a facility other than a drive-in theater that is used primarily for the purpose of showing movies to the public for a fee.

*Affected Public (Other):* None.

*Abstract:* The Department's Civil Rights Division, Disability Rights Section (DRS), is requesting PRA approval of a new collection that would require movie theaters to disclose information to the public regarding the availability of closed movie captioning

and audio description for movies shown in their auditoriums. On August 1, 2014, the Department published a notice of proposed rulemaking amending its ADA title III regulation, 28 CFR part 36, to specifically require movie theaters to provide closed movie captioning and audio description for patrons with hearing and vision disabilities (NPRM). 79 FR 44976. The NPRM proposed a new information collection requirement that is the subject of this notice. Proposed § 36.303(g)(5) stated that "movie theaters shall ensure that communications and advertisements intended to inform potential patrons of movie showings and times, that are provided by the theater through Web sites, posters, marquees, newspapers, telephone, and other forms of communications, shall provide information regarding the availability of closed movie captioning and audio description for each movie." Movie theaters' disclosure of this information will enable individuals with hearing and vision disabilities to readily find out which theaters are showing movies with these features, and the times those movies are being shown. All public comments on the NPRM supported the inclusion of a notice requirement in some form.

4. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 1,876 respondents will be required to disclose information concerning the availability of closed movie captioning and audio description in their existing communications concerning movie showings and times.

However, this number includes movie theaters that show analog movies exclusively. In the NPRM, the Department sought public comment on whether it should defer application of the proposed requirements for theaters with auditoriums that show analog movies exclusively. If the Department decides to defer coverage of analog auditoriums, then the number of respondents may drop. DRS estimates that all of the approximately 1,876 respondents will comply with this requirement.

Based on a review of current movie theater communications, it is estimated that an average of 10 minutes per respondent is needed to update existing notices of movie showings and times with this information. The Department acknowledges, however, that the amount of time it will take a respondent to comply with this requirement will likely vary because the amount of time necessary depends on the number of

movies that the respondent is able to show at any given time.

5. *Frequency*: The Department anticipates that movie theaters will likely update their existing listings of movie showings and times to include information concerning the availability of closed movie captioning and audio description on a regular basis. The Department's research suggests that this information would only need to be updated whenever a new movie with these features is added to the schedule. This will vary as some movies stay on the schedule for longer periods of time than other movies, but the Department estimates that movie theaters will update their listings to include this information weekly. If, in the future, all movies are distributed with these features, specific notice on a movie-by-movie basis may no longer be necessary, and a movie theater may only need to advise the public that it shows movies with closed movie captioning and audio description.

6. *An estimate of the total annual public burden (in hours) associated with the collection*: The estimated public burden associated with this collection is 16,259 hours. It is estimated that respondents will take an average of 10 minutes ( $\frac{1}{6}$  of an hour) to update their existing listings of movie showings and times to include this information and that such updates will occur weekly for new movies that are added to the schedule. The total annual public burden hours for disclosing this information sum to 16,258.67 hours ( $1,876 \text{ respondents} \times \frac{1}{6} \text{ hours} \times 52 \text{ times a year} = 16,258 \text{ and } \frac{2}{3} \text{ hours}$ ). Assuming a movie theater spends 10 minutes each week to update its notices of moving showings and times to include this information, the average movie theater firm will spend 8.67 hours annually ( $\frac{1}{6} \text{ hour} \times 52 \text{ times}$ ) performing the necessary tasks to comply with this requirement.

If additional information is required, contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., 3E.405B, Washington, DC 20530.

Dated: June 7, 2016.

**Jerri Murray,**

*Department Clearance Officer for PRA, U.S. Department of Justice.*

[FR Doc. 2016-13737 Filed 6-9-16; 8:45 am]

**BILLING CODE 4410-13-P**

## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

[Docket No. OSHA-2010-0016]

#### Derricks; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

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

**ACTION**: Request for public comments.

**SUMMARY**: OSHA solicits public comments concerning its proposal to extend the Office of Management and Budget's (OMB) approval of the information collection requirements contained in its Standard on Derricks (29 CFR 1910.181).

**DATES**: Comments must be submitted (postmarked, sent, or received) by August 9, 2016.

#### ADDRESSES:

*Electronically*: You may submit comments and attachments electronically at <http://www.regulations.gov>, which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

*Facsimile*: If your comments, including attachments, are not longer than 10 pages you may fax them to the OSHA Docket Office at (202) 693-1648.

*Mail, hand delivery, express mail, messenger, or courier service*: When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, OSHA Docket No. OSHA-2010-0016, Occupational Safety and Health Administration, U.S. Department of Labor, Room N-2625, 200 Constitution Avenue NW., Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m., e.t.

*Instructions*: All submissions must include the Agency name and the OSHA docket number (OSHA-2010-0016) for the Information Collection Request (ICR). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at <http://www.regulations.gov>. For further information on submitting comments, see the "Public Participation" heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

*Docket*: To read or download comments or other material in the

docket, go to <http://www.regulations.gov> or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the <http://www.regulations.gov> index; however, some information (e.g., copyrighted material) is not publicly available to read or download from the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Theda Kenney at the address below to obtain a copy of the ICR.

#### FOR FURTHER INFORMATION CONTACT:

Theda Kenney or Todd Owen, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N-3609, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693-2222.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (i.e., employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accord with the Paperwork Reduction Act of 1995 (PRA-95) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

The Standard specifies several paperwork requirements. The following sections describe who uses the information collected under each requirement as well as how they use it. The purpose of these requirements is to prevent death and serious injuries among workers by ensuring that the derrick is not used to lift loads beyond its rated capacity and that all the ropes are inspected for wear and tear.

Paragraph (c)(1) requires that for permanently installed derricks a clearly legible rating chart must be provided with each derrick and securely affixed to the derrick. Paragraph (c)(2) requires that for non-permanent installations the manufacturer must provide sufficient information from which capacity charts can be prepared by the employer for the particular installation. The capacity charts must be located at the derrick or at the jobsite office. The data on the capacity charts provide information to the workers to assure that the derricks are used as designed and not overloaded or used beyond the range specified in the charts.

Paragraph (f)(2)(i)(d) requires that warning or out of order signs must be placed on the derrick hoist while adjustments and repairs are being performed.

Paragraph (g)(1) requires employers to thoroughly inspect all running rope in use, and to do so at least once a month. In addition, before using rope that has been idle for at least a month, it must be inspected as prescribed by paragraph (g)(3) and a record prepared to certify that the inspection was done. The certification records must include the inspection date, the signature of the person conducting the inspection, and the identifier of the rope inspected. Employers must keep the certification records on file and available for inspection. The certification records provide employers, workers, and OSHA compliance officers with assurance that the ropes are in good condition.

Disclosure of Charts under paragraph (c) and Inspection Certification Records under paragraph (g). The Standard requires the disclosure of charts and inspection certification records if requested during an OSHA inspection.

## II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

## III. Proposed Actions

The Agency is requesting an adjustment decrease of 1 hour, from 1,356 to 1,355 hours, associated with the information collection requirements in the Standard. OSHA normally requests access to records during an inspection, however, the Agency has now determined that information collected by the Agency during an investigation is not subject to the PRA under 5 CFR 1320.4(a)(2). Therefore, OSHA takes no burden or cost for disclosure of records. The Agency will summarize the comments submitted in response to this notice and will include this summary in the request to OMB.

*Type of Review:* Extension of a currently approved collection.

*Title:* Derricks (29 CFR 1910.181).

*OMB Control Number:* 1218-0222.

*Affected Public:* Business or other for-profits; Federal Government; State, Local or Tribal Government.

*Number of Respondents:* 500.

*Frequency of Responses:* On occasion.

*Average Time per Response:* Ranges from one minute (.02 hour) to maintain rating load charts to 13 minutes (.22 hour) to inspect ropes and to develop and maintain the inspection certification record.

*Estimated Total Burden Hours:* 1,355.

*Estimated Cost (Operation and Maintenance):* \$0.

## IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows:

(1) Electronically at <http://www.regulations.gov>, which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other material must identify the Agency name and the OSHA docket number for the ICR (OSHA Docket No. OSHA-2010-0016). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the Agency can attach them to your comments.

Due to security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or

courier service, please contact the OSHA Docket Office at (202) 693-2350, (TTY) (877) 889-5627).

Comments and submissions are posted without change at <http://www.regulations.gov>. Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and dates of birth. Although all submissions are listed in the <http://www.regulations.gov> index, some information (e.g., copyrighted material) is not publicly available to read or download from this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the <http://www.regulations.gov> Web site to submit comments and access the docket is available at the Web site's "User Tips" link. Contact the OSHA Docket Office for information about materials not available from the Web site, and for assistance in using the Internet to locate docket submissions.

## V. Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1-2012 (77 FR 3912).

Signed at Washington, DC, on June 6, 2016.

**David Michaels,**

*Assistant Secretary of Labor for Occupational Safety and Health.*

[FR Doc. 2016-13732 Filed 6-9-16; 8:45 am]

**BILLING CODE 4510-26-P**

## NATIONAL SCIENCE FOUNDATION

### Privacy Act of 1974; Systems of Records

**AGENCY:** National Science Foundation.

**ACTION:** Notice of rescindment of two existing systems of records, the addition of one new system of records, the amendment of one agency-wide routine use, and amendment to eight existing systems of records.

**SUMMARY:** Pursuant to the Privacy Act of 1974 (5 U.S.C. 552a), the National Science Foundation (NSF) is providing public notice that it is rescinding two systems of records: NSF-3 Application and Account for Advance of Funds; and NSF-34 Integrated Time and Attendance System (ITAS). NSF is adding one new system of records: NSF-75 Early Career Doctorates Survey (ECDS). NSF is amending the agency-wide routine use number two titled

Freedom of Information Act/Privacy Act Compliance. NSF is also making revisions to the text of eight existing systems of records: NSF-6, Doctorate Records Files (Survey of Earned Doctorates); NSF-13, Fellowship Payroll; NSF-43, Doctorate Work History Files (Survey of Doctorate Recipients); NSF-55, Debarment/Scientific Misconduct Files; NSF-57, NSF Delinquent Debtors' File; NSF-58, National Survey of Recent College Graduates and Follow-up Files; NSF-65, NSF Electronic Payment File; and NSF-67, Invention, Patent and Licensing Documents.

**DATES:** Persons wishing to comment on the changes set out in this notice may do so on or before July 20, 2016.

**Effective Date:** This action will be effective without further notice on July 20, 2016 unless modified by a subsequent notice to incorporate comments received from the public.

**ADDRESSES:** You may submit comments, identified by [docket number and/or RIN number \_\_\_\_], by any of the following methods:

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

- **Agency Web site:** [https://www.nsf.gov/policies/privacy\\_act.jsp](https://www.nsf.gov/policies/privacy_act.jsp). Follow the instructions for submitting comments on the NSF Web site.

- **Email:** [sevens@nsf.gov](mailto:sevens@nsf.gov). Include [docket number and/or RIN number \_\_\_\_] in the subject line of the message.

- **Fax:** (703) 292-9242.

- **Mail:** Sandra Evans, Privacy Officer, Office of the General Counsel, National Science Foundation, 4201 Wilson Boulevard, Room 1265, Arlington, VA 22230.

- **Hand Delivery/Courier:** Office of the General Counsel, National Science Foundation, 4201 Wilson Boulevard, Room 1265, Arlington, VA 22230.

**Instructions:** NSF will post all comments on the NSF's Web site ([https://www.nsf.gov/policies/privacy\\_act.jsp](https://www.nsf.gov/policies/privacy_act.jsp)). All comments submitted in response to this Notice will become a matter of public record. Therefore, you should submit only information that you wish to make publicly available.

**FOR FURTHER INFORMATION CONTACT:** Privacy Officer, Office of the General Counsel, National Science Foundation, 4201 Wilson Boulevard, Room 1265, Arlington, VA 22230; or by telephone at 703-292-8060.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Two NSF systems of records are proposed for rescindment, NSF-3

Application and Account for Advance of Funds and NSF-34 Integrated Time and Attendance System (ITAS). NSF no longer uses these systems. All records that were contained in these systems have been moved to other existing systems or archived and/or destroyed consistent with applicable records schedules.

A new system of records, NSF-75 Early Career Doctorates Survey (ECDS) will contain records from a sample of individuals who earned their first doctorate within the past 10 years and are working in specific areas of employment. This information is collected from a new NSF survey, the ECDS.

The NSF agency-wide routine use, titled Freedom of Information Act/Privacy Act Compliance is being amended to allow NSF to more easily share information with the Office of Government Information Services (OGIS) for FOIA compliance and mediation purposes.

Proposed changes to eight systems of records maintained by NSF, described in more detail below, will correct outdated information and references, update routine uses, and in two instances update the names of the systems to better reflect the records contained in those systems. All revised system notices are reprinted in their entirety.

NSF-6: Doctorate Records Files (Survey of Earned Doctorates) contains records about persons who have received research doctorates from U.S. institutions since 1920 and who have filled out the Survey of Earned Doctorates questionnaire that is created and maintained by NSF. The proposed changes to this system include amending the system name to reference the survey that is the source of records contained in the system; updating the categories of records in the system to reflect changes to the way social security number and salary information is collected; updating the description of existing routine uses to clarify how information is being used by NSF; and minor updates to language throughout the system to better inform the public as to how information is being stored and how records can be accessed. An amendment to this system notice was last published in the **Federal Register** on August 20, 2007, effective on September 30, 2007, 72 FR 46520-46521.

NSF-13: Fellowship Payroll contains records about fellows under certain NSF fellowship programs being paid directly by the government. The proposed changes to this system include updating and clarifying language in the system

location, authority for maintaining the system, storage, and retrievability sections, as well as minor updates to other system sections, to better inform the public about access procedures and how information in the system is being used. An amendment to this system notice was last published in the **Federal Register** on August 20, 2007, effective on September 30, 2007, 72 FR 46520-46521.

NSF-43: Doctorate Work History Files (Survey of Doctorate Recipients) contains records about individuals holding a research doctoral degree in a science, engineering, or health field from a U.S. academic institution who have filled out the biennial Survey of Doctorate Recipients. The proposed changes to this system include amending the system name to better reflect reference the survey that is the source of records contained in the system; updating the categories of individuals covered by the system to more specifically identify who is covered; updating the categories of records in the system to reflect changes to the way social security numbers and demographic characteristics are collected; updating the description of existing routine uses to clarify how information is being used by NSF; and minor updates to remaining system sections to better inform the public as to how information is being stored and how records can be accessed. An amendment to this system notice was last published in the **Federal Register** on August 20, 2007, effective on September 30, 2007, 72 FR 46520-46521.

NSF-55: Debarment/Scientific Misconduct Files, contains records about persons considered for government-wide suspension, debarment, and/or research misconduct determinations. The proposed changes to this system include amending the system name to better reflect the type of records contained in the system, as well as, minor updates to all of the system sections to better inform the public about access procedures and how information in the system is being used. An amendment to this system notice was last published in the **Federal Register** on August 20, 2007, effective on September 30, 2007, 72 FR 46520-46521.

NSF-57: NSF Delinquent Debtors' File contains records about individuals who owe money to NSF. The proposed changes to this system include minor updates to the authority, routine uses, retrievability and record source system sections to better inform the public about access procedures and how information in the system is being used.

An amendment to this system notice was last published in the **Federal Register** on August 20, 2007, effective on September 30, 2007, 72 FR 46520–46521.

NSF–58: National Survey of Recent College Graduates and Follow-up Files, contains records about individuals holding bachelor's and master's degrees from U.S. institutions in science, engineering, and health degree fields who have filled out the Survey of Recent College Graduates. The proposed changes to this system include updating the categories of individuals covered by the system to more specifically identify who is covered; updating the categories of records in the system to reflect changes to the way social security numbers and demographic characteristics are collected; updating the language in the purpose and routine uses sections to clarify how information is being used by NSF; and minor updates to remaining system sections to better inform the public as to how information is being stored and how records can be accessed. An amendment to this system notice was last published in the **Federal Register** on August 20, 2007, effective on September 30, 2007, 72 FR 46520–46521.

NSF–65, NSF Electronic Payment File contains records about individuals who receive electronic payment from NSF for goods or services. The proposed changes to this system include minor updates throughout the system sections to better inform the public about access procedures and how information in the system is being used. An amendment to this system notice was last published in the **Federal Register** on August 20, 2007, effective on September 30, 2007, 72 FR 46520–46521.

NSF–67, Invention, Patent and Licensing Documents contains records about invention disclosures, patents and patent applications, and licenses submitted to NSF by its employees, grantees and contractors. The proposed changes to this system include minor updates to all of the system sections to better inform the public about access procedures and how information in the system is being used. An amendment to this system notice was last published in the **Federal Register** on August 20, 2007, effective on September 30, 2007, 72 FR 46520–46521.

## II. Privacy Act

The Privacy Act of 1974, as amended (5 U.S.C. 552a), embodies fair information practice principles in a statutory framework governing the means by which federal agencies collect, maintain, use, and disseminate individual's personal information. A

“system of records” is a group of records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined as a U.S. citizen or lawful permanent resident. As a matter of policy, NSF extends administrative Privacy Act protections to all individuals. Individuals may request access to their own records that are maintained in a system of records in the possession or control of NSF by complying with NSF Privacy Act regulations, 45 CFR part 613.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses of their records, and to assist individuals to find such records within the agency. Below are the complete texts of the NSF agency-wide routine uses and the following NSF systems: NSF–6, Doctorate Records Files (Survey of Earned Doctorates); NSF–13 Fellowship Payroll; NSF–43, Doctorate Work History Files (Survey of Doctorate Recipients); NSF–55, Debarment/Scientific Misconduct Files, proposed to be renamed as NSF–55, Suspension/Debarment/Research Misconduct Files; NSF–58: National Survey of Recent College Graduates and Follow-up Files, proposed to be renamed as NSF–58, National Survey of Recent College Graduates; NSF–67, Invention, Patent and Licensing Documents; and NSF–75, Early Career Doctorates Survey (ECDS).

In accordance with 5 U.S.C. 552a(r), NSF has provided a report of this system of records notice to the Office of Management and Budget; the Chairman, Senate Committee on Governmental Affairs; and the Chairman, House Committee on Government Reform and Oversight.

Dated: June 2, 2016.

**Sandra Evans,**  
Privacy Act Officer, National Science Foundation.

## Privacy Act Systems—Standard Routine Uses—National Science Foundation

The following standard routine uses apply, subject to the Privacy Act of 1974, except where otherwise noted, to each system of records maintained by the National Science Foundation:

1. *Members of Congress.* Information from a system may be disclosed to congressional offices in response to inquiries from the congressional offices made at the request of the individual to whom the record pertains.

2. *Freedom of Information Act/Privacy Act Compliance.* Information from a system may be disclosed to the Department of Justice or the Office of Management and Budget in order to obtain advice regarding NSF's obligations under the Freedom of Information Act and the Privacy Act. Information may also be provided to the National Archives and Records Administration (NARA) Office of Government Information Services (OGIS) for the following purposes: to allow OGIS to fulfill its responsibilities in 5 U.S.C. 552(h); to allow OGIS to review administrative agency policies, procedures and compliance with the Freedom of Information Act (FOIA); and to facilitate OGIS' offering of mediation services to resolve disputes between persons making FOIA requests and administrative agencies.

3. *Counsel.* Information from a system may be disclosed to NSF's legal representatives, including the Department of Justice and other outside counsel, where the agency is a party in litigation or has an interest in litigation, including when any of the following is a party to litigation or has an interest in such litigation: (a) NSF, or any component thereof; (b) any NSF employee in his or her official capacity; (c) any NSF employee in his or her individual capacity, where the Department of Justice has agreed to, or is considering a request to, represent the employee; or (d) the United States, where NSF determines that litigation is likely to affect the agency or any of its components.

4. *National Archives, General Services Administration.* Information from a system may be disclosed to representatives of the General Services Administration and the National Archives and Records Administration (NARA) during the course of records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

5. *Response to an Actual or Suspected Compromise or Breach of Personally Identifiable Information.* Information from a system may be disclosed to appropriate agencies, entities, and persons when (a) NSF suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (b) NSF has determined that as a result of the suspected or confirmed compromise 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 (whether maintained by NSF or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist with NSF's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

6. *Courts.* Information from a system may be disclosed to the Department of Justice or other agencies in the event of a pending court or formal administrative proceeding, when records are relevant to that proceeding, for the purpose of representing the government, or in the course of presenting evidence, or they may be produced to parties or counsel involved in the proceeding in the course of pre-trial discovery.

7. *Contractors.* Information from a system may be disclosed to contractors, agents, experts, consultants, or others performing work on a contract, service, cooperative agreement, job, or other activity for NSF and who have a need to access the information in the performance of their duties or activities for NSF.

8. *Audit.* Information from a system may be disclosed to government agencies and other entities authorized to perform audits, including financial and other audits, of the agency and its activities.

9. *Law Enforcement.* Information from a system may be disclosed to appropriate Federal, State, or local agencies responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, to disclose pertinent information when NSF becomes aware of an indication of a violation or potential violation of civil or criminal law or regulation.

10. *Disclosure When Requesting Information.* Information from a system may be disclosed to Federal, State, or local agencies which maintain civil, criminal, or other relevant enforcement information or other pertinent information, such as current licenses, if necessary, to obtain information relevant to an agency decision concerning the hiring or retention of an employee, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant, or other benefit.

11. *To The News Media And The Public When:* (1) A matter has become public knowledge, (2) the NSF Office of the Director determines that disclosure is necessary to preserve confidence in the integrity of NSF or is necessary to

demonstrate the accountability of NSF's officers, employees, or individuals covered by this system, or (3) the Office of the Director determines that there exists a legitimate public interest in the disclosure of the information, except to the extent that the Office of the Director determines in any of these situations that disclosure of specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

#### NSF-6

##### SYSTEM NAME:

Doctorate Records Files (Survey of Earned Doctorates).

##### SYSTEM LOCATION(S):

National Science Foundation (NSF) headquarters, Virginia, and NSF's current survey contractor location(s).

##### AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

National Science Foundation Act of 1950, as amended, 42 U.S.C. 1862(a)(6), 1863(j)(1), 1885(d); and the America COMPETES Reauthorization Act of 2010.

##### PURPOSE(S):

This system is used:

(1) To provide a source of information, that will be used for statistical purposes only, on demographic characteristics, educational history, and employment plans of recipients of U.S. research doctorates, in compliance with NSF responsibilities to monitor scientific and technical resources.

(2) To provide indicators of the state of science and engineering enterprise in the United States, as required by congressional mandate.

(3) To report biennially on the participation rates of men, women, persons with disabilities, and race/ethnicity groups, in scientific and technical fields, as required by congressional mandate.

(4) To provide the sampling frame for the Survey of Doctorate Recipients.

##### CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who have earned research doctorates from accredited U.S. institutions since 1920. Limited information (name, field of degree and institution) about individuals receiving doctorates between 1920 and 1957 was compiled from public records. Information about individuals receiving doctoral degrees after 1957 was supplied voluntarily by the individual receiving the degree. Some institutions supply name and field of degree for individuals who do not provide any information.

##### CATEGORIES OF RECORDS IN THE SYSTEM:

Educational, professional and demographic characteristics of doctorate earners including name, birth date, gender, citizenship, race, ethnicity, education history, social security number (for individuals added after 2006, only the last four digits of the SSN are maintained), sources of financial support during graduate school, and post-graduation plans (since 2008, including the anticipated annual salary).

##### RECORD SOURCE CATEGORIES:

Information is obtained voluntarily from the individual; limited information may be provided by academic institutions.

##### ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

NSF standard routine uses apply to the extent that such disclosure is compatible with the National Science Foundation Act of 1950, the America COMPETES Reauthorization Act of 2010, and the Confidential Information Protection and Statistical Efficiency Act (CIPSEA). In addition, information may be disclosed to:

(1) License for the Use of Restricted Data (License) holders. Organizations (e.g. academic institutions, nonprofit organizations) and their researcher(s) granted a NSF/National Center for Science and Engineering Statistics (NCSES) License for the purpose of analyzing data and preparing scientific reports and articles. These Licensees receive data without direct personal identifiers.

(2) Federal agency sponsors. Records with personal identifiers may be disclosed to federal sponsors, their contractors and collaborating researchers and their staff under an Inter-Agency Agreement for the purpose of analyzing data, preparing scientific reports and articles, and for conducting review and evaluation of their programs.

(3) NCSES contractors. Records may be disclosed to NCSES contractors for statistical activities or purposes such as conducting surveys. Any NSF contractor who wishes to use restricted-use data for statistical activities or purposes that are not part of NCSES-sponsored work must follow the regular License procedures as laid out in routine use (1) above.

##### POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records are stored in paper (short term) and on electronic digital media (long term).

**POLICIES AND PRACTICES FOR RETRIEVABILITY OF RECORDS:**

Records are retrieved by individual name and unique, anonymous data collection identifier.

**POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:**

Data are cumulative and are kept indefinitely.

**PHYSICAL, PROCEDURAL, AND ADMINISTRATIVE SAFEGUARDS:**

Records are protected by administrative, technical, and physical safeguards administered by NSF.

**SYSTEM MANAGER(S):**

Division Director, National Center for Science and Engineering Statistics, NSF headquarters, Virginia.

**RECORD ACCESS PROCEDURES:**

This system is exempt from this requirement pursuant to 5 U.S.C. 552a(k)(4).

**CONTESTING RECORD PROCEDURES:**

This system is exempt from this requirement pursuant to 5 U.S.C. 552a(k)(4).

**NOTIFICATION PROCEDURE:**

This system is exempt from this requirement pursuant to 5 U.S.C. 552a(k)(4).

**EXEMPTIONS PROMULGATED FOR THE SYSTEM:**

The portions of this system consisting of statistical records have been exempted from provisions of 5 U.S.C. 552a(c)(3); (d); (e)(1); (e)(4)(G), (H), (I), and (f), pursuant to 5 U.S.C. 552a(k)(4).

**NSF-13****SYSTEM NAME:**

Fellowship Payroll.

**SYSTEM LOCATION(S):**

National Science Foundation (NSF) headquarters, Virginia.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

42 U.S.C. 1861; Department of the Treasury Financial Manual; GAO Policy and Procedures Manual for Guidance of Federal Agencies, Title 6—Pay, Leave and Allowances.

**PURPOSE(S):**

This system enables the NSF to maintain data regarding the payment of fellowship payroll in a single location and ensures that appropriate payments are made.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Individuals participating in certain NSF Fellowship Programs being paid directly by the federal government (Fellows).

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Copies of the fellowship award letter, acceptance form, starting certificates, and records of stipend payments.

**RECORD SOURCE CATEGORIES:**

Information is obtained from Fellows.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

NSF standard routine uses apply. In addition, information may be disclosed to:

- (1) The Department of Treasury for the purpose of issuing the payment directly to the financial account of the payee.
- (2) Financial institutions for the purpose of direct deposit.

**POLICIES AND PRACTICES FOR STORAGE OF RECORDS:**

Records are stored in paper and/or on electronic digital media.

**POLICIES AND PRACTICES FOR RETRIEVABILITY OF RECORDS:**

Records are retrieved alphabetically by last name of Fellow, supplier number, or award number.

**POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:**

Records are maintained and disposed of in accordance with NAPA approved records schedules.

**PHYSICAL, PROCEDURAL, AND ADMINISTRATIVE SAFEGUARDS:**

Records are protected by administrative, technical, and physical safeguards administered by NSF.

**SYSTEM MANAGER(S):**

Division Director, Division of Financial Management, NSF headquarters, Virginia.

**RECORD ACCESS PROCEDURES:**

Follow the Requesting Access to Records procedures found at 45 CFR part 613.

**CONTESTING RECORD PROCEDURES:**

Follow the procedures found at 45 CFR part 613.

**NOTIFICATION PROCEDURE:**

Follow the Requesting Access to Records procedures found at 45 CFR part 613.

**EXEMPTIONS PROMULGATED FOR THE SYSTEM:**

None.

**NSF-43****SYSTEM NAME:**

Survey of Doctorate Recipients.

**SYSTEM LOCATION(S):**

National Science Foundation (NSF) headquarters, Virginia, and NSF's current survey contractor location(s).

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

National Science Foundation Act of 1950, as amended, 42 U.S.C. 1862(a)(6), 1863(j)(1), 1885(d); the America COMPETES Reauthorization Act of 2010; and the Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA).

**PURPOSE(S):**

This system is used:

- (1) To provide a source of information, that will be used for statistical purposes only, on demographic characteristics of individuals with doctorate degrees in science, engineering, or selected health (SEE) fields in the U.S., in compliance with NSF responsibilities to monitor scientific and technical resources.
- (2) To provide indicators of the state of science and engineering enterprise in the U.S., as required by congressional mandate.
- (3) To report biennially on the participation rates of men, women, persons with disabilities, and race/ethnicity groups, in scientific and technical fields, as required by congressional mandate.
- (4) To provide data on doctorate holders in the SEH workforce to the Scientists and Engineers Statistical Data System (SESTAT) maintained by NSF.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

A sample of individuals holding a research doctoral degree in a SEH field from a U.S. academic institution. The information is collected from individuals in the biennial Survey of Doctorate Recipients (SDR). The survey follows a sample of individuals with SEH doctorates throughout their careers from the year of their degree award until age 76.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Educational, professional and demographic characteristics of doctorate holders including name, birth date, gender, citizenship, race, ethnicity, education history, social security number (for individuals added after 2006, only the last four digits of the SSN are maintained), geographic locations, earned degrees, field of degree, employment status, occupation, type of employer, primary work activity, and salary.

**RECORD SOURCE CATEGORIES:**

Information is obtained voluntarily from the individual.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

NSF standard routine uses apply to the extent that such disclosure is compatible with the National Science Foundation Act of 1950, the America COMPETES Reauthorization Act of 2010, and CIPSEA. In addition, information may be disclosed to:

(1) License for the Use of Restricted Data (License) holders. Organizations (e.g. academic institutions, nonprofit organizations) and their researcher(s) granted an NSF/National Center for Science and Engineering Statistics (NOSES) License for the purpose of analyzing data and preparing scientific reports and articles. These Licensees receive data without direct personal identifiers.

(2) Federal agency sponsors. Records with personal identifiers may be disclosed to federal sponsors, their contractors and collaborating researchers and their staff under an Inter-Agency Agreement for the purpose of analyzing data, preparing scientific reports and articles, and for conducting review and evaluation of their programs.

(3) NCSES contractors. Records may be disclosed to NCSES contractors for statistical activities or purposes such as conducting surveys. Any NSF contractor who wishes to use restricted-use data for statistical activities or purposes that are not part of NCSES-sponsored work must follow the regular License procedures as laid out in routine use (1) above.

**POLICIES AND PRACTICES FOR STORAGE OF RECORDS:**

Records are stored in paper and/or on electronic digital media.

**POLICIES AND PRACTICES FOR RETRIEVABILITY OF RECORDS:**

Records are retrieved by the name of individual and unique, anonymous data collection identifier.

**POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:**

Data are cumulative and are kept indefinitely.

**PHYSICAL, PROCEDURAL, AND ADMINISTRATIVE SAFEGUARDS:**

Records are protected by administrative, technical, and physical safeguards administered by NSF.

**SYSTEM MANAGER(S):**

Division Director, National Center for Science and Engineering Statistics, NSF headquarters, Virginia.

**RECORD ACCESS PROCEDURES:**

This system is exempt from this requirement pursuant to 5 U.S.C. 552a(k)(4).

**CONTESTING RECORD PROCEDURES:**

This system is exempt from this requirement pursuant to 5 U.S.C. 552a(k)(4).

**NOTIFICATION PROCEDURE:**

This system is exempt from this requirement pursuant to 5 U.S.C. 552a(k)(4).

**EXEMPTIONS PROMULGATED FOR THE SYSTEM:**

The portions of this system consisting of statistical records have been exempted from provisions of 5 U.S.C. 552a(c)(3); (d); (e)(1); (e)(4)(G), (H), (I), and (f), pursuant to 5 U.S.C. 552a(k)(4).

**NSF-55**

**SYSTEM NAME:**

Suspension, Debarment, and Research Misconduct Files.

**SYSTEM LOCATION:**

National Science Foundation (NSF) headquarters, Virginia.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Section 11(a), National Science Foundation Act of 1950, as amended, 42 U.S.C. 1870(a); Federal Acquisition Regulation (FAR), 2 CFR 180.800; 45 CFR part 689; and E.O. 12549 (February 18, 1986).

**PURPOSE(S):**

To Information contained in this system of records is used to protect the federal government from the actions prohibited under applicable suspension, debarment, and research misconduct regulations; make decisions regarding suspension, debarment, and research misconduct; ensure that other federal agencies give effect to suspension, debarment, and research misconduct decisions rendered by NSF; and to ensure that NSF gives effect to suspension, debarment, and research misconduct decisions rendered by other Federal agencies.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Persons, including applicants for NSF grants and contracts, NSF grantees, contractors, and principal investigators, who are the subject of suspension, debarment, or research misconduct proceedings.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Case files for persons considered for suspension, debarment or research misconduct; communications between the NSF and the respondent; inter-

agency and intra-agency communications regarding proposed or completed suspensions, debarments, or research misconduct; investigative files; witness statements and affidavits; staff working papers; testimony transcripts; hearing exhibits; and records of any findings.

**RECORD SOURCE CATEGORIES:**

Federal, state, and local agency officials; the NSF Office of the Inspector General; private persons; and respondents and their legal representatives.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

NSF standard routine uses apply. In addition, information may be disclosed to:

(1) The General Services Administration (GSA) to compile and maintain the System for Award Management.

(2) A federal agency involved in suspension, debarment or research misconduct actions involving the same person.

(3) A federal, state, or local government agency to the extent necessary to allow NSF to obtain information maintained by those agencies in connection with a suspension, debarment, or research misconduct action.

(4) Other persons involved in or affected by a suspension, debarment, or research misconduct actions, including witnesses, awardee institutions, to support NSF objectives.

(5) A federal, state, local government agency, federal contractor, or grantee, for the purpose of verifying the identity of an individual NSF has suspended, debarred, or imposed actions upon pursuant to an administrative agreement or research misconduct determination.

**POLICIES AND PRACTICES FOR STORAGE OF RECORDS:**

Records are stored in paper and/or on electronic digital media.

**POLICIES AND PRACTICES FOR RETRIEVABILITY OF RECORDS:**

Records are retrieved by the name of the person and/or entity being considered for suspension, debarment, or a finding of research misconduct.

**POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:**

Records are maintained and disposed of in accordance with NARA approved record schedules.

**PHYSICAL, PROCEDURAL AND ADMINISTRATIVE SAFEGUARDS:**

Records are protected by administrative, technical, and physical safeguards administered by NSF.

**SYSTEM MANAGER(S):**

General Counsel, Office of General Counsel, NSF headquarters, Virginia.

**RECORD ACCESS PROCEDURES:**

Follow the Requesting Access to Records procedures found at 45 CFR part 613.

**CONTESTING RECORD PROCEDURES:**

Follow the procedures found at 45 CFR part 613.

**NOTIFICATION PROCEDURE:**

Follow the Requesting Access to Records procedures found at 45 CFR part 613.

**EXEMPTIONS PROMULGATED FOR THE SYSTEM:**

In accordance with 5 U.S.C. 552a(k)(2), investigative material in this system of records compiled for law enforcement purposes is exempt from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H) and (I), and (f) of 5 U.S.C. 552a, provided, however, that if any individual is denied any right, privilege, or benefit that he or she would otherwise be entitled to by federal law, or for which he or she would otherwise be eligible, as a result of the maintenance of these records, such material shall be provided to the individual, except to the extent that the disclosure of the material would reveal the identity of a source who furnished information to the government with an express promise that the identity of the source would be held in confidence.

**NSF-57****SYSTEM NAME:**

NSF Delinquent Debtors' File.

**SYSTEM LOCATION:**

Division of Financial Management, Financial Statements Section, National Science Foundation (NSF) headquarters, Virginia.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Federal Claims Collection Act of 1966, Public Law 89-508; Debt Collection Act of 1996, Public Law 104-134; and E.O. 9397.

**PURPOSE(S):**

Information is used for the purpose of collecting moneys owed NSF arising out of any administrative or program activities or service administered by NSF. The file represents the basis for the debt and amount of debt and actions taken by NSF to collect the moneys

owed under the debt. The credit report or financial statement provides an understanding of the individual's financial condition with respect to requests for deferments of payment.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Employees and former employees of NSF, panelists, recipients of fellowship stipends, and others owing money to NSF.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Information varies depending on individual debtor. Normally, the name, social security number, address, amount of debt or delinquent amount, basis of the debt, office referring debts, agency collection efforts, credit reports, debt collection letters, correspondence to or from the debtor relating to the debt and correspondence with employing agencies of debtors.

**RECORD SOURCE CATEGORIES:**

Information in this system of records obtained from the individual, institution, award records, collection agencies, and other appropriate agencies, *i.e.*, the Internal Revenue Service (IRS), the Government Accountability Office (GAO), the United States Postal Service (USPS), the Department of the Treasury, etc.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

NSF standard routine uses apply. In addition, information may be disclosed to:

(1) GAO, the Department of Justice, the U.S. Attorney, or other federal agencies for further collection action on any delinquent account when circumstances warrant.

(2) A commercial credit reporting agency for the purpose of either adding to a credit history file or obtaining a credit history file for use in the administration of debt collection.

(3) A debt collection agency for the purpose of collection services to recover indebtedness owed to NSF.

(4) Debtor's name, social security number, the amount of debt owed, and the history of the debt may be disclosed to any Federal agency where the individual debtor is employed or receiving some form of remuneration for the purpose of enabling that agency to collect debts on NSF's behalf by administrative or salary offset procedures under the provisions of the Debt Collection Act of 1996.

(5) Any other federal agency including but limited to, the IRS pursuant to 31 U.S.C. 3720A, and the Department of the Treasury Debt

Management Services, for the purpose of effecting an administrative offset against the debtor of a delinquent debt owed to NSF by the debtor.

(6) The IRS, to obtain the mailing address of a taxpayer for the purpose of locating such taxpayer to collect or to compromise a Federal claim by NSF against the taxpayer pursuant to 26 U.S.C. 6103(m)(20) and in accordance with 31 U.S.C. 3711, 3217, and 3718.

**Note:** Disclosure of a mailing address from the IRS may be made only for the purpose of debt collection, including to a debt collection agency in order to facilitate the collection or compromise of a federal claim under the Debt Collection Act of 1996, except that a mailing address to a consumer reporting agency is for the limited purpose of obtaining a commercial credit report on the particular taxpayer. Any such address information obtained from the IRS will not be used or shared for any other NSF purpose or disclosed to another federal, state, or local agency, which seeks to locate the same individual for its own debt collection purpose.

(7) Database information consisting of debtor's name, social security number, and amount owed may be disclosed to the Defense Manpower Data Center (DMDC), Department of Defense, USPS, or to any other federal state, or local agency for the purpose of conducting an authorized computer matching program in compliance with the Privacy Act of 1974, 5 U.S.C. 552a, as amended, to identify and locate delinquent debtors in order to start a recoupment process on an individual basis of any debt owed NSF by the debtor arising out of any administrative or program activities or services administered by NSF.

**POLICIES AND PRACTICES FOR STORAGE OF RECORDS:**

Records are stored in paper and/or on electronic digital media.

**POLICIES AND PRACTICES FOR RETRIEVABILITY OF RECORDS:**

Records are retrieved by the Principal Investigator's name or identification number, or by proposal number.

**POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:**

Records are maintained and disposed of in accordance with NARA approved record schedules.

**PHYSICAL, PROCEDURAL, AND ADMINISTRATIVE SAFEGUARDS:**

Records are protected by administrative, technical, and physical safeguards administered by NSF.

**SYSTEM MANAGER(S):**

Director/Head or designee of particular Division or Office maintaining such records, NSF headquarters, Virginia.

**RECORD ACCESS PROCEDURES:**

Follow the Requesting Access to Records procedures found at 45 CFR part 613.

**CONTESTING RECORD PROCEDURES:**

Follow the procedures found at 45 CFR part 613.

**NOTIFICATION PROCEDURE:**

Follow the Requesting Access to Records procedures found at 45 CFR part 613.

**EXEMPTIONS PROMULGATED FOR THE SYSTEM:**

The portions of this system consisting of data that would identify reviewers or other persons supplying evaluations of NSF proposals have been exempted at 45 CFR part 613, pursuant to 5 U.S.C. 552a(k)(4).

**NSF-58****SYSTEM NAME:**

National Survey of Recent College Graduates.

**SYSTEM LOCATION(S):**

National Science Foundation (NSF) headquarters, Virginia, and NSF's current survey contractor location(s).

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

National Science Foundation Act of 1950, as amended, 42 U.S.C. 1862(a)(6), 1863(j)(1), 1885(d); the America COMPETES Reauthorization Act of 2010; and the Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA).

**PURPOSE(S):**

This system is used:

(1) To provide a source of information, that will be used for statistical purposes only, on demographic characteristics of individuals with bachelor's and master's degrees in science, engineering, and health fields (SEH) in the U.S., in compliance with NSF responsibilities to monitor scientific and technical resources.

(2) To provide indicators of the state of science and engineering enterprise in the U.S., as required by congressional mandate.

(3) To report biennially on the participation rates of men, women, persons with disabilities, and race/ethnicity groups, in scientific and technical fields, as required by congressional mandate.

(4) To provide data on recent bachelor's and master's degree

recipients in the SEE workforce to the Scientists and Engineers Statistical Data System (SESTAT) maintained by NSF.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

A sample of individuals holding a bachelor's and master's degrees from U.S. institutions in SEE fields.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Educational, professional and demographic characteristics of bachelor's and master's degree holders including name, address, birth date, race, ethnicity, gender, disability, country of birth, social security number (for individuals added after 2006, only the last four digits of the SSN are maintained), occupational information, employment status, professional activities, academic degrees, earlier education, continuing education, marital status, spouse's employment status, number and ages of children living at home, parent's educational attainment, and citizenship.

**RECORD SOURCE CATEGORIES:**

Information is obtained voluntarily from the individual.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

NSF standard routine uses apply to the extent that such disclosure is compatible with the National Science Foundation Act of 1950, the America COMPETES Reauthorization Act of 2010, and CIPSEA. In addition, information may be disclosed to:

(1) License for the Use of Restricted Data (License) holders. Organizations (e.g. academic institutions, nonprofit organizations) and their researcher(s) granted an NSF/National Center for Science and Engineering Statistics (NCSES) License for the purpose of analyzing data and preparing scientific reports and articles. These Licensees receive data without direct personal identifiers.

(2) NCSES contractors. Records may be disclosed to NCSES contractors for statistical activities or purposes such as conducting surveys. Any NSF contractor who wishes to use restricted-use data for statistical activities or purposes that are not part of NCSES-sponsored work must follow the regular License procedures as laid out in routine use (1) above.

**POLICIES AND PRACTICES FOR STORAGE OF RECORDS:**

Records are stored in paper and/or on electronic digital media.

**POLICIES AND PRACTICES FOR RETRIEVABILITY OF RECORDS:**

Records are retrieved by the name of individual and unique, anonymous data collection identifier.

**POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:**

Data are cumulative and are kept indefinitely.

**PHYSICAL, PROCEDURAL, AND ADMINISTRATIVE SAFEGUARDS:**

Records are protected by administrative, technical, and physical safeguards administered by NSF.

**SYSTEM MANAGER(S):**

Division Director, National Center for Science and Engineering Statistics, NSF headquarters, Virginia.

**RECORD ACCESS PROCEDURES:**

This system is exempt from this requirement pursuant to 5 U.S.C. 552a(k)(4).

**CONTESTING RECORD PROCEDURES:**

This system is exempt from this requirement pursuant to 5 U.S.C. 552a(k)(4).

**NOTIFICATION PROCEDURE:**

This system is exempt from this requirement pursuant to 5 U.S.C. 552a(k)(4).

**EXEMPTIONS PROMULGATED FOR THE SYSTEM:**

The portions of this system consisting of statistical records have been exempted from provisions of 5 U.S.C. 552a(c)(3); (d); (e)(1); (e)(4)(G), (H), (I), and (f), pursuant to 5 U.S.C. 552a(k)(4).

**NSF-65****SYSTEM NAME:**

NSF Electronic Payment File.

**SYSTEM LOCATION:**

Division of Financial Management, National Science Foundation (NSF) headquarters, Virginia.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

The Debt Collection Improvement Act of 1996.

**PURPOSE(S):**

To enable NSF to comply with the mandatory electronic payment provisions of the Debt Collection Act of 1996.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Employees of NSF, former employees, other individuals and vendors who will or do receive electronic payment from NSF for goods and services.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Name, address, Social Security Number, and payee banking information.

**RECORD SOURCE CATEGORIES:**

Information is obtained from individuals or payees.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

NSF standard routine uses apply. In addition, information may be disclosed to:

(1) The Department of the Treasury for the purpose of issuing the payment directly to the financial account of the payee, and reporting income paid in accordance with reporting requirements.

(2) Financial institutions for the purpose of direct deposit.

**POLICIES AND PRACTICES FOR STORAGE OF RECORDS:**

Records are stored on electronic digital media.

**POLICIES AND PRACTICES FOR RETRIEVABILITY OF RECORDS:**

Records are retrieved by supplier number.

**POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:**

Updated information automatically replaces old information. The file is cumulative and maintained permanently.

**PHYSICAL, PROCEDURAL, AND ADMINISTRATIVE SAFEGUARDS:**

Records are protected by administrative, technical, and physical safeguards administered by NSF.

**SYSTEM MANAGER(S):**

Director, Division of Financial Management, NSF headquarters, Virginia.

**RECORD ACCESS PROCEDURES:**

Follow the Requesting Access to Records procedures found at 45 CFR part 613.

**CONTESTING RECORD PROCEDURES:**

Follow the procedures found at 45 CFR part 613.

**NOTIFICATION PROCEDURE:**

Follow the Requesting Access to Records procedures found at 45 CFR part 613.

**EXEMPTIONS PROMULGATED FOR THE SYSTEM:**

None.

**NSF-67****SYSTEM NAME:**

Invention, Patent and Licensing Documents.

**SYSTEM LOCATION:**

Office of the General Counsel, National Science Foundation (NSF) headquarters, Virginia.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

35 U.S.C. 200, *et seq.*; E.O. 10096, as amended; 37 CFR part 401; and 37 CFR part 501.

**PURPOSE(S):**

To administer governmental rights to inventions made by NSF employees or during NSF-assisted research.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Employees of NSF, its grantees, or contractors, who made inventions while employed by NSF while performing NSF-assisted research.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

The system contains invention disclosures, patents and patent applications, and licenses submitted to NSF by its employees, grantees, and contractors, including inventor(s) name(s), identification of grantee or contractor, title and description of the invention, inventor(s) address(es), and patent prosecution and licensing document in situations where the inventor's rights were waived.

**RECORD SOURCE CATEGORIES:**

Record sources are Principal Investigators, academic or other applicant institutions, proposal reviewers, and NSF program officials.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

NSF standard routine uses apply. In addition, information may be disclosed to:

(1) Scientific personnel, both in NSF and other government agencies and in non-governmental organizations such as universities, who possess the expertise to understand the invention and evaluate its importance as a scientific advance.

(2) Contract patent counsel and their employees and foreign contract personnel retained by NSF for patent searching and prosecution in both the United States and foreign patent offices.

(3) Federal agencies whom NSF contacts regarding the possible use, interest in, or ownership rights in NSF inventions.

(4) Prospective licensees or technology finders who may further make the invention available to the public through sale or use.

(5) Parties, such as supervisors of inventors, whom NSF contacts to determine ownership rights, and those

parties contacting NSF to determine the Government's ownership.

(6) United States and foreign patent offices involved in the filing of NSF patent applications.

**POLICIES AND PRACTICES FOR STORAGE OF RECORDS:**

Records are stored in paper and/or on electronic digital media.

**POLICIES AND PRACTICES FOR RETRIEVABILITY OF RECORDS:**

Records are retrieved by the name of the inventor, invention-disclosure number, NSF program, or institution.

**POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:**

Records are maintained and disposed of in accordance with NARA approved record schedules.

**PHYSICAL, PROCEDURAL, AND ADMINISTRATIVE SAFEGUARDS:**

Records are protected by administrative, technical, and physical safeguards administered by NSF.

**SYSTEM MANAGER(S):**

General Counsel, Office of the General Counsel, NSF headquarters, Virginia.

**RECORD ACCESS PROCEDURES:**

Follow the Requesting Access to Records procedures found at 45 CFR part 613.

**CONTESTING RECORD PROCEDURES:**

Follow the procedures found at 45 CFR part 613.

**NOTIFICATION PROCEDURE:**

Follow the Requesting Access to Records procedures found at 45 CFR part 613.

**EXEMPTIONS PROMULGATED FOR THE SYSTEM:**

None.

**NSF-75****SYSTEM NAME:**

Early Career Doctorates Survey (ECDS)

**SYSTEM LOCATION(S):**

National Science Foundation (NSF) headquarters, Virginia, and NSF's current survey contractor location(s).

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

National Science Foundation Act of 1950, as amended, 42 U.S.C. 1862(a)(6), 1863(j)(1), 1885(d); the America COMPETES Reauthorization Act of 2010; and the Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA).

**PURPOSE(S):**

This system is used:

(1) To provide a source of information, that will be used for statistical purposes only, on demographic characteristics of individuals who received their first doctorate or doctorate-equivalent degrees within the past 10 years, regardless of the country of degree.

(2) To provide indicators of the state of science and engineering enterprise in the U.S., as required by congressional mandate.

(3) To report biennially on the participation rates of men, women, persons with disabilities, and race/ethnicity groups, in scientific and technical fields, as required by congressional mandate.

#### **CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

A sample of individuals who earned their first doctorate within the past 10 years and are working in one of the following areas of employment: U.S. academic institutions, federally funded research and development centers (FFRDCs), or the National Institutes of Health intramural research programs (NIH IRPs).

#### **CATEGORIES OF RECORDS IN THE SYSTEM:**

Educational, professional and demographic characteristics of doctorate degree holders including name, age, race, ethnicity, gender, functional limitations, educational history, professional activities and achievements, employer characteristics, professional and personal life balance, mentoring training, research opportunities, and career paths and plans of early career doctorate holders.

#### **RECORD SOURCE CATEGORIES:**

Information is obtained voluntarily from the individual.

#### **ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

NSF standard routine uses apply to the extent that such disclosure is compatible with the National Science Foundation Act of 1950, the America COMPETES Reauthorization Act of 2010, and CIPSEA. In addition, information may be disclosed to:

(1) License for the Use of Restricted Data (License) holders. Organizations (e.g. academic institutions, nonprofit organizations) and their researcher(s) granted an NSF/National Center for Science and Engineering Statistics (NCSES) License for the purpose of analyzing data and preparing scientific reports and articles. These Licensees receive data without direct personal identifiers.

(2) Federal agency sponsors. Records without personal identifiers may be disclosed to federal sponsors, their contractors and collaborating researchers and their staff under an Inter-Agency Agreement for the purpose of analyzing data, preparing scientific reports and articles, and for conducting review and evaluation of their programs.

(3) NCSES contractors. Records may be disclosed to NCSES contractors for statistical activities or purposes such as conducting surveys. Any NSF contractor who wishes to use restricted-use data for statistical activities or purposes that are not part of NCSES-sponsored work must follow the regular License procedures as laid out in routine use (1) above.

#### **POLICIES AND PRACTICES FOR STORAGE OF RECORDS:**

Records are stored on electronic digital media.

#### **POLICIES AND PRACTICES FOR RETRIEVABILITY OF RECORDS:**

Records are retrieved by the name of individual and unique, anonymous data collection identifier.

#### **POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:**

Data are cumulative and are kept indefinitely.

#### **PHYSICAL, PROCEDURAL, AND ADMINISTRATIVE SAFEGUARDS:**

Records are protected by administrative, technical, and physical safeguards administered by NSF.

#### **SYSTEM MANAGER(S):**

Division Director, National Center for Science and Engineering Statistics, NSF headquarters, Virginia.

#### **RECORD ACCESS PROCEDURES:**

This system is exempt from this requirement pursuant to 5 U.S.C. 552a(k)(4).

#### **CONTESTING RECORD PROCEDURES:**

This system is exempt from this requirement pursuant to 5 U.S.C. 552a(k)(4).

#### **NOTIFICATION PROCEDURE:**

This system is exempt from this requirement pursuant to 5 U.S.C. 552a(k)(4).

#### **EXEMPTIONS PROMULGATED FOR THE SYSTEM:**

The portions of this system consisting of statistical records have been exempted from provisions of 5 U.S.C. 552a(c)(3); (d); (e)(1); (e)(4)(G), (H), (I), and (f), pursuant to 5 U.S.C. 552a(k)(4).

[FR Doc. 2016-13452 Filed 6-9-16; 8:45 am]

**BILLING CODE 7555-01-M**

## **SECURITIES AND EXCHANGE COMMISSION**

[Investment Company Act Release No. 32139; 812-14501]

### **Ramius Archview Credit and Distressed Fund and Ramius Advisors, LLC; Notice of Application**

June 6, 2016.

**AGENCY:** Securities and Exchange Commission ("Commission").

**ACTION:** Notice of an application under section 6(c) of the Investment Company Act of 1940 (the "Act") for an exemption from sections 18(c) and 18(i) of the Act and for an order pursuant to section 17(d) of the Act and rule 17d-1 under the Act.

**SUMMARY OF APPLICATION:** Applicants request an order to permit certain registered closed-end management investment companies to issue multiple classes of shares of beneficial interest ("Shares") and to impose asset-based service and/or distribution fees and contingent deferred sales loads ("CDSCs").

**APPLICANTS:** Ramius Archview Credit and Distressed Fund (the "Fund") and Ramius Advisors, LLC (the "Adviser").

**FILING DATES:** The application was filed on June 30, 2015, and amended on September 3, 2015 and February 4, 2016.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on July 1, 2016, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0-5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

**ADDRESSES:** Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090; Applicants, 1200 Prospect Street, Suite 400, La Jolla, CA 92037.

**FOR FURTHER INFORMATION CONTACT:** Kieran G. Brown, Senior Counsel, at (202) 551-6773 or James M. Curtis, Branch Chief, at (202) 551-6712

(Division of Investment Management, Chief Counsel's Office).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at <http://www.sec.gov/search/search.htm> or by calling (202) 551-8090.

### Applicants' Representations

1. The Fund is a continuously offered closed-end management investment company registered under the Act and organized as a Delaware statutory trust. The Fund currently serves as the master fund in a master-feeder structure with one feeder fund.<sup>1</sup> If the requested relief is granted, the feeder fund will be dissolved promptly and the Fund will no longer operate within a master-feeder structure.<sup>2</sup> The Fund's investment objective is to seek to generate consistent, total returns while minimizing the risk of loss. The Fund intends to pursue its investment objective by investing primarily in debt and equity securities, loans, trade claims and derivative instruments of leveraged or financially distressed companies. In addition, the Fund will typically take long and short positions in securities, loans and derivatives.

2. The Adviser, a Delaware limited liability company, is registered as an investment adviser under the Investment Advisers Act of 1940 ("Advisers Act"). The Adviser serves as investment adviser to the Fund. Foreside Fund Services, LLC, a broker-dealer registered under the Securities Exchange Act of 1934 ("1934 Act"), acts as the distributor of the Fund.

3. The Fund continuously offers its Shares<sup>3</sup> to investors that represent that they are "qualified clients" within the meaning of Rule 205-3 under the Advisers Act ("Qualified Clients"). Shares of the Fund are not listed on any securities exchange and do not trade on an over-the-counter system such as NASDAQ. Applicants do not expect that any secondary market will develop for the Shares.

4. The Fund currently offers a single class of Shares (the "Initial Class") at net asset value per share without a sales load and without an annual asset-based

service and/or distribution fee. The Fund proposes to issue multiple classes of Shares and specifically proposes to offer a new Share class (the "New Class"): (1) Only to Qualified Clients; (2) at net asset value plus a front-end sales load of up to 3%; and (3) subject to an annual distribution/shareholder fee of 0.75%. The front-end sales load and annual distribution/shareholder servicing fee to be charged to the New Class Shares will be the same as those currently charged to the feeder fund Shares. The Fund intends to continue to offer Initial Class Shares, without a sales load and without a service and/or distribution fee.

5. In order to provide a limited degree of liquidity to shareholders, the Fund may from time to time offer to repurchase Shares, in an amount not to exceed 25% of the Fund's net asset value, at their then current net asset value in accordance with rule 13e-4 under the 1934 Act pursuant to written tenders by shareholders.<sup>4</sup> Repurchases will be made at such times, in such amounts and on such terms as may be determined by the Fund's board of trustees ("Board"), in its sole discretion.<sup>5</sup> Repurchases will not commence for at least six months following the date of the initial closing for subscriptions for Shares. Following such date, the Adviser will recommend to the Board (subject to its discretion) that the Fund offer to repurchase Shares from shareholders on a quarterly basis.

6. Applicants request that the order also apply to any other continuously offered registered closed-end management investment company existing now or in the future for which the Adviser or any entity controlling, controlled by, or under common control with the Adviser acts as investment adviser and which provides periodic liquidity with respect to its Shares through tender offers conducted in compliance with rule 13e-4 under the 1934 Act.<sup>6</sup>

<sup>4</sup> Likewise, the feeder fund's repurchase offers are conducted pursuant to rule 13e-4 under the 1934 Act.

<sup>5</sup> Shares are subject to an Early Repurchase Fee at a rate of 2% of the net asset value of any Shares repurchased by the Fund that were held for less than one year. The Early Repurchase Fee will equally apply to all shareholders of the Fund, regardless of class, consistent with section 18 of the Act and rule 18f-3 under the Act. To the extent the Fund determines to waive, impose scheduled variations of, or eliminate the Early Repurchase Fee, it will do so consistently with the requirements of rule 22d-1 under the Act as if the Early Repurchase Fee were a CDSC and as if the Fund were an open-end investment company, and the Fund's waiver of, scheduled variation in, or elimination of, the Early Repurchase Fee will apply uniformly to all shareholders of the Fund.

<sup>6</sup> The Fund and any other investment company relying on the requested relief will do so in a

7. Applicants represent that any asset-based service and/or distribution fees will comply with the provisions of rule 2830(d) of the Conduct Rules of the National Association of Securities Dealers, Inc. ("NASD Conduct Rule 2830") as if that rule applied to the Fund.<sup>7</sup> Applicants also represent that the Fund will disclose in its prospectus, the fees, expenses and other characteristics of each class of Shares offered for sale by the prospectus as is required for open-end multiple class funds under Form N-1A. As is required for open-end funds, the Fund will disclose its expenses in shareholder reports, and disclose any arrangements that result in breakpoints in or elimination of sales loads in its prospectus.<sup>8</sup> The Fund will also comply with any requirements that may be adopted by the Commission or FINRA regarding disclosure at the point of sale and in transaction confirmations about the costs and conflicts of interest arising out of the distribution of open-end investment company shares, and regarding prospectus disclosure of sales loads and revenue sharing arrangements as if those requirements applied to the Fund and the Distributor.<sup>9</sup> The Fund will contractually require that the Distributor and any other distributor of the Fund's Shares comply with such requirements in connection with the distribution of Shares of the Fund.

8. The Fund will allocate all expenses incurred by it among the various classes of Shares based on the net assets of the Fund attributable to each class, except that the net asset value and expenses of each class will reflect distribution fees, service fees, and any other incremental expenses of that class. Expenses of the Fund allocated to a particular class of Shares will be borne on a pro rata basis

manner consistent with the terms and conditions of the application. Applicants represent that any person presently intending to rely on the requested relief is listed as an applicant.

<sup>7</sup> All references to NASD Conduct Rule 2830 include any successor or replacement rule that may be adopted by the Financial Industry Regulatory Authority ("FINRA").

<sup>8</sup> See Shareholder Reports and Quarterly Portfolio Disclosure of Registered Management Investment Companies, Investment Company Act Release No. 26372 (Feb. 27, 2004) (adopting release) (requiring open-end investment companies to disclose fund expenses in shareholder reports); and Disclosure of Breakpoint Discounts by Mutual Funds, Investment Company Act Release No. 26464 (June 7, 2004) (adopting release) (requiring open-end investment companies to provide prospectus disclosure of certain sales load information).

<sup>9</sup> See, e.g., Confirmation Requirements and Point of Sale Disclosure Requirements for Transactions and Certain Mutual Funds and Other Securities, and Other Confirmation Requirement Amendments, and Amendments to the Registration Form for Mutual Funds, Investment Company Act Release No. 26341 (Jan. 29, 2004) (proposing release).

<sup>1</sup> The feeder fund is Ramius Archview Credit and Distressed Feeder Fund.

<sup>2</sup> In accordance with the organizational documents of the feeder fund and Delaware statutory trust law, no shareholder vote is required to liquidate and dissolve the feeder fund.

<sup>3</sup> "Shares" includes any other equivalent designation of a proportionate ownership interest of the Fund.

by each outstanding Share of that class. Applicants state that the Fund will comply with the provisions of rule 18f-3 under the Act as if it were an open-end investment company.

9. In the event the Fund imposes a CDSC, the applicants will comply with the provisions of rule 6c-10 under the Act, as if that rule applied to closed-end management investment companies. With respect to any waiver of, scheduled variation in, or elimination of the CDSC, the Fund will comply with rule 22d-1 under the Act as if the Fund were an open-end investment company.

### Applicants' Legal Analysis

#### *Multiple Classes of Shares*

1. Section 18(c) of the Act provides, in relevant part, that a closed-end investment company may not issue or sell any senior security if, immediately thereafter, the company has outstanding more than one class of senior security. Applicants state that the creation of multiple classes of Shares of the Fund may be prohibited by section 18(c).

2. Section 18(i) of the Act provides that each share of stock issued by a registered management investment company will be a voting stock and have equal voting rights with every other outstanding voting stock. Applicants state that permitting multiple classes of Shares of the Fund may violate section 18(i) of the Act because each class would be entitled to exclusive voting rights with respect to matters solely related to that class.

3. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction or any class or classes of persons, securities or transactions from any provision of the Act, or from any rule under the Act, if and to the extent such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants request an exemption under section 6(c) from sections 18(c) and 18(i) to permit the Fund to issue multiple classes of Shares.

4. Applicants submit that the proposed allocation of expenses and voting rights among multiple classes is equitable and will not discriminate against any group or class of shareholders. Applicants submit that the proposed arrangements would permit the Fund to facilitate the distribution of its Shares and provide investors with a broader choice of shareholder options. Applicants assert that the proposed closed-end investment company multiple class

structure does not raise the concerns underlying section 18 of the Act to any greater degree than open-end investment companies' multiple class structures that are permitted by rule 18f-3 under the Act. Applicants state that the Fund will comply with the provisions of rule 18f-3 as if it were an open-end investment company.

#### *CDSCs*

Applicants believe that the requested relief meets the standards of section 6(c) of the Act. Rule 6c-10 under the Act permits open-end investment companies to impose CDSCs, subject to certain conditions. Applicants state that any CDSC imposed by the Fund will comply with rule 6c-10 under the Act as if the rule were applicable to closed-end investment companies. The Fund also will disclose CDSCs in accordance with the requirements of Form N-1A concerning CDSCs as if the Fund were an open-end investment company. Applicants further state that the Fund will apply the CDSC (and any waivers, scheduled variations or eliminations of the CDSC) uniformly to all shareholders in a given class and consistently with the requirements of rule 22d-1 under the Act.

#### *Asset-Based Service and/or Distribution Fees*

1. Section 17(d) of the Act and rule 17d-1 under the Act prohibit an affiliated person of a registered investment company or an affiliated person of such person, acting as principal, from participating in or effecting any transaction in connection with any joint enterprise or joint arrangement in which the investment company participates unless the Commission issues an order permitting the transaction. In reviewing applications submitted under section 17(d) and rule 17d-1, the Commission considers whether the participation of the investment company in a joint enterprise or joint arrangement is consistent with the provisions, policies and purposes of the Act, and the extent to which the participation is on a basis different from or less advantageous than that of other participants.

2. Rule 17d-3 under the Act provides an exemption from section 17(d) and rule 17d-1 to permit open-end investment companies to enter into distribution arrangements pursuant to rule 12b-1 under the Act. Applicants request an order under section 17(d) and rule 17d-1 under the Act to permit the Fund to impose asset-based service and/or distribution fees. Applicants have agreed to comply with rules 12b-1 and

17d-3 as if those rules applied to closed-end investment companies.

### Applicants' Condition

The applicants agree that any order granting the requested relief will be subject to the following condition:

Applicants will comply with the provisions of rules 6c-10, 12b-1, 17d-3, 18f-3 and 22d-1 under the Act, as amended from time to time or replaced, as if those rules applied to closed-end management investment companies, and will comply with NASD Conduct Rule 2830, as amended from time to time, as if that rule applied to all closed-end management investment companies.

For the Commission, by the Division of Investment Management, under delegated authority.

**Robert W. Errett,**  
*Deputy Secretary.*

[FR Doc. 2016-13717 Filed 6-9-16; 8:45 am]

**BILLING CODE P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77995; File No. SR-CHX-2016-07]

### Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt Business Continuity Plan Requirements for Participants

June 6, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4<sup>2</sup> thereunder, notice is hereby given that on May 24, 2016, 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 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

CHX proposes to amend the Rules of the Exchange ("CHX Rules") to adopt Article 7, Rule 14, which corresponds to a similar rule of the Financial Industry Regulatory Authority, Inc. ("FINRA") regarding Business Continuity Plans ("BCPs").

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

CHX has designated this proposed rule change as non-controversial pursuant to Section 19(b)(3)(A)<sup>3</sup> of the Act and Rule 19b-4(f)(6)<sup>4</sup> thereunder and has provided the Commission with the notice required by Rule 19b-4(f)(6)(iii).<sup>5</sup>

The text of this proposed rule change is available on the Exchange's Web site at ([www.chx.com](http://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 CHX included statements concerning the purpose of and basis for the proposed rule changes 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 CHX 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 Changes

#### 1. Purpose

The Exchange proposes to adopt Article 7, Rule 14 to require Participants to maintain BCPs. The Exchange recognizes that BCPs serve a critical function in facilitating the operation of orderly markets in the event of a disruptive emergency. Given that the Exchange does not currently require Participants to maintain BCPs or emergency contact information, the Exchange now proposes to adopt such standards and believes that adopting BCP requirements that are similar to FINRA Rule 4370 and the BCP rules of other national securities exchanges<sup>6</sup> would better ensure that Participant BCPs meet minimum standards that are, when triggered, executed in a consistent and predictable manner, which furthers the purposes of Section 6(b)(5) of the Act by removing impediments to and perfecting the mechanism of a free and open market and a national market system, and, in general, protects investors and the public interest.<sup>7</sup> Moreover, the Exchange believes that greater harmonization between CHX Rules and FINRA Rules will result in less burdensome and more efficient

regulatory compliance for Participants that are also members of FINRA ("Dual Members"). To this end, the Exchange proposes to adopt Article 7, Rule 14, which is similar to FINRA Rule 4370, except that proposed Article 7, Rule 14 differs from FINRA Rule 4370 in the following ways:

- Addresses the unique membership, organizational and rules structures of the Exchange;
- Clarifies throughout proposed Article 7, Rule 14 that Participant BCPs must address a Participant's existing obligations to other interested parties, in addition to its existing obligations to its Customers,<sup>8</sup> and defines "interested parties," as discussed below;
- Expands alternate communication requirements to include Associated Persons<sup>9</sup> of the Participant, in addition to employees, and other interested parties, in addition to Customers; and
- Expands alternate physical location requirements to include Associated Persons of the Participant, in addition to employees.

Specifically, proposed paragraph (a) provides as follows:

Each Participant must create and maintain a written business continuity plan ("BCP") identifying procedures relating to an emergency or significant business disruption. Such procedures must be reasonably designed to enable the Participant to meet its existing obligations to Customers and other interested parties. The BCP must be made available promptly upon request to the Exchange staff.

Unlike FINRA Rule 4370(a), which includes additional language that BCPs must address "existing relationships with other broker-dealers and counterparties," the Exchange proposes to clarify that requirement by omitting such language from proposed Article 7 Rule 14(a) and, rather, provide that BCPs must be reasonably designed to enable the Participant to meet its existing obligations to Customers and other interested parties. Moreover, the Exchange proposes to define "other interested parties" to be inclusive of other broker-dealers and counterparties, under proposed paragraph (g)(3), which provides as follows:

<sup>8</sup> Incidentally, the Exchange proposes to amend CHX Article 1, Rule 1(hh) defining "Customer" to correspond to FINRA Rule 160(b)(4), so as to provide, "'Customer' shall not include a broker or dealer registered with the Commission." Currently, CHX Article 1, Rule 1(hh) provides that "'Customer' means any person or entity other than a broker or dealer registered with the Commission." The Exchange proposes to harmonize its definition of Customer with that of FINRA to clarify the scope of the term.

<sup>9</sup> See CHX Article 1, Rule 1(d) defining "Associated Person."

"Interested parties" means any person or entity to which Participant owes a fiduciary and/or legal responsibility, including, but not limited to, Customers, other brokers or dealers, vendors and banks.

To further clarify the requirement, the Exchange proposes to add the term "other interested parties" after all subsequent references to "Customers" under proposed paragraphs (c)(4), (c)(10) and (e).

Proposed paragraph (b) provides as follows:

Each Participant must update its BCP in the event of any material change to the Participant's operations, structure, business or location. Each Participant must also conduct an annual review of its BCP to determine whether any modifications are necessary in light of changes to the Participant's operations, structure, business or location.

Proposed paragraph (c) provides as follows:

The elements that comprise a BCP are flexible and may be tailored to the size and needs of a Participant. Each plan, however, must at a minimum, address:

- (1) Data back-up and recovery (hard copy and electronic);
- (2) All mission critical systems;
- (3) Financial and operational assessments;
- (4) Alternate communications between Customers and the Participant and between other interested parties and the Participant;
- (5) Alternate communications between the Participant and its employees and between the Participant and its Associated Persons;
- (6) Alternate physical location of employees and the Participant's Associated Persons;
- (7) Critical business constituent, bank, and counter-party impact;
- (8) Regulatory reporting;
- (9) Communications with all regulators; and
- (10) How the Participant will assure Customers and other interested parties have prompt access to their funds and securities in the event that the Participant determines that it is unable to continue its business.

Each Participant must address the above-listed categories to the extent applicable and necessary. If any of the above-listed categories is not applicable, the Participant's BCP need not address the category. The Participant's BCP, however, must document the rationale for not including such category in its plan. If a Participant relies on another entity for any one of the above-listed categories or any mission critical system, the Participant's BCP must address this relationship.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

<sup>5</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>6</sup> See e.g., NYSE MKT Equities Rule 4370.

<sup>7</sup> 15 U.S.C. 78f(b)(5).

Notably, the Exchange proposes to expand the alternate communications and physical location requirements to include Associated Persons under proposed paragraphs (c)(5) and (c)(6).

Proposed paragraph (d) provides as follows:

Each Participant must designate a member of senior management to approve the plan and he or she shall be responsible for conducting the required annual review. The member of senior management must also be a registered principal.

Proposed paragraph (e) provides as follows:

Each Participant must disclose to its Customers and other interested parties how its BCP addresses the possibility of a future significant business disruption and how the Participant plans to respond to events of varying scope. At a minimum, such disclosure must be made in writing to Customers and other interested parties at account opening, posted on the Participant's Web site (if the Participant maintains a Web site), and mailed to Customers or other interested parties upon request.

Proposed paragraph (f)(1) provides as follows:

Each Participant shall report to the Exchange, via such electronic or other means as the Exchange may specify, prescribed emergency contact information for the Participant. The emergency contact information for the Participant includes designation of two Associated Persons as emergency contact persons. At least one emergency contact person shall be a member of senior management and a registered principal of the Participant. If a Participant designates a second emergency contact person who is not a registered principal, such person shall be a member of senior management who has knowledge of the Participant's business operations. A Participant with only one Associated Person shall designate as a second emergency contact person an individual, either registered with another firm or nonregistered, who has knowledge of the Participant's business operations (e.g., the Participant's attorney, accountant, or clearing firm contact).

Proposed paragraph (f)(2) provides as follows:

Each Participant must promptly update its emergency contact information, via such electronic or other means as the Exchange may specify, in the event of any material change, but in any event not later than 30 days following any change in such information. In addition, each Participant shall review and, if

necessary, update its required contact information within 17 business days after the end of each calendar year.

Proposed paragraph (f)(2) is similar to FINRA Rule 4370(f)(2), except that proposed paragraph (f)(2) includes the explicit timing requirements of FINRA Rule 4517(c)(1). Since CHX Rules do not include a rule or provision similar to FINRA Rule 4517, the Exchange believes it is appropriate to incorporate such timing requirements into proposed paragraph (f)(2).

Proposed paragraph (g) provides as follows:

For purposes of this Rule, the following terms shall have the meanings specified below:

(1) "Mission critical system" means any system that is necessary, depending on the nature of a Participant's business, to ensure prompt and accurate processing of securities transactions, including, but not limited to, order taking, order entry, execution, comparison, allocation, clearance and settlement of securities transactions, the maintenance of Customer or other interested party accounts, access to Customer or other interested party accounts and the delivery of funds and securities.

(2) "Financial and operational assessment" means a set of written procedures that allow a Participant to identify changes in its operational, financial, and credit risk exposures.

(3) "Interested parties" means any person or entity to which Participant owes a fiduciary and/or legal responsibility, including, but not limited to, Customers, other brokers or dealers, counter-parties, vendors and banks.

#### Operative Date

The Exchange proposes to make the proposed rule change operative pursuant to two weeks' notice by the Exchange to its Participants via Information Memorandum, but not on a date prior to the expiration of the thirty (30) days pre-operative waiting period contained in Rule 19b-4(f)(6)(iii) under the Act.<sup>10</sup>

#### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act<sup>11</sup> in general, and furthers the objectives of Sections 6(b)(5) of the Act<sup>12</sup> in particular, in that they are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of

trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Specifically, the Exchange believes that adopting standardized BCP requirements that are similar to FINRA Rule 4370 and the BCP rules of other national securities exchanges<sup>13</sup> would better ensure that Participant BCPs meet minimum standards that are, when triggered, executed in a consistent and predictable manner, which furthers the purposes of Section 6(b)(5) of the Act by removing impediments to and perfecting the mechanism of a free and open market and a national market system, and, in general, protects investors and the public interest.<sup>14</sup>

The Exchange also believes that the proposed rule change supports the objectives of the Act by providing greater harmonization between CHX Rules and FINRA Rules, which would result in less burdensome and more efficient regulatory compliance for Dual Members. To the extent that proposed Article 7, Rule 14 differs from FINRA Rules 4370 and 4517(c)(1), such differences are non-substantive in nature, merely clarify the scope of the rule, expands certain alternative communication and location requirements to apply to Associated Persons of a Participant or, in the case of the proposed term "interested parties," better defines the type of contra-parties that must be contemplated in the BCP.

#### *B. Self-Regulatory Organization's Statement of 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. To the contrary, the proposed rule change will harmonize CHX Rules with FINRA Rules regarding BCPs and, thus, has no impact on competition.

#### *C. Self-Regulatory Organization's Statement on Comments Regarding the Proposed Rule Changes Received From Members, Participants or Others*

No written comments were either solicited or received.

### **III. Date of Effectiveness of the Proposed Rule Changes and Timing for Commission Action**

The Exchange believes that the proposal qualifies for immediate effectiveness upon filing as non-

<sup>10</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>11</sup> 15 U.S.C. 78f.

<sup>12</sup> 15 U.S.C. 78f(b)(5).

<sup>13</sup> See *supra* note 6.

<sup>14</sup> See *supra* note 12.

controversial under Section 19(b)(3)(A) of the Act<sup>15</sup> and paragraph (f)(6) of Rule 19b-4 thereunder.<sup>16</sup>

The Exchange asserts that the proposed rule change: (1) Will not significantly affect the protection of investors or the public interest, (2) will not impose any significant burden on competition, and (3) and will not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate. In addition, the Exchange provided 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, or such shorter time as designated by the Commission.<sup>17</sup> While the Exchange does not currently have a rule that requires Participants maintain BCPs, the Exchange believes that the proposed rule change raises no novel issues, as it is substantively consistent with FINRA Rules 4370 and 4517(c)(1). Moreover, although proposed Article 7, Rule 14 differs from FINRA Rule 4370 in that the proposed rule expands alternative communication and location requirements to Associated Persons of Participants and explicitly requires BCPs contemplate a broader range of contra-parties (*i.e.*, interested parties), the Exchange believes that such differences are non-controversial as they merely expand FINRA Rule 4370 requirements to additional parties that rely on the orderly operation of the Participant in the event of an emergency. The Exchange also notes that the proposed rule change would apply to all Participants and not only Dual Members. As such, the Exchange has designated this rule filing as non-controversial under Section 19(b)(3)(A) of the Act<sup>18</sup> and paragraph (f)(6) of Rule 19b-4 thereunder.<sup>19</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) of the Act to determine whether the proposed rule should be approved or disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CHX-2016-07 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-CHX-2016-07. 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 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 will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CHX-2016-07 and should be submitted on or before July 1, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>20</sup>

**Robert W. Errett,**  
*Deputy Secretary.*

[FR Doc. 2016-13715 Filed 6-9-16; 8:45 am]

BILLING CODE 8011-01-P

#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77996; File No. SR-NYSE-2016-22]

#### **Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change, as Modified by Amendment No. 5, To Adopt Initial and Continued Listing Standards for the Listing of Equity Investment Tracking Stocks and Adopt Listing Fees Specific to Equity Investment Tracking Stocks**

June 6, 2016.

On April 7, 2016, the New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to adopt initial and continued listing standards for the listing of Equity Investment Tracking Stocks and to adopt fees for Equity Investment Tracking Stocks. The proposed rule change was published for comment in the **Federal Register** on April 27, 2016.<sup>3</sup> On April 20, 2016, the Exchange filed Amendment No. 1 to the proposed rule change, which superseded the original filing in its entirety.<sup>4</sup> On May 17, 2016, the Exchange filed Amendment No. 5 to the proposal, which superseded the filing, as amended by Amendment No. 1. Amendment No. 5 was published for comment in the **Federal Register** on May 23, 2016.<sup>5</sup> No comments have been received on the proposed rule change in response to both the original publication

<sup>20</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 77674 (April 21, 2016), 81 FR 24919 (April 27, 2016).

<sup>4</sup> On May 13, 2016, the Exchange submitted and withdrew Amendment No. 2 to the proposed rule change. On May 13, 2016, the Exchange filed Amendment No. 3 to the proposed rule change, and on May 16, 2016 the Exchange withdrew Amendment No. 3 to the proposed rule change. On May 16, 2016 the Exchange submitted Amendment No. 4 to the proposal, and on May 17, 2016, the Exchange withdrew Amendment No. 4 to the proposed rule change.

<sup>5</sup> See Securities Exchange Act Release No. 77850 (May 17, 2016), 81 FR 32360 (May 23, 2016).

<sup>15</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>16</sup> 17 CFR 240.19b-4.

<sup>17</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>18</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>19</sup> 17 CFR 240.19b-4.

of the proposal in the **Federal Register**<sup>6</sup> and, to date, in response to the subsequent publication of the proposal as modified by Amendment No. 5.<sup>7</sup>

Section 19(b)(2) of the Act<sup>8</sup> provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is June 11, 2016. The Commission is extending this 45-day time period for Commission action on the proposed rule change.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider this proposed rule change, as modified by Amendment No. 5.<sup>9</sup> Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,<sup>10</sup> and for the reason noted above, designates July 26, 2016 as the date by which the Commission should either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR-NYSE-2016-22).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**Robert W. Errett,**  
Deputy Secretary.

[FR Doc. 2016-13716 Filed 6-9-16; 8:45 am]

**BILLING CODE 8011-01-P**

## DEPARTMENT OF STATE

[Public Notice 9601]

**In the Matter of the Designation of Yarmouk Martyrs Brigade, aka Katibah Shuhada' al-Yarmouk, aka Liwa' Shuhada' al-Yarmouk, aka Yarmouk Brigade, aka Brigade of the Yarmouk Martyrs, aka Martyrs of Yarmouk, aka Al Yarmuk Brigade, aka Shuhda al-Yarmouk, aka Shohadaa al-Yarmouk Brigade, aka Suhada'a al-Yarmouk Brigade, aka Shuhada al Yarmouk Brigade, aka YMB, aka LSY as a Specially Designated Global Terrorist**

Acting under the authority of and in accordance with section 1(b) of Executive Order 13224 of September 23, 2001, as amended by Executive Order 13268 of July 2, 2002, and Executive Order 13284 of January 23, 2003, I hereby determine that the entity known as Yarmouk Martyrs Brigade, also known as Katibah Shuhada' al-Yarmouk, also known as Liwa' Shuhada' al-Yarmouk, also known as Yarmouk Brigade, also known as Brigade of the Yarmouk Martyrs, also known as Martyrs of Yarmouk, also known as Al Yarmuk Brigade, also known as Shuhda al-Yarmouk, also known as Shohadaa al-Yarmouk Brigade, also known as Suhada'a al-Yarmouk Brigade, also known as Shuhada al Yarmouk Brigade, also known as YMB, also known as LSY committed, or poses a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.

Consistent with the determination in section 10 of Executive Order 13224 that prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously, I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register**.

Dated: May 31, 2016.

**John F. Kerry,**  
Secretary of State.

[FR Doc. 2016-13676 Filed 6-9-16; 8:45 am]

**BILLING CODE 4710-AD-P**

## SURFACE TRANSPORTATION BOARD

[Docket No. FD 36035]

**Union Pacific Railroad Company—  
Trackage Rights Exemption—BNSF  
Railway Company**

BNSF Railway Company (BNSF), pursuant to a trackage rights agreement dated April 5, 2016, has agreed to grant Union Pacific Railroad Company (UP) overhead trackage rights over approximately 41.3 miles of railroad between milepost 1.6, near Kansas City, Mo., and milepost 42.9, near Paola, Kan., on BNSF's Fort Scott Subdivision.<sup>1</sup>

The purpose of the proposed transaction is to allow UP to continue moving trains between Paola and Kansas City, as an alternative to UP's own route, thereby providing for increased efficiency in operations.<sup>2</sup>

UP may consummate the transaction on or after June 24, 2016, the effective date of the exemption (30 days after the verified notice of exemption was filed).

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk & Western Railway—Trackage Rights—Burlington Northern, Inc.*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Railway—Lease & Operate—California Western Railroad*, 360 I.C.C. 653 (1980).

This notice is filed under 49 CFR 1180.2(d)(7). If the notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed by June 17, 2016 (at least seven days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 36035, must be filed with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423-0001. In addition, a copy of each pleading must be served on Jeremy M. Berman, 1400

<sup>1</sup> A redacted version of the Agreement between UP and BNSF was filed with the notice of exemption. UP simultaneously filed a motion for a protective order to protect the confidential and commercially sensitive information contained in the unredacted version of the Agreement, which UP submitted under seal in this proceeding. That motion will be addressed in a separate decision.

<sup>2</sup> UP states that it obtained trackage rights over the rail line as successor to the Missouri-Kansas-Texas Railroad Company (MKT). MKT was granted authority to acquire the trackage rights from Burlington Northern Railroad Company in *Missouri-Kansas-Texas Railroad—Trackage Rights—Burlington Northern Railroad*, FD 30672 (ICC served July 8, 1985).

<sup>6</sup> See note 3 supra.

<sup>7</sup> See note 5 supra.

<sup>8</sup> 15 U.S.C. 78s(b)(2).

<sup>9</sup> See note 4 supra, and accompanying text.

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>11</sup> 17 CFR 200.30-3(a)(31).

Douglas St., Stop 1580, Omaha, NE 68179.

Board decisions and notices are available on our Web site at [WWW.STB.DOT.GOV](http://WWW.STB.DOT.GOV).

Decided: June 7, 2016.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

**Kenyatta Clay,**  
Clearance Clerk.

[FR Doc. 2016-13754 Filed 6-9-16; 8:45 am]

**BILLING CODE 4915-01-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2016-0161]

#### Agency Information Collection Activities; Extension of a Currently-Approved Information Collection: Unified Registration System, FMCSA Registration/Updates

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for review and approval and invites public comment. The FMCSA requests approval to extend an ICR titled, "Unified Registration System, FMCSA Registration/Updates." This ICR is due to the Agency's development of a Final Rule titled, "Unified Registration System" (78 FR 52608 dated August 23, 2013) requiring those entities that are subject to the FMCSA's licensing, registration and certification regulations to use a new electronic on-line application Form MCSA-1 titled, "FMCSA Registration/Update(s)" to make data more readily accessible for all regulated entities. On October 21, 2015, FMCSA published a final rule delaying the final effective date of the URS final rule until September 30, 2016, with full compliance not due until December 31, 2016.

**DATES:** We must receive your comments on or before August 9, 2016.

**ADDRESSES:** You may submit comments identified by Federal Docket Management System (FDMS) Docket Number FMCSA-2016-0161 using any of the following methods:

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

- *Fax:* 1-202-493-2251.

- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building, Ground Floor, Room W12-140, 20590-0001.

- *Hand Delivery or Courier:* West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m. E.T., Monday through Friday, except Federal holidays.

**Instructions:** All submissions must include the Agency name and docket number. For detailed instructions on submitting comments and additional information on the exemption process, see the Public Participation heading below. Note that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. Please see the Privacy Act heading below.

**Docket:** For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>, and follow the online instructions for accessing the dockets, or go to the street address listed above.

**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 for the Federal Docket Management System published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit <http://edocket.access.gpo.gov/2008/pdf/E8-794.pdf>.

**Public Participation:** The Federal eRulemaking Portal is available 24 hours each day, 365 days each year. You can obtain electronic submission and retrieval help and guidelines under the "help" section of the Federal eRulemaking Portal Web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard, or print the acknowledgement page that appears after submitting comments online. Comments received after the comment closing date will be included in the docket and will be considered to the extent practicable.

**FOR FURTHER INFORMATION CONTACT:** Mr. Jeffrey Secrist, Office of Registration and Safety Information, Department of Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590-0001. Telephone Number: (202) 385-2367; Email Address: [jeff.secris@dot.gov](mailto:jeff.secris@dot.gov).

*dot.gov*. Office hours are from 8:00 a.m. to 5:00 p.m., E.T., Monday through Friday, except Federal holidays.

#### SUPPLEMENTARY INFORMATION:

**Background:** Section 103 of the ICC Termination Act of 1995 (ICCTA) enacted 49 U.S.C. 13908, which required the Secretary of Transportation (Secretary) to propose regulations to replace four current identification and registration systems with a single, online, Federal system—the Unified Registration System (URS). The Unified Carrier Registration Act of 2005, subtitle C of title IV of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) [Pub. L. 109-59, 119 Stat. 1714, August 10, 2005] modified the requirements for a unified registration system by amending § 13908. In particular, SAFETEA-LU repealed the Single State Registration System (SSRS), one of the four systems identified in § 13908, and replaced it with the Unified Carrier Registration Agreement. It also modified the requirement that fees collected under the new system cover the costs of operating and upgrading the registration by placing limitations on certain fees that the Agency could charge. Section 4304 of SAFETEA-LU reiterated the congressional requirement for a single, Federal online system to replace the four individual systems identified under 49 U.S.C. 13908. This consolidation simplifies current Federal registration processes and makes data on interstate motor carriers, property brokers, freight forwarders, and other regulated entities more accessible. The URS applies to virtually every motor carrier, property broker, freight forwarder, cargo tank facility, and intermodal equipment provider that is required to register with the United States Department of Transportation (USDOT).

This information collection supports the DOT Strategic Goal of Safety. It will streamline the existing registration process and ensure that FMCSA can more efficiently track motor carriers, freight forwarders, brokers, and other entities regulated by the Agency.

The information on the on-line Form MCSA-1 will be used by FMCSA to identify its regulated entities, to help prioritize the Agency's activities, to aid in assessing the safety outcomes of those activities and for statistical purposes. The FMCSA will collect the information electronically through on-line forms. The information is currently being collected through a series of forms, which may be filed on-line or on paper. Every interstate motor carrier operating commercial motor vehicles is required to register with FMCSA to obtain a

USDOT Number. Most for-hire carriers are also required to file a separate application for operating authority under 49 U.S.C. 13901. Mexico- and Non-North America-domiciled motor carriers file a separate registration form. The information collection will replace these three collections and create a single on-line form. This rule will streamline the collection and eliminate the need for motor carriers to file the same information on multiple forms.

*Title:* Unified Registration System, FMCSA Registration/Updates.

*OMB Control Number:* 2126-0051.

*Type of Request:* Extension of a currently approved information collection.

*Respondents:* Motor carriers (including private and exempt for-hire carriers effective September 30, 2016), freight forwarders, brokers, cargo tank (CT) facilities, and intermodal equipment providers (IEPs) that are required to initially register for and then maintain their safety and operating authority registrations with USDOT.

*Estimated Number of Respondents:* 78,400 respondents for initial registration filings; 507,500 respondents for completing the biennial update; 13,000 respondents for filing name/address change requests; 1,100 respondents for transfer of operating authority registration notifications; and 2,030 respondents for reinstatements of operating authority registration.

*Estimated Time per Response:* 1.34 hours for initial registration filings; and 10 minutes each for the biennial update, name/address change request, notification of transfer of operating authority registration, and reinstatement of revoked or inactive registration.

*Expiration Date:* November 30, 2016.

*Frequency of Response:* This information collection covers the initial application to register with FMCSA as a motor carrier, freight forwarder, broker, intermodal equipment provider, and cargo tank facility; as well as subsequent applications to complete a biennial update or any other update of the information recorded on the registration system, submit a name/address change request, seek a reinstatement of revoked or inactive registration, and notify the Agency of a transfer of operating authority registration.

*Estimated Total Annual Burden:* 105,000 burden hours for the initial applications of registration; 84,600 burden hours for completing biennial updates; 2,200 burden hours for filing name/address change requests; 180 burden hours for operating authority registration transfer notifications; and 340 burden hours for reinstatements of revoked or inactive registration; for a

total estimated annual burden of 192,320 hours.

*Public Comments Invited:* You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the performance of FMCSA's functions; (2) the accuracy of the estimated burden; (3) ways for FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize or include your comments in the request for OMB's clearance of this information collection.

Issued on: June 3, 2016.

**G. Kelly Regal,**

*Associate Administrator, Office of Research and Information Technology.*

[FR Doc. 2016-13752 Filed 6-9-16; 8:45 am]

**BILLING CODE 4910-EX-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2016-0167]

#### Parts and Accessories Necessary for Safe Operation, Lamps and Reflective Devices; Application for an Exemption From STEMCO LP

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of application for exemption; request for comments.

**SUMMARY:** FMCSA requests public comment on an application for exemption from STEMCO LP (STEMCO) to allow motor carriers to operate commercial motor vehicles (CMVs) that are equipped with STEMCO's TrailerTail® aerodynamic device with rear identification lamps and rear clearance lamps that are mounted lower than currently permitted by the Agency's regulations. The Federal Motor Carrier Safety Regulations (FMCSRs) require rear identification lamps and rear clearance lamps to be located "as close as practicable to the top of the vehicle." While the TrailerTail® aerodynamic device is currently mounted slightly below the roof of the vehicle, STEMCO states that this offset prevents the device from delivering the maximum available fuel economy benefit as opposed to mounting it flush with the top of the vehicle which may block the visibility of the rear identification lamps and rear clearance lamps. STEMCO believes that locating the rear identification lamps and rear

clearance lamps lower on the vehicle, on a horizontal plane with other required lamps (stop, turn, and tail lamps) as is done on a flatbed trailer or an intermodal chassis, will maintain a level of safety that is equivalent to, or greater than, the level of safety achieved without the exemption. STEMCO is requesting the temporary exemption in advance of petitioning FMCSA to conduct a rulemaking to amend 49 CFR 393.11.

**DATES:** Comments must be received on or before July 11, 2016.

**ADDRESSES:** You may submit comments bearing the Federal Docket Management System (FDMS) Docket ID FMCSA-2016-0167 using any of the following methods:

- *Web site:* <http://www.regulations.gov>. Follow the instructions for submitting comments on the Federal electronic docket site.
- *Fax:* 1-202-493-2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590-0001.
- *Hand Delivery:* Ground Floor, Room W12-140, DOT Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m. e.t., Monday-Friday, except Federal holidays.

*Instructions:* All submissions must include the Agency name and docket number for this notice. For detailed instructions on submitting comments and additional information on the exemption process, see the "Public Participation" heading below. Note that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. Please see the "Privacy Act" heading for further information.

*Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> or to Room W12-140, DOT Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Privacy Act:* In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at [www.dot.gov/privacy](http://www.dot.gov/privacy).

*Public participation:* The <http://www.regulations.gov> Web site is generally available 24 hours each day,

365 days each year. You may find electronic submission and retrieval help and guidelines under the “help” section of the <http://www.regulations.gov> Web site as well as the DOT’s <http://docketsinfo.dot.gov> Web site. If you would like notification that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgment page that appears after submitting comments online.

**FOR FURTHER INFORMATION CONTACT:** Mr. Jose Cestero, Vehicle and Roadside Operations Division, Office of Bus and Truck Standards and Operations, MC-PSV, (202) 366-5541; Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590-0001.

#### SUPPLEMENTARY INFORMATION:

##### Background

Section 4007 of the Transportation Equity Act for the 21st Century (TEA-21) [Pub. L. 105-178, June 9, 1998, 112 Stat. 401] amended 49 U.S.C. 31315 and 31136(e) to provide authority to grant exemptions from the Federal Motor Carrier Safety Regulations (FMCSRs). On August 20, 2004, FMCSA published a final rule (69 FR 51589) implementing section 4007. Under this rule, FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public with an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews the safety analyses and the public comments and determines whether granting the exemption would likely achieve a level of safety equivalent to or greater than the level that would be achieved by the current regulation (49 CFR 381.305).

The decision of the Agency must be published in the **Federal Register** (49 CFR 381.315(b)). If the Agency denies the request, it must state the reason for doing so. If the decision is to grant the exemption, the notice must specify the person or class of persons receiving the exemption and the regulatory provision or provisions from which an exemption is granted. The notice must specify the effective period of the exemption (up to 5 years) and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.315(c) and 49 CFR 381.300(b)).

##### STEMCO Application for Exemption

STEMCO, on behalf of motor carriers utilizing its TrailerTail® aerodynamic

devices, applied for an exemption from 49 CFR 393.11 to allow rear identification lamps and rear clearance lamps to be mounted lower than currently permitted by the Agency’s regulations. A copy of the application is included in the docket referenced at the beginning of this notice.

Table 1 of § 393.11, “Required lamps and reflectors on commercial motor vehicles,” specifies the requirements for lamps, reflective devices and associated equipment by the type of CMV. All CMVs manufactured on or after December 25, 1968, must, at a minimum, meet the applicable requirements of Federal Motor Vehicle Safety Standard (FMVSS) No. 108, “Lamps, reflective devices, and associated equipment,” in effect at the time of manufacture of the vehicle. Rear identification lamps must be mounted as close as practicable to the top of the vehicle. One lamp must be as close as practicable to the vertical centerline and one on each side of the center lamp with the lamp centers spaced not less than 6 inches or more than 12 inches apart, and all on the same level. One rear clearance lamp must be located on each side of the vertical centerline of the vehicle to indicate overall width, both of which must be on the same level and as high as practicable.

The U.S. Environmental Protection Agency (EPA) and the Department of Transportation’s National Highway Traffic Safety Administration (NHTSA) have jointly proposed a national program that would establish the next phase of greenhouse gas (GHG) emissions and fuel efficiency standards for medium- and heavy-duty vehicles. This “Phase 2 program” would significantly reduce carbon emissions and improve the fuel efficiency of heavy-duty vehicles, helping to address the challenges of global climate change and energy security. In February 2015, STEMCO purchased ATDynamics and its TrailerTail® product line, a collapsible boat tail technology that improves the rear aerodynamic shape of CMVs. STEMCO states that motor carriers are evaluating the TrailerTail® rear aerodynamic device to help meet (1) the proposed Phase 2 program standards, and (2) the California Air Resources Board (CARB) Tractor-Trailer Greenhouse Gas Regulation for dry van and refrigerated van type trailers that has been in effect since 2010.

For newly manufactured trailers, STEMCO states that the TrailerTail® top panel is mounted 1.5–3.5 inches below the roof of the trailer in order to comply with the FMVSS No. 108 and FMCSR mounting location requirements for rear

identification and clearance lamps. However, STEMCO states:

This inset creates an un-aerodynamic gap as airflow transitions from the trailer roof onto the TrailerTail panels and has prevented TrailerTails from delivering the maximum available fuel economy benefit. Wind tunnel flow visualization highlights the contrast in airflow between flush and inset panels and our own internal testing estimates an additional 0.14 delta C<sub>D</sub>A (measured drag area) gain and 70 million gallons of annual diesel fuel savings can be achieved simply by installing TrailerTails flush with the trailer roof. In order to evaluate the actual performance of flush mounted TrailerTail aerodynamic systems on actual fleet based fuel economy, it is necessary to request relief from the location requirements for upper identification lamps and rear clearance lamps on commercial van trailers and box trucks. Additionally, these lower clearance and identification lamp locations will pave the way for the commercial launch of collapsible boat tails for roll door box trailers, where the rear upper header is a critical mounting location of boat tail components.

In support of its application, STEMCO states that “The relocation of the rear identification lamps and rear clearance lamps to a lower location on the trailer or box truck are equivalent to the current required lamp location on a flatbed trailer or intermodal chassis, so no safety impact is anticipated.” In addition, according to the application:

STEMCO believes that there will be no safety impact from the relocation of both the rear identification lamps and the rear clearance lamps to a location on an approximate horizontal plane with other rear lamps. NHTSA issued legal interpretations from 1968 until approximately 1999 to trailer manufacturers to allow the lower mounting location for rear identification lamps and rear clearance lamps when there was no “practicable” means of installing the lamps “as close as practicable to the top of the vehicle.” NHTSA subsequently issued an interpretative rule on April 5, 1999, 64 FR 16358, suggesting that trailer manufacturers could no longer mount lamps at the lower location as narrow lamps were now readily available, and NHTSA would no longer defer to a manufacturer’s subjective determination of practicability for locating lamps in the rear upper header location on van trailers and box trucks. However, NHTSA noted in that same Notice that they did not intend to bring enforcement actions based on this interpretive rule immediately. Subsequently, trailer manufacturers continued to manufacture van trailers and box trucks with the rear identification lamps and rear clearance lamps mounted lower on the vehicles on an approximate horizontal plane with the other required lamps.”

STEMCO states that without the exemption, it will be unable to verify fleet performance of a higher performance TrailerTail® design that is expected to provide the maximum available fuel economy benefit that may

be necessary in order to meet future fuel efficiency requirements.

### Request for Comments

In accordance with 49 U.S.C. 31315 and 31136(e), FMCSA requests public comment from all interested persons on STEMCO's application for an exemption from 49 CFR 393.11. All comments received before the close of business on the comment closing date indicated at the beginning of this notice will be considered and will be available for examination in the docket at the location listed under the **ADDRESSES** section of this notice.

Comments received after the comment closing date will be filed in the public docket and will be considered to the extent practicable. In addition to late comments, FMCSA will continue to file relevant information in the public docket that becomes available after the comment closing date. Interested persons should continue to examine the public docket for new material.

Issued on: June 2, 2016.

**Larry W. Minor,**

*Associate Administrator for Policy.*

[FR Doc. 2016-13774 Filed 6-9-16; 8:45 am]

**BILLING CODE 4910-EX-P**

## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

[Docket ID PHMSA-2016-0059]

### Pipeline Safety: Public Workshop on Public Awareness

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

**ACTION:** Notice of public meeting.

**SUMMARY:** This notice is announcing a one-day public workshop PHMSA is sponsoring on public awareness to bring pipeline safety stakeholders together to review the findings from the joint Public Awareness Program Working Group's (PAPWG) Strengths, Weaknesses, Opportunities, and Threats (SWOT) Report and explore future actions that can be taken to expand public awareness and stakeholder engagement efforts. Various stakeholders, including federal and state regulators, industry, pipeline operators, public, emergency response officials, local public officials, land planners, and excavators, will engage to strengthen pipeline safety public awareness.

**DATES:** The workshop will be held on July 13, 2016. The workshop will take place from 8:00 a.m. until

approximately 5:00 p.m. central time. The workshop will be webcasted live and recorded for pipeline safety stakeholders who are unable to travel to the workshop.

**ADDRESSES:** The workshop will be held in Chicago, IL. The meeting location in Chicago and the hotel information will be provided on the meeting Web site at <https://primis.phmsa.dot.gov/meetings/MtgHome.mtg?mtg=114&nocache=5719> in the near future. The meeting room location will be posted on the day of the workshop.

**Registration:** Members of the public may attend this free workshop. To help assure that adequate space is provided, all attendees, both in person and by webcast, should register in advance for the workshop at the PHMSA Public Meeting Web site at: <https://primis.phmsa.dot.gov/meetings/MtgHome.mtg?mtg=114&nocache=5719>. The meeting agenda will be posted and updated on the registration site. On-site registration will also be available for those attending in person starting at 7:00 a.m. central time. All workshop presentations will be available on the meeting registration Web site within 15 days following the workshop.

**Comments:** Members of the public may submit written comments either before or after the workshop. Comments should reference Docket No. PHMSA-2016-0059. Comments may be submitted in the following ways:

- **E-Gov Web site:** <http://www.regulations.gov>. This site allows the public to enter comments on any **Federal Register** notice issued by any agency. Follow the instructions for submitting comments.
- **Fax:** 1-202-493-2251.
- **Mail:** Docket Management System, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Room W12-140, Washington, DC 20590.

**Hand Delivery:** DOT Docket Management System, Room W12-140, on the ground floor of the West Building, 1200 New Jersey Avenue SE., Washington, DC between 9 a.m. and 5 p.m. eastern time, Monday through Friday, except Federal holidays.

**Instructions:** Identify the docket number (PHMSA-2016-0059) at the beginning of your comments. If you submit your comments by mail, submit two copies. If you wish to receive confirmation that PHMSA has received your comments, include a self-addressed stamped postcard. Internet users may submit comments at <http://www.regulations.gov>.

**Note:** Comments will be posted without changes or edits to <http://www.regulations.gov> including any personal

information provided. Please see the Privacy Act statement below for additional information.

### Privacy Act Statement

Anyone may search the electronic form of all comments received for any of our dockets. You may review DOT's complete Privacy Act Statement in the **Federal Register** published April 11, 2000, (65 FR 19477) or visit <http://dms.dot.gov>.

### Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities, or to request special assistance at the meeting, please contact Dr. Christie Murray, Director, Program Development Division, PHMSA, at (202) 366-4996 or by email at [Christie.Murray@dot.gov](mailto:Christie.Murray@dot.gov) no later than July 8, 2016.

**FOR FURTHER INFORMATION CONTACT:** Dr. Christie Murray, Director, Program Development Division, PHMSA, at 202-366-4996 or by email at [Christie.Murray@dot.gov](mailto:Christie.Murray@dot.gov).

### SUPPLEMENTARY INFORMATION:

Stakeholders are encouraged to review the PAPWG SWOT Report prior to the workshop. The PAPWG SWOT Report is available at: <https://primis.phmsa.dot.gov/comm/publicawareness/docs/PAPWG%20SWOT%20Analysis%20Report-FINAL%2005-16-16.pdf>.

The Federal pipeline safety regulations (49 CFR 192.616 and 49 CFR 195.440) require pipeline operators to develop and implement public awareness programs that follow the guidance provided by the API RP 1162, 1st Edition, "Public Awareness Programs for Pipeline Operators" (incorporated by reference in the pipeline safety regulations 49 CFR 192.616 and 49 CFR 195.440). Pipeline operators are required to implement public awareness programs that provide pipeline safety information to the affected public, emergency response officials, local public officials, and excavators. Implementing and improving public awareness programs allows pipeline stakeholders an opportunity to address pipeline safety concerns, such as third party damages, in a proactive manner.

The PAPWG was a collaborative stakeholder work group comprised of myriad pipeline safety stakeholders. The PAPWG was established in September 2013. The mission of the PAPWG was to review pipeline safety public awareness data and information from various sources, identify relevant topical review areas, perform SWOT

analyses of those topical areas, and report out on key findings to support improving public awareness.

Issued in Washington, DC, on June 7, 2016, under the authority delegated in 49 CFR 1.97.

**Alan K. Mayberry,**

*Acting Associate Administrator for Pipeline Safety.*

[FR Doc. 2016-13845 Filed 6-9-16; 8:45 am]

**BILLING CODE 4910-60-P**

## DEPARTMENT OF THE TREASURY

### Office of the Comptroller of the Currency

### FEDERAL RESERVE SYSTEM

### FEDERAL DEPOSIT INSURANCE CORPORATION

#### Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** Board of Governors of the Federal Reserve System (Board); Office of the Comptroller of the Currency (OCC), Treasury; and Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Joint notice and request for comment.

**SUMMARY:** In accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the Board, the OCC, and the FDIC (the “agencies”) may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (“OMB”) control number. The agencies have approved for public comment a proposal to extend, with minor revision, the Uniform Interagency Transfer Agent Registration and Amendment Form (“Form TA-1”), which is a currently approved collection of information. The agencies propose to modify Form TA-1, effective December 31, 2016, to require Board registrants to submit the form and attachments to a designated email address, to give FDIC registrants the option to submit the form and attachments to a designated email address, to require state savings associations to file with the FDIC, to remove outdated references to the Office of Thrift Supervision (“OTS”), to clarify the definition of a “qualifying security,” and to make other instructional clarifications. At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the agencies should modify the proposed revisions before giving final

approval. The agencies will then submit the revisions to OMB for approval.

**DATES:** Comments must be submitted on or before August 9, 2016.

**ADDRESSES:** Interested parties are invited to submit written comments to any or all of the agencies. All comments, which should refer to the OMB control number(s), will be shared among the agencies.

**Board:** You may submit comments, which should refer to “Form TA-1,” by any of the following methods:

- **Agency Web site:** <http://www.federalreserve.gov>. Follow the instructions for submitting comments on <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](mailto:regs.comments@federalreserve.gov). Include the reporting form numbers 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 <http://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 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.

**OCC:** Because paper mail in the Washington, DC, area and at the OCC is subject to delay, commenters are encouraged to submit comments by email, if possible. Comments may be sent to: Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, Attention “1557-0124, Form TA-1,” 400 7th Street SW., Suite 3E-218, Mail Stop 9W-11, Washington, DC 20219. In addition, comments may be sent by fax to 571-465-4326 or by electronic mail to [prainfo@occ.treas.gov](mailto:prainfo@occ.treas.gov).

You may personally inspect and photocopy comments at the OCC, 400 7th Street SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling 202-649-6700 or, for persons who are deaf or hard of hearing, TTY, (202) 649-5597. Upon arrival, visitors

will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.

All comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comments or supporting materials that you consider confidential or inappropriate for public disclosure.

**FDIC:** You may submit comments, which should refer to “Form TA-1,” by any of the following methods:

- **Agency Web site:** <https://www.fdic.gov/regulations/laws/federal/>. Follow the instructions for submitting comments on the FDIC Web site.
- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments.
- **Email:** [Comments@FDIC.gov](mailto:Comments@FDIC.gov). Include “Form TA-1” in the subject line of the message.

• **Mail:** Gary A. Kuiper, Counsel, Room MB-3016, or Manuel E. Cabeza, Counsel, Room MB-3105, Attn: Comments, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

• **Hand Delivery:** Comments may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7:00 a.m. and 5:00 p.m.

**Public Inspection:** All comments received will be posted without change to <https://www.fdic.gov/regulations/laws/federal/> including any personal information provided.

Additionally, commenters may send a copy of their comments to the OMB desk officer for the agencies by mail to the Office of Information and Regulatory Affairs, U.S. Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW., Washington, DC 20503; by fax to 202-395-6974; or by email to [oira\\_submission@omb.eop.gov](mailto:oira_submission@omb.eop.gov).

**FOR FURTHER INFORMATION CONTACT:** For further information about the proposed revisions to Form TA-1 discussed in this notice, please contact any of the agency staff whose names appear below. In addition, copies of the current Form TA-1 reporting form and instructions can be obtained at the Federal Financial Institutions Examination Council Web site ([http://www.ffiec.gov/ffiec\\_report\\_forms.htm](http://www.ffiec.gov/ffiec_report_forms.htm)).

**Board:** Nuha Elmaghribi, Federal Reserve Board Clearance Officer, 202-452-3884, Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, 20th and C

Streets NW., Washington, DC 20551. Telecommunications Device for the Deaf (TDD) users may call 202–263–4869.

*OCC:* Shaquita Merritt, OCC Clearance Officer, 202–649–5490 or, for persons who are deaf or hard of hearing, TTY, (202) 649–5597, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, Washington, DC 20219.

*FDIC:* Gary Kuiper, Counsel, 202–898–3877, or Manuel E. Cabeza, Counsel, 202–898–3767, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

#### **SUPPLEMENTARY INFORMATION:**

The agencies are proposing to extend, with minor revision, Form TA–1, which is a currently approved collection of information for each agency.

*Report Title:* Uniform Interagency Transfer Agent Registration and Amendment Form.

*Form Number:* Form TA–1.

*Frequency of Response:* On occasion.

*Affected Public:* National banks and their subsidiaries, federal savings associations and their subsidiaries, state member banks (“SMBs”) and their subsidiaries, state nonmember banks, state savings associations, bank holding companies (“BHCs”), certain nondeposit trust company subsidiaries of BHCs, and savings and loan holding companies (“SLHCs”).

#### **Board**

*OMB Number:* 7100–0099.

*Estimated Number of Respondents:* registrations: 2; amendments: 4.

*Estimated Average Time per Response:* registrations: 1.25 hours; amendments: 10 minutes.

*Estimated Total Annual Burden:* 4 hours.

#### **OCC**

*OMB Number:* 1557–0124.

*Estimated Number of Respondents:* registrations: 1; amendments: 10.

*Estimated Average Time per Response:* registrations: 1.25 hours; amendments: 10 minutes.

*Estimated Total Annual Burden:* 3 hours.

#### **FDIC**

*OMB Number:* 3064–0026.

*Estimated Number of Respondents:* registrations: 2; amendments: 10.

*Estimated Average Time per Response:* registrations: 1.25 hours; amendments: 10 minutes.

*Estimated Total Annual Burden:* 4 hours.

#### *General Description of Report*

Section 17A(c) of the Security Exchange Act of 1934 (the Act) requires

all transfer agents for securities registered under section 12 of the Act or, if the security would be required to be registered except for the exemption from registration provided by Section 12(g)(2)(B) or Section 12(g)(2)(G), to “fil[e] with the appropriate regulatory agency . . . an application for registration in such form and containing such information and documents . . . as such appropriate regulatory agency may prescribe as necessary or appropriate in furtherance of the purposes of this section.”<sup>1</sup> In general, an entity performing transfer agent functions for a security is required to register with its appropriate regulatory agency (“ARA”) if the security is registered on a national securities exchange or if the issuer of the security has total assets exceeding \$10 million and a class of equity security held of record by 2,000 persons or, for an issuer that is not a bank, BHC, or SLHC, by 500 persons who are not accredited investors.<sup>2</sup> The Board’s Regulation H (12 CFR 208.31(a)) and Regulation Y (12 CFR 225.4(d)), the OCC’s 12 CFR 9.20, and the FDIC’s 12 CFR part 341 implement these provisions of the Act.

To accomplish the registration of transfer agents, Form TA–1 was developed in 1975 as an interagency effort by the Securities and Exchange Commission (SEC) and the agencies. The agencies primarily use the data collected on Form TA–1 to determine whether an application for registration should be approved, denied, accelerated or postponed, and they use the data in connection with their supervisory responsibilities.

#### *Current Actions*

The agencies propose to revise the reporting instructions for Form TA–1. The Board will require, and the FDIC will provide the option for, respondents to submit a Portable Document Format (PDF) version of the form and attachments to a designated email address for each respective agency, effective December 31, 2016. In addition, the proposed revisions remove outdated references to the OTS, clarify the definition of a “qualifying security” pursuant to statutory changes, reduce the number of Form TA–1 copies that registrants are required to file with their ARA to one for all agencies, require state savings associations to file with the FDIC, and make other minor instructional clarifications.

<sup>1</sup> 15 U.S.C. 78q–1.

<sup>2</sup> 15 U.S.C. 78l(g)(1).

#### **Discussion of Proposed Revisions**

Title III of the Dodd-Frank Act Wall Street Reform and Consumer Protection Act abolishes the OTS and transfers the OTS’s functions to the OCC, the Board, and the FDIC effective as of July 21, 2011.<sup>3</sup> Therefore, there is no reason to continue to refer to the OTS on Form TA–1.

Pursuant to statutory changes,<sup>4</sup> the definition of a “qualifying security” was altered to include securities registered on a national securities exchange pursuant to Section 12(b) of the Act, as well as equity securities registered pursuant to Section 12(g)(1) of the Act for issuers that have:

(a) Total assets exceeding \$10 million and a class of equity security (other than an exempted security) held of record by either 2,000 persons, or 500 persons who are not accredited investors (as such term is defined by the SEC), and

(b) In the case of an issuer that is a bank, a savings and loan holding company (as defined in section 10 of the Home Owners’ Loan Act), or a bank holding company, as such term is defined in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841), has total assets exceeding \$10 million and a class of equity security (other than an exempted security) held of record by 2,000 or more persons.

#### *Legal Basis for the Information Collection*

The agencies have determined that Form TA–1 is mandatory and that its collection is authorized by sections 17A(c), 17(a)(3), and 23(a)(1) of the Act, as amended (15 U.S.C. 78q–1(c), 78q(a)(3), and 78w(a)(1)). Additionally, Section 3(a)(34)(B) of the Act (15 U.S.C. 78c(a)(34)(B)(ii)) provides that the OCC is the ARA in the case of a national banks and insured Federal savings associations, and subsidiaries of such institutions; the Board is the ARA for purposes of various filings by state member banks and their subsidiaries, BHCs, SLHCs, and certain nondepository trust company subsidiaries of BHCs that act as a clearing agency or transfer agent; and the FDIC is the ARA in the case of state nonmember banks and state nonmember savings associations, and subsidiaries of such institutions. The registrations are public filings and are not considered confidential.

<sup>3</sup> 12 U.S.C. 5301, *et seq.*

<sup>4</sup> See Fixing America’s Surface Transportation Act § 85001, Public Law 114–94, 129 Stat. 1312, 1797 (2010), amending 15 U.S.C. 78a *et seq.*; Jumpstart Our Business Startups Act § 501, Public Law 112–106, 126 Stat. 306, 325 (2012), amending 15 U.S.C. 78l(g)(1)(A).

Section 208.31 of the Board's regulations (12 CFR 208.31) governs registration of transfer agents for state member banks, and section 225.4(d) (12 CFR 225.4(d)) governs registration of transfer agents for bank holding companies and certain nondepository trust company subsidiaries of BHCs that act as a transfer agent. The Board is also the ARA for SLHCs seeking to act as transfer agent. Before any of these entities may perform any transfer agent function for a qualifying security, it must register on Form TA-1 with the Board and its registration must become effective.

Section 341.3 of FDIC's regulations (12 CFR part 341) governs registration of transfer agents for state nonmember banks and state non-member savings associations, and subsidiaries of such institutions. Before an insured state nonmember bank or a state savings association and any subsidiary of such institution may perform any transfer agent function for a qualifying security, it must register on Form TA-1 with the FDIC and its registration must become effective.

Section 9.20 of the OCC's regulations (12 CFR 9.20) governs registration of transfer agents. Section 9.20(b) provides that SEC rules pursuant to Section 17A of the Act, prescribing operational and reporting requirements for transfer agents, apply to the domestic activities of registered national bank transfer agents. Before a national bank, Federal savings bank, or a bank operating under the Code of Law for the District of Columbia, or a subsidiary of any such bank, may perform any transfer agent function for a qualifying security, it must register on Form TA-1 with the OCC and its registration must become effective.

#### *Request for Comment*

The agencies invite comment on the following topics related to this collection of information:

(a) Whether the information collections are necessary for the proper performance of the agencies' functions, including whether the information has practical utility;

(b) The accuracy of the agencies' estimates of the burden of the information collections, 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 collections 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.

Comments submitted in response to this joint notice will be shared among the agencies. All comments will become a matter of public record.

Dated: May 24, 2016.

**Mary H. Gottlieb,**

*Regulatory Specialist, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency.*

Board of Governors of the Federal Reserve System, June 3, 2016.

**Robert deV. Frierson,**

*Secretary of the Board.*

Dated at Washington, DC, this 24th day of May, 2016.

Federal Deposit Insurance Corporation.

**Valerie J. Best,**

*Assistant Executive Secretary.*

[FR Doc. 2016-13810 Filed 6-9-16; 8:45 am]

**BILLING CODE 6714-01-P; 4810-33-P; 6210-01-P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### **Proposed Collection; Comment Request for Form 1099-H**

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

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13(44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 1099-H, Health Coverage Tax Credit (HCTC) Advance Payments.

**DATES:** Written comments should be received on or before August 9, 2016, to be assured of consideration.

**ADDRESSES:** Direct all written comments to Tuawana Pinkston, Internal Revenue Service, Room 6528, 1111 Constitution Avenue NW., Washington, DC 20224.

#### **FOR FURTHER INFORMATION CONTACT:**

Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 317-5746, or through the internet at [RJoseph.Durbala@irs.gov](mailto:RJoseph.Durbala@irs.gov).

#### **SUPPLEMENTARY INFORMATION:**

*Title:* Health Coverage Tax Credit (HCTC) Advance Payments.

*OMB Number:* 1545-1813.

*Form Number:* Form 1099-H.

*Abstract:* Form 1099-H is used to report advance payments of health insurance premiums to qualified recipients for their use in computing the allowable health insurance credit on Form 8885.

*Current Actions:* There are no changes being made to the form at this time. However, the estimated number of responses is being decreased as a result of updated filing estimates.

*Type of Review:* Revision of a currently approved collection.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Responses:* 49,000.

*Estimated Time per Respondent:* 18 minutes.

*Estimated Total Annual Burden Hours:* 14,700.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Request for Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: June 2, 2016.

**R. Joseph Durbala,**

*IRS, Tax Analyst.*

[FR Doc. 2016-13778 Filed 6-9-16; 8:45 am]

**BILLING CODE 4830-01-P**



# FEDERAL REGISTER

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## Part II

### Department of the Treasury

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Office of the Comptroller of the Currency

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12 CFR Part 42

### Federal Reserve System

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12 CFR Part 236

### Federal Deposit Insurance Corporation

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12 CFR Part 372

### National Credit Union Administration

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12 CFR Parts 741 and 751

### Federal Housing Finance Agency

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12 CFR Part 1232

### Securities and Exchange Commission

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17 CFR Parts 240, 275, and 303

Incentive-Based Compensation Arrangements; Proposed Rule

**DEPARTMENT OF THE TREASURY****Office of the Comptroller of the Currency****12 CFR Part 42**

[Docket No. OCC–2011–0001]

RIN 1557–AD39

**FEDERAL RESERVE SYSTEM****12 CFR Part 236**

[Docket No. R–1536]

RIN 7100 AE–50

**FEDERAL DEPOSIT INSURANCE CORPORATION****12 CFR Part 372**

RIN 3064–AD86

**NATIONAL CREDIT UNION ADMINISTRATION****12 CFR Parts 741 and 751**

RIN 3133–AE48

**FEDERAL HOUSING FINANCE AGENCY****12 CFR Part 1232**

RIN 2590–AA42

**SECURITIES AND EXCHANGE COMMISSION****17 CFR Parts 240, 275, and 303**

[Release No. 34–77776; IA–4383; File No. S7–07–16]

RIN 3235–AL06

**Incentive-Based Compensation Arrangements**

**AGENCY:** Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); Federal Housing Finance Agency (FHFA); National Credit Union Administration (NCUA); and U.S. Securities and Exchange Commission (SEC).

**ACTION:** Notice of proposed rulemaking and request for comment.

**SUMMARY:** The OCC, Board, FDIC, FHFA, NCUA, and SEC (the Agencies) are seeking comment on a joint proposed rule (the proposed rule) to revise the proposed rule the Agencies published in the **Federal Register** on April 14, 2011, and to implement section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank

Act). Section 956 generally requires that the Agencies jointly issue regulations or guidelines: (1) Prohibiting incentive-based payment arrangements that the Agencies determine encourage inappropriate risks by certain financial institutions by providing excessive compensation or that could lead to material financial loss; and (2) requiring those financial institutions to disclose information concerning incentive-based compensation arrangements to the appropriate Federal regulator.

**DATES:** Comments must be received by July 22, 2016.

**ADDRESSES:** Although the Agencies will jointly review the comments submitted, it would facilitate review of the comments if interested parties send comments to the Agency that is the appropriate Federal regulator, as defined in section 956(e) of the Dodd-Frank Act, for the type of covered institution addressed in the comments. Commenters are encouraged to use the title “Incentive-based Compensation Arrangements” to facilitate the organization and distribution of comments among the Agencies. Interested parties are invited to submit written comments to:

*Office of the Comptroller of the Currency:* Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments by the Federal eRulemaking Portal or email, if possible. Please use the title “Incentive-based Compensation Arrangements” to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal—Regulations.gov:* Go to [www.regulations.gov](http://www.regulations.gov). Enter “Docket ID OCC–2011–0001” in the Search Box and click “Search.” Click on “Comment Now” to submit public comments.

- Click on the “Help” tab on the *Regulations.gov* home page to get information on using *Regulations.gov*, including instructions for submitting public comments.

- *Email:* [regs.comments@occ.treas.gov](mailto:regs.comments@occ.treas.gov).

- *Mail:* Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 400 7th Street SW., Suite 3E–218, Mail Stop 9W–11, Washington, DC 20219.

- *Fax:* (571) 465–4326.

- *Hand Delivery/Courier:* 400 7th Street SW., Suite 3E–218, Mail Stop 9W–11, Washington, DC 20219.

**Instructions:** You must include “OCC” as the agency name and “Docket ID OCC–2011–0001” in your comment.

In general, OCC will enter all comments received into the docket and publish them on the *Regulations.gov* Web site without change, including any business or personal information that you provide such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this proposed rule by any of the following methods:

- *Viewing Comments Electronically:* Go to [www.regulations.gov](http://www.regulations.gov). Enter “Docket ID OCC–2011–0001” in the Search box and click “Search.” Click on “Open Docket Folder” on the right side of the screen and then “Comments.” Comments can be filtered by clicking on “View All” and then using the filtering tools on the left side of the screen.

- Click on the “Help” tab on the *Regulations.gov* home page to get information on using *Regulations.gov*. Supporting materials may be viewed by clicking on “Open Docket Folder” and then clicking on “Supporting Documents.” The docket may be viewed after the close of the comment period in the same manner as during the comment period.

- *Viewing Comments Personally:* You may personally inspect and photocopy comments at the OCC, 400 7th Street SW., Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700 or, for persons who are deaf or hard of hearing, TTY, (202) 649–5597. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

*Board of Governors of the Federal Reserve System:* You may submit comments, identified by Docket No. 1536 and RIN No. 7100 AE–50, 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](mailto:regs.comments@federalreserve.gov). Include the docket number and RIN number in the subject line of the message.

• *Fax:* (202) 452–3819 or (202) 452–3102.

• *Mail:* Address to Robert deV. Frierson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW., Washington, DC 20551.

All public comments will be made available on the Board's Web site at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm> as submitted, unless modified for technical reasons. Accordingly, 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 3515, 1801 K Street NW. (between 18th and 19th Streets NW.), Washington, DC 20006 between 9:00 a.m. and 5:00 p.m. on weekdays.

**Federal Deposit Insurance Corporation:** You may submit comments, identified by RIN 3064–AD86, by any of the following methods:

• *Agency Web site:* <http://www.FDIC.gov/regulations/laws/federal/propose.html>. Follow instructions for submitting comments on the Agency Web site.

• *Email:* [Comments@FDIC.gov](mailto:Comments@FDIC.gov). Include the RIN 3064–AD86 on 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:* Comments may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7:00 a.m. and 5:00 p.m.

• *Public Inspection:* All comments received, including any personal information provided, will be posted generally without change to <http://www.fdic.gov/regulations/laws/federal>.

**Federal Housing Finance Agency:** You may submit your written comments on the proposed rulemaking, identified by RIN number, by any of the following methods:

• *Agency Web site:* [www.fhfa.gov/open-for-comment-or-input](http://www.fhfa.gov/open-for-comment-or-input).

• *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. If you submit your comment to the Federal eRulemaking Portal, please also send it by email to FHFA at [RegComments@fhfa.gov](mailto:RegComments@fhfa.gov) to ensure timely receipt by the Agency. Please include “RIN 2590–AA42” in the subject line of the message.

• *Hand Delivery/Courier:* The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/ RIN 2590–AA42, Federal Housing Finance Agency, Eighth Floor, 400 7th

Street SW., Washington, DC 20219. The package should be delivered at the 7th Street entrance Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.

• *U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:* The mailing address for comments is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA42, Federal Housing Finance Agency, 400 7th Street SW., Washington, DC 20219. Please note that all mail sent to FHFA via U.S. Mail is routed through a national irradiation facility, a process that may delay delivery by approximately two weeks.

All comments received by the deadline will be posted without change for public inspection on the FHFA Web site at <http://www.fhfa.gov>, and will include any personal information provided, such as name, address (mailing and email), and telephone numbers. Copies of all comments timely received will be available for public inspection and copying at the address above on government-business days between the hours of 10:00 a.m. and 3:00 p.m. To make an appointment to inspect comments please call the Office of General Counsel at (202) 649–3804.

**National Credit Union Administration:** You may submit comments by any of the following methods (please send comments by one method only):

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

• *Agency Web site:* <http://www.ncua.gov>. Follow the instructions for submitting comments.

• *Email:* Address to [regcomments@ncua.gov](mailto:regcomments@ncua.gov). Include “[Your name] Comments on ‘Notice of Proposed Rulemaking for Incentive-based Compensation Arrangements’ in the email subject line.

• *Fax:* (703) 518–6319. Use the subject line described above for email.

• *Mail:* Address to Gerard S. Poliquin, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.

• *Hand Delivery/Courier:* Same as mail address.

• *Public Inspection:* All public comments are available on the agency's Web site at <http://www.ncua.gov/Legal/Regs/Pages/PropRegs.aspx> as submitted, except when not possible for technical reasons. Public comments will not be edited to remove any identifying or contact information. Paper copies of comments may be inspected in NCUA's law library at 1775 Duke Street, Alexandria, Virginia 22314, by

appointment weekdays between 9:00 a.m. and 3:00 p.m. To make an appointment, call (703) 518–6546 or send an email to [OGCMail@ncua.gov](mailto:OGCMail@ncua.gov).

**Securities and Exchange Commission:** You may submit comments by the following method:

#### Electronic Comments

• Use the SEC's Internet comment form (<http://www.sec.gov/rules/proposed.shtml>);

• Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number S7–07–16 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 Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

All submissions should refer to File Number S7–07–16. 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 SEC will post all comments on the SEC's Internet Web site (<http://www.sec.gov/rules/proposed.shtml>). Comments are also available for Web site viewing and printing in the SEC'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; the SEC does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

Studies, memoranda or other substantive items may be added by the SEC or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on the SEC's Web site. To ensure direct electronic receipt of such notifications, sign up through the “Stay Connected” option at [www.sec.gov](http://www.sec.gov) to receive notifications by email.

#### FOR FURTHER INFORMATION CONTACT:

**OCC:** Patrick T. Tierney, Assistant Director, Alison MacDonald, Senior Attorney, and Melissa Lisenbee, Attorney, Legislative and Regulatory Activities, (202) 649–5490, and Judi McCormick, Analyst, Operational Risk Policy, (202) 649–6415, Office of the Comptroller of the Currency, 400 7th Street SW., Washington, DC 20219.

**Board:** Teresa Scott, Manager, (202) 973–6114, Meg Donovan, Senior Supervisory Financial Analyst, (202)

872–7542, or Joe Maldonado, Supervisory Financial Analyst, (202) 973–7341, Division of Banking Supervision and Regulation; or Laurie Schaffer, Associate General Counsel, (202) 452–2272, Michael Waldron, Special Counsel, (202) 452–2798, Gillian Burgess, Counsel, (202) 736–5564, Flora Ahn, Counsel, (202) 452–2317, or Steve Bowne, Senior Attorney, (202) 452–3900, Legal Division, Board of Governors of the Federal Reserve System, 20th and C Streets NW., Washington, DC 20551.

**FDIC:** Rae-Ann Miller, Associate Director, Risk Management Policy, Division of Risk Management Supervision (202) 898–3898, Catherine Topping, Counsel, Legal Division, (202) 898–3975, and Nefretete Smith, Counsel, Legal Division, (202) 898–6851.

**FHFA:** Mary Pat Fox, Manager, Executive Compensation Branch, (202) 649–3215; or Lindsay Simmons, Assistant General Counsel, (202) 649–3066, Federal Housing Finance Agency, 400 7th Street SW., Washington, DC 20019. The telephone number for the Telecommunications Device for the Hearing Impaired is (800) 877–8339.

**NCUA:** Vickie Apperson, Program Officer, and Jeffrey Marshall, Program Officer, Office of Examination & Insurance, (703) 518–6360; or Elizabeth Wirick, Senior Staff Attorney, Office of General Counsel, (703) 518–6540, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314.

**SEC:** Raymond A. Lombardo, Branch Chief, Kevin D. Schopp, Special Counsel, Division of Trading & Markets, (202) 551–5777 or [tradingandmarkets@sec.gov](mailto:tradingandmarkets@sec.gov); Sirimal R. Mukerjee, Senior Counsel, Melissa R. Harke, Branch Chief, Division of Investment Management, (202) 551–6787 or [IARules@SEC.gov](mailto:IARules@SEC.gov), U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

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#### I. Introduction

Section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act” or the “Act”)<sup>1</sup> requires the Agencies to jointly prescribe regulations or guidelines with respect to incentive-based compensation practices at certain financial institutions (referred to as “covered financial

<sup>1</sup> Public Law 111–203, 124 Stat. 1376 (2010).

institutions”).<sup>2</sup> Specifically, section 956 of the Dodd-Frank Act (“section 956”) requires that the Agencies prohibit any types of incentive-based compensation<sup>3</sup> arrangements, or any feature of any such arrangements, that the Agencies determine encourage inappropriate risks by a covered financial institution: (1) By providing an executive officer, employee, director, or principal shareholder of the covered financial institution with excessive compensation, fees, or benefits; or (2) that could lead to material financial loss to the covered financial institution. Under the Act, a covered financial institution also must disclose to its appropriate Federal regulator the structure of its incentive-based compensation arrangements sufficient to determine whether the structure provides excessive compensation, fees, or benefits or could lead to material financial loss to the institution. The Dodd-Frank Act does not require a covered financial institution to report the actual compensation of particular individuals.

The Act defines “covered financial institution” to include any of the following types of institutions that have \$1 billion or more in assets: (A) A depository institution or depository institution holding company, as such terms are defined in section 3 of the Federal Deposit Insurance Act (“FDIA”) (12 U.S.C. 1813); (B) a broker-dealer registered under section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o); (C) a credit union, as described in section 19(b)(1)(A)(iv) of the Federal Reserve Act; (D) an investment adviser, as such term is defined in section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(11)); (E) the Federal National Mortgage Association (Fannie Mae); (F) the Federal Home Loan Mortgage Corporation (Freddie Mac); and (G) any other financial institution that the appropriate Federal regulators, jointly, by rule, determine should be treated as a covered financial institution for these purposes.

The Act also requires that any compensation standards adopted under section 956 be comparable to the safety and soundness standards applicable to insured depository institutions under

section 39 of the FDIA<sup>4</sup> and that the Agencies take the compensation standards described in section 39 of the FDIA into consideration in establishing compensation standards under section 956.<sup>5</sup> As explained in greater detail below, the standards established by the proposed rule are comparable to the standards established under section 39 of the FDIA.

In April 2011, the Agencies published a joint notice of proposed rulemaking that proposed to implement section 956 (2011 Proposed Rule).<sup>6</sup> Since the 2011 Proposed Rule was published, incentive-based compensation practices have evolved in the financial services industry. The Board, the OCC, and the FDIC have gained experience in applying guidance on incentive-based compensation,<sup>7</sup> FHFA has gained supervisory experience in applying compensation-related rules<sup>8</sup> adopted under the authority of the Safety and Soundness Act,<sup>9</sup> and foreign jurisdictions have adopted incentive-based compensation remuneration codes, regulations, and guidance.<sup>10</sup> In

<sup>4</sup> 12 U.S.C. 1831p–1. The OCC, Board, and FDIC (collectively, the “Federal Banking Agencies”) each have adopted guidelines implementing the compensation-related and other safety and soundness standards in section 39 of the FDIA. See Interagency Guidelines Establishing Standards for Safety and Soundness (the “Federal Banking Agency Safety and Soundness Guidelines”), 12 CFR part 30, Appendix A (OCC); 12 CFR part 208, Appendix D–1 (Board); 12 CFR part 364, Appendix A (FDIC).

<sup>5</sup> 12 U.S.C. 1831p–1(c).

<sup>6</sup> 76 FR 21170 (April 14, 2011).

<sup>7</sup> OCC, Board, FDIC, and Office of Thrift Supervision, “Guidance on Sound Incentive Compensation Policies” (“2010 Federal Banking Agency Guidance”), 75 FR 36395 (June 25, 2010).

<sup>8</sup> These include the Executive Compensation Rule (12 CFR part 1230), the Golden Parachute Payments Rule (12 CFR part 1231), and the Federal Home Loan Bank Directors’ Compensation and Expenses Rule (12 CFR part 1261 subpart C).

<sup>9</sup> The Safety and Soundness Act means the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (12 U.S.C. 4501 *et seq.*). 12 CFR 1201.1.

<sup>10</sup> See, e.g., the European Union, Directive 2013/36/EU (effective January 1, 2014); United Kingdom Prudential Regulation Authority (“PRA”) and Financial Conduct Authority (“FCA”), “PRA PS12/15/FCA PS15/16: Strengthening the Alignment of Risk and Reward: New Remuneration Rules” (June 25, 2015) (“UK Remuneration Rules”), available at <http://www.bankofengland.co.uk/pradocuments/publications/ps/2015/ps1215.pdf>; Australian Prudential Regulation Authority (“APRA”), Prudential Practice Guide SPG 511—Remuneration (November 2013), available at <http://www.apra.gov.au/Super/Documents/Prudential-Practice-Guide-SPG-511-Remuneration.pdf>; Canada, The Office of the Superintendent of Financial Institutions (“OSFI”) Corporate Governance Guidelines (January 2013) (“OSFI Corporate Governance Guidelines”), available at [http://www.osfi-bsif.gc.ca/eng/fi-if/rgr-ro/gdn-ort/gl-ld/pages/cg\\_guideline.aspx](http://www.osfi-bsif.gc.ca/eng/fi-if/rgr-ro/gdn-ort/gl-ld/pages/cg_guideline.aspx) and Supervisory Framework (December 2010) (“OSFI Supervisory Framework”), available at <http://www.osfi-bsif.gc.ca/Eng/Docs/sframew.pdf>; Switzerland,

light of these developments and the comments received on the 2011 Proposed Rule, the Agencies are publishing a new proposed rule to implement section 956.

The first part of this **SUPPLEMENTARY INFORMATION** section provides background information on the proposed rule, including a summary of the 2011 Proposed Rule and areas in which the proposed rule differs from the 2011 Proposed Rule. The second part contains a section-by-section description of the proposed rule.<sup>11</sup> To help explain how the requirements of the proposed rule would work in practice, the Appendix to this **SUPPLEMENTARY INFORMATION** section sets out an example of an incentive-based compensation arrangement for a hypothetical senior executive officer at a hypothetical large banking organization and an example of how a forfeiture and downward adjustment review might be conducted for a senior manager at a hypothetical large banking organization.

For ease of reference, the proposed rules of the Agencies are referenced in this **SUPPLEMENTARY INFORMATION** section using a common designation of section \_\_\_\_\_.1 to section \_\_\_\_\_.14 (excluding the title and part designations for each agency). Each agency would codify its rule, if adopted, within its respective title of the Code of Federal Regulations.<sup>12</sup>

## A. Background

Incentive-based compensation arrangements are critical tools in the management of financial institutions. These arrangements serve several important objectives, including attracting and retaining skilled staff and promoting better performance of the institution and individual employees. Well-structured incentive-based compensation arrangements can promote the health of a financial institution by aligning the interests of executives and employees with those of

Financial Market Supervisory Authority (“FINMA”), 2010/01 FINMA Circular on Remuneration Schemes (October 2009) (“FINMA Remuneration Circular”), available at <https://www.finma.ch/en/documentation/circulars/#Order=2>.

<sup>11</sup> This section-by-section description also includes certain examples of how the proposed rule would work in practice. These examples are intended solely for purposes of illustration and do not cover every aspect of the proposed rule. They are provided as an aid to understanding the proposed rule and do not carry the force and effect of law or regulation.

<sup>12</sup> Specifically, the Agencies propose to codify the rules as follows: 12 CFR part 42 (OCC); 12 CFR part 236 (the Board); 12 CFR part 372 (FDIC); 17 CFR part 303 (SEC); 12 CFR parts 741 and 751 (NCUA); and 12 CFR part 1232 (FHFA).

<sup>2</sup> 12 U.S.C. 5641.

<sup>3</sup> Section 956(b) uses the term “incentive-based payment arrangement.” It appears that Congress used the terms “incentive-based payment arrangement” and “incentive-based compensation arrangement” interchangeably. The Agencies have chosen to use the term “incentive-based compensation arrangement” throughout the proposed rule and this **SUPPLEMENTARY INFORMATION** section for the sake of clarity.

the institution's shareholders and other stakeholders. At the same time, poorly structured incentive-based compensation arrangements can provide executives and employees with incentives to take inappropriate risks that are not consistent with the long-term health of the institution and, in turn, the long-term health of the U.S. economy. Larger financial institutions in particular are interconnected with one another and with many other companies and markets, which can mean that any negative impact from inappropriate risk-taking can have broader consequences. The risk of these negative externalities may not be fully taken into account in incentive-based compensation arrangements, even arrangements that otherwise align the interests of shareholders and other stakeholders with those of executives and employees.

There is evidence that flawed incentive-based compensation practices in the financial industry were one of many factors contributing to the financial crisis that began in 2007. Some compensation arrangements rewarded employees—including non-executive personnel like traders with large position limits, underwriters, and loan officers—for increasing an institution's revenue or short-term profit without sufficient recognition of the risks the employees' activities posed to the institutions, and therefore potentially to the broader financial system.<sup>13</sup> Traders with large position limits, underwriters, and loan officers are three examples of non-executive personnel who had the ability to expose an institution to material amounts of risk. Significant losses caused by actions of individual traders or trading groups occurred at some of the largest financial institutions during and after the financial crisis.<sup>14</sup>

<sup>13</sup> See, e.g., Financial Crisis Inquiry Commission, "Financial Crisis Inquiry Report" (January 2011), at 209, 279, 291, 343, available at <https://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf>; Senior Supervisors Group, "Observations on Risk Management Practices during the Recent Market Turbulence" (March 6, 2008), available at [https://www.newyorkfed.org/medialibrary/media/newsevents/news/banking/2008/SSG\\_Risk\\_Mgt\\_doc\\_final.pdf](https://www.newyorkfed.org/medialibrary/media/newsevents/news/banking/2008/SSG_Risk_Mgt_doc_final.pdf).

<sup>14</sup> A large financial institution suffered losses in 2012 from trading by an investment office in its synthetic credit portfolio. These losses amounted to approximately \$5.8 billion, which was approximately 3.6 percent of the holding company's tier 1 capital. <https://www.sec.gov/Archives/edgar/data/19617/000001961713000221/0000019617-13-000221-index.htm> Form 10-K 2013, Pages 69 and 118. In 2007, a proprietary trading group at another large institution caused losses of an estimated \$7.8 billion (approximately 25 percent of the firm's total stockholder's equity). <http://www.morganstanley.com/about-us-ir/shareholder/10k113008/10k1108.pdf> Form 10-K 2008, Pages 45 and 108. Between 2005 and 2008, one futures trader

Of particular note were incentive-based compensation arrangements for employees in a position to expose the institution to substantial risk that failed to align the employees' interests with those of the institution. For example, some institutions gave loan officers incentives to write a large amount of loans or gave traders incentives to generate high levels of trading revenues, without sufficient regard for the risks associated with those activities. The revenues that served as the basis for calculating bonuses were generated immediately, while the risk outcomes might not have been realized for months or years after the transactions were completed. When these, or similarly misaligned incentive-based compensation arrangements, are common in an institution, the foundation of sound risk management can be undermined by the actions of employees seeking to maximize their own compensation.

The effect of flawed incentive-based compensation practices is demonstrated by the arrangements implemented by Washington Mutual (WaMu). According to the Senate Permanent Subcommittee on Investigations Staff's report on the failure of WaMu "[l]oan officers and processors were paid primarily on volume, not primarily on the quality of their loans, and were paid more for issuing higher risk loans. Loan officers and mortgage brokers were also paid more when they got borrowers to pay higher interest rates, even if the borrower qualified for a lower rate—a practice that enriched WaMu in the short term, but made defaults more likely down the road."<sup>15</sup>

at a large financial institution engaged in activities that caused losses of an estimated EUR4.9 billion in 2007, which was approximately 23 percent of the firm's 2007 tier 1 capital. <http://www.societegenerale.com/sites/default/files/03%20March%202008%202008%20Registration%20Document.pdf>, Pages 52, 159–160; <http://www.societegenerale.com/sites/default/files/12%20May%202008%20The%20report%20by%20the%20General%20Inspection%20of%20Societe%20Generale.pdf>, Pages 1–71. In 2011, one trader at another large financial institution caused losses of an estimated \$2.25 billion, which represented approximately 5.4 percent of the firm's tier 1 capital. <https://www.fca.org.uk/news/press-releases/fca-bans-kweku-mawuli-adoboli-from-the-financial-services-industry>, Page 1; [https://www.ubs.com/global/en/about\\_ubs/investor\\_relations/other\\_filings/sec.html](https://www.ubs.com/global/en/about_ubs/investor_relations/other_filings/sec.html). 2012 SEC Form 20-F, Page 34. In 2007, one trader caused losses of an estimated \$264 million at a large financial institution, which represented approximately 1.7 percent of its tier 1 capital. <http://www.federalreserve.gov/newsevents/press/enforcement/20081118a.htm>, Page 1; [https://www.bmo.com/ci/ar2008/downloads/bmo\\_ar2008.pdf](https://www.bmo.com/ci/ar2008/downloads/bmo_ar2008.pdf), Page 61.

<sup>15</sup> Staff of S. Permanent Subcomm. on Investigations, Wall Street and the Financial Crisis: Anatomy of a Financial Collapse at 143 (Comm. Print 2011).

Flawed incentive-based compensation arrangements were evident in not just U.S. financial institutions, but also major financial institutions worldwide.<sup>16</sup> In a 2009 survey of banking organizations engaged in wholesale banking activities, the Institute of International Finance found that 98 percent of respondents recognized the contribution of incentive-based compensation practices to the financial crisis.<sup>17</sup>

Shareholders and other stakeholders in a covered institution<sup>18</sup> have an interest in aligning the interests of executives, managers, and other employees with the institution's long-term health. However, aligning the interests of shareholders (or members, in the case of credit unions, mutual savings associations, mutual savings banks, some mutual holding companies, and Federal Home Loan Banks) and other stakeholders with employees may not always be sufficient to protect the safety and soundness of an institution, deter excessive compensation, or deter behavior or inappropriate risk-taking that could lead to material financial loss at the institution. Executive officers and employees of a covered institution may be willing to tolerate a degree of risk that is inconsistent with the interests of stakeholders, as well as broader public policy goals.

Generally, the incentive-based compensation arrangements of a covered institution should reflect the interests of the shareholders and other stakeholders, to the extent that the incentive-based compensation makes those covered persons demand more or less reward for their risk-taking at the covered institution, and to the extent that incentive-based compensation

<sup>16</sup> See Financial Stability Forum, "FSF Principles for Sound Compensation Practices" (April 2009) (the "FSB Principles"), available at [http://www.financialstabilityboard.org/publications/r\\_0904b.pdf](http://www.financialstabilityboard.org/publications/r_0904b.pdf); Senior Supervisors Group, "Risk-management Lessons from the Global Banking Crisis of 2008" (October 2009), available at <http://www.newyorkfed.org/newsevents/news/banking/2009/ma091021.html>. The Financial Stability Forum was renamed the Financial Stability Board ("FSB") in April 2009.

<sup>17</sup> See Institute of International Finance, Inc., "Compensation in Financial Services: Industry Progress and the Agenda for Change" (March 2009), available at [http://www.oliverwyman.com/ow/pdf\\_files/OW\\_En\\_FS\\_Publ\\_2009\\_CompensationInFS.pdf](http://www.oliverwyman.com/ow/pdf_files/OW_En_FS_Publ_2009_CompensationInFS.pdf). See also UBS, "Shareholder Report on UBS's Write-Downs," (April 18, 2008), at 41–42 (identifying incentive effects of UBS compensation practices as contributing factors in losses suffered by UBS due to exposure to the subprime mortgage market), available at <http://www.ubs.com/1/ShowMedia/investors/agm?contentId=140333&name=080418ShareholderReport.pdf>.

<sup>18</sup> As discussed below, the proposed rule uses the term "covered institution" rather than the statutory term "covered financial institution."

changes those covered persons' risk-taking. However, risks undertaken by a covered institution—particularly a larger institution—can spill over into the broader economy, affecting other institutions and stakeholders. Therefore, there may be reasons why the preferences of all of the stakeholders are not fully reflected in incentive-based compensation arrangements. Hence, there is a public interest in curtailing the inappropriate risk-taking incentives provided by incentive-based compensation arrangements. Without restrictions on incentive-based compensation arrangements, covered institutions may engage in more risk-taking than is optimal from a societal perspective, suggesting that regulatory measures may be required to cut back on the risk-taking incentivized by such arrangements. Particularly at larger institutions, shareholders and other stakeholders may have difficulty effectively monitoring and controlling the impact of incentive-based compensation arrangements throughout the institution that may affect the institution's risk profile, the full range of stakeholders, and the larger economy.

As a result, supervision and regulation of incentive-based compensation can play an important role in helping safeguard covered institutions against incentive-based compensation practices that threaten safety and soundness, are excessive, or could lead to material financial loss. In particular, such supervision and regulation can help address the negative externalities affecting the broader economy or other institutions that may arise from inappropriate risk-taking by large financial institutions.

#### *B. Supervisory Experience*

To address such practices, the Federal Banking Agencies proposed, and then later adopted, the 2010 Federal Banking Agency Guidance governing incentive-based compensation programs, which applies to all banking organizations regardless of asset size. This Guidance uses a principles-based approach to ensure that incentive-based compensation arrangements appropriately tie rewards to longer-term performance and do not undermine the safety and soundness of banking organizations or create undue risks to the financial system. In addition, to foster implementation of improved incentive-based compensation practices, the Board, in cooperation with the OCC and FDIC, initiated in late 2009 a multidisciplinary, horizontal review ("Horizontal Review") of incentive-based compensation practices at 25 large, complex banking organizations,

which is still ongoing.<sup>19</sup> One goal of the Horizontal Review is to help improve the Federal Banking Agencies' understanding of the range and evolution of incentive-based compensation practices across institutions and categories of employees within institutions. The second goal is to provide guidance to each institution in implementing the 2010 Federal Banking Agency Guidance. The supervisory experience of the Federal Banking Agencies in this area is also relevant to the incentive-based compensation practices at broker-dealers and investment advisers.

As part of the Horizontal Review, the Board conducted reviews of line of business operations in the areas of trading, mortgage, credit card, and commercial lending operations as well as senior executive incentive-based compensation awards and payouts. The institutions subject to the Horizontal Review have made progress in developing practices that would incorporate the principles of the 2010 Federal Banking Agency Guidance into their risk management systems, including through better recognition of risk in incentive-based compensation decision-making and improved practices to better balance risk and reward. Many of those changes became evident in the actual compensation arrangements of the institutions as the review progressed. In 2011, the Board made public its initial findings from the Horizontal Review, recognizing the steps the institutions had made towards improving their incentive-based compensation practices, but also noting that each institution needed to do more.<sup>20</sup> In early 2012, the Board initiated a second, cross-firm review of 12 additional large banking organizations ("2012 LBO Review"). The Board also monitors incentive-based compensation as part of ongoing supervision. Supervisory oversight

<sup>19</sup> The financial institutions in the Horizontal Review are Ally Financial Inc.; American Express Company; Bank of America Corporation; The Bank of New York Mellon Corporation; Capital One Financial Corporation; Citigroup Inc.; Discover Financial Services; The Goldman Sachs Group, Inc.; JPMorgan Chase & Co.; Morgan Stanley; Northern Trust Corporation; The PNC Financial Services Group, Inc.; State Street Corporation; SunTrust Banks, Inc.; U.S. Bancorp; and Wells Fargo & Company; and the U.S. operations of Barclays plc, BNP Paribas, Credit Suisse Group AG, Deutsche Bank AG, HSBC Holdings plc, Royal Bank of Canada, The Royal Bank of Scotland Group plc, Societe Generale, and UBS AG.

<sup>20</sup> Board, "Incentive Compensation Practices: A Report on the Horizontal Review of Practices at Large Banking Organizations" (October 2011) ("2011 FRB White Paper"), available at <http://www.federalreserve.gov/publications/other-reports/files/incentive-compensation-practices-report-201110.pdf>.

focuses most intensively on large banking organizations because they are significant users of incentive-based compensation and because flawed approaches at these organizations are more likely to have adverse effects on the broader financial system. As part of that supervision, the Board also conducts targeted incentive-based compensation exams and considers incentive-based compensation in the course of wider line of business and risk-related reviews.

For the past several years, the Board also has been actively engaged in international compensation, governance, and conduct working groups that have produced a variety of publications aimed at further improving incentive-based compensation practices.<sup>21</sup>

The FDIC reviews incentive-based compensation practices as part of its safety and soundness examinations of state nonmember banks, most of which are smaller community institutions that would not be covered by the proposed rule. FDIC incentive-based compensation reviews are conducted in the context of the 2010 Federal Banking Agency Guidance and Section 39 of the FDIA. Of the 518 bank failures resolved by the FDIC between 2007 and 2015, 65 involved banks with total assets of \$1 billion or more that would have been covered by the proposed rule. Of the 65 institutions that failed with total assets of \$1 billion or more, 18 institutions or approximately 28 percent, were identified as having some level of issues or concerns related to compensation arrangements, many of which involved incentive-based compensation. Overall, most of the compensation issues related to either excessive compensation or tying financial incentives to metrics such as corporate performance or loan production without adequate consideration of related risks. Also, several cases involved poor governance practices, most commonly, dominant

<sup>21</sup> See, e.g., FSB Principles; FSB, "FSB Principles for Sound Compensation Practices: Implementation Standards, Basel, Switzerland" (September 2009), available at [http://www.fsb.org/wp-content/uploads/r\\_090925c.pdf?page\\_moved=1](http://www.fsb.org/wp-content/uploads/r_090925c.pdf?page_moved=1) (together with the FSB Principles, the "FSB Principles and Implementation Standards"); Basel Committee on Banking Supervision, "Report on Range of Methodologies for Risk and Performance Alignment of Remuneration" (May 2011); Basel Committee on Banking Supervision, "Principles for the Effective Supervision of Financial Conglomerates" (September 2012); FSB, "Implementing the FSB Principles for Sound Compensation Practices and their Implementation Standards—First, Second, Third, and Fourth Progress Reports" (June 2012, August 2013, November 2014, November 2015), available at [http://www.fsb.org/publications/?policy\\_area%5B%5D=24](http://www.fsb.org/publications/?policy_area%5B%5D=24).

management influencing improper incentives.<sup>22</sup>

The OCC reviews and assesses compensation practices at individual banks as part of its normal supervisory activities. For example, the OCC identifies matters requiring attention (MRAs) relating to compensation practices, including matters relating to governance and risk management and controls for compensation. The OCC's Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches<sup>23</sup> (the "OCC's Heightened Standards") require covered banks to establish and adhere to compensation programs that prohibit incentive-based payment arrangements that encourage inappropriate risks by providing excessive compensation or that could lead to material financial loss. The OCC includes an assessment of the banks' compensation practices when determining compliance with the OCC's Heightened Standards.

In addition to safety and soundness oversight, FHFA has express statutory authorities and mandates related to compensation paid by its regulated entities. FHFA reviews compensation arrangements before they are implemented at Fannie Mae, Freddie Mac, the Federal Home Loan Banks, and the Office of Finance of the Federal Home Loan Bank System. By statute, FHFA must prohibit its regulated entities from providing compensation to any executive officer of a regulated entity that is not reasonable and comparable with compensation for employment in other similar businesses (including publicly held financial institutions or major financial services companies) involving similar duties and responsibilities.<sup>24</sup> FHFA also has additional authority over the Enterprises during conservatorship, and has established compensation programs for Enterprise executives.<sup>25</sup>

<sup>22</sup> The Inspector General of the appropriate federal banking agency must conduct a Material Loss Review ("MLR") when losses to the Deposit Insurance Fund from failure of an insured depository institution exceed certain thresholds. See FDIC MLRs, available at <https://www.fdicig.gov/mlr.shtml>; Board MLRs available at <http://oig.federalreserve.gov/reports/audit-reports.htm>; and OCC MLRs, available at [https://www.treasury.gov/about/organizational-structure/ig/Pages/audit\\_reports\\_index.aspx](https://www.treasury.gov/about/organizational-structure/ig/Pages/audit_reports_index.aspx). See also the Subcommittee Report.

<sup>23</sup> 12 CFR part 30, appendix D.

<sup>24</sup> 12 U.S.C. 4518(a).

<sup>25</sup> As conservator, FHFA succeeded to all rights, titles, powers and privileges of the Enterprises, and of any shareholder, officer or director of each company with respect to the company and its assets. The Enterprises have been under conservatorship since September 2008.

In early 2014, FHFA issued two final rules related to compensation pursuant to its authority over compensation under the Safety and Soundness Act.<sup>26</sup> The Executive Compensation Rule sets forth requirements and processes with respect to compensation provided to executive officers by the Enterprises, the Federal Home Loan Banks, and the Federal Home Loan Bank System's Office of Finance.<sup>27</sup> Under the rule, those entities may not enter into an incentive plan with an executive officer or pay any incentive compensation to an executive officer without providing advance notice to FHFA.<sup>28</sup> FHFA's Golden Parachute Payments Rule governs golden parachute payments in the case of a regulated entity's insolvency, conservatorship, or troubled condition.<sup>29</sup>

In part because of the work described above, incentive-based compensation practices and the design of incentive-based compensation arrangements at banking organizations supervised by the Federal Banking Agencies have improved significantly in the years since the recent financial crisis. However, the Federal Banking Agencies have continued to evaluate incentive-based compensation practices as a part of their ongoing supervision responsibilities, with a particular focus on the design of incentive-based compensation arrangements for senior executive officers; deferral practices (including compensation at risk through forfeiture and clawback mechanisms); governance and the use of discretion; ex ante risk adjustment; and control function participation in incentive-based compensation design and risk evaluation. The Federal Banking Agencies' supervision has been focused on ensuring robust risk management and governance practices rather than on prescribing levels of pay.

Generally, the supervisory work of the Federal Banking Agencies and FHFA has promoted more risk-sensitive incentive-based compensation practices and effective risk governance. Incentive-based compensation decision-making increasingly leverages underlying risk management frameworks to help ensure better risk identification, monitoring, and escalation of risk issues. Prior to the

<sup>26</sup> 12 CFR parts 1230 and 1231, under the authority of the Safety and Soundness Act (12 U.S.C. 4518), as amended by the Housing and Economic Recovery Act of 2008. Congress enacted HERA, including new or amended provisions addressing compensation at FHFA's regulated entities, at least in part in response to the financial crisis that began in 2007.

<sup>27</sup> 12 CFR part 1230.

<sup>28</sup> 12 CFR 1230.3(d).

<sup>29</sup> 12 CFR part 1231.

recent financial crisis, many institutions had no effective risk adjustments to incentive-based compensation at all. Today, the Board has observed that incentive-based compensation arrangements at the largest banking institutions reflect risk adjustments, the largest banking institutions take into consideration adverse outcomes, more pay is deferred, and more of the deferred amount is subject to reduction based on failure to meet assigned performance targets or as a result of adverse outcomes that trigger forfeiture and clawback reviews.<sup>30</sup>

Similarly, prior to the recent financial crisis, institutions rarely involved risk management and control personnel in incentive-based compensation decision-making. Today, control functions frequently play an increased role in the design and operation of incentive-based compensation, and institutions have begun to build out frameworks to help validate the effectiveness of risk adjustment mechanisms. Risk-related performance objectives and "risk reviews" are increasingly common. Prior to the recent financial crisis, boards of directors had begun to consider the relationship between incentive-based compensation and risk, but were focused on incentive-based compensation for senior executives. Today, refined policies and procedures promote some consistency and effectiveness across incentive-based compensation arrangements. The role of boards of directors has expanded and the quality of risk information provided to those boards has improved. Finance and audit committees work together with compensation committees with the goal of having incentive-based compensation result in prudent risk-taking.

Notwithstanding the recent progress, incentive-based compensation practices are still in need of improvement, including better targeting of performance measures and risk metrics to specific activities, more consistent application of risk adjustments, and better documentation of the decision-making process. Congress has required the Agencies to jointly prescribe regulations or guidelines that cover not only depository institutions and depository institution holding companies, but also other financial institutions. While the Federal Banking Agencies' supervisory approach based on the 2010 Federal Banking Agency

<sup>30</sup> See generally 2011 FRB White Paper. The 2011 FRB White Paper provides specific examples of how compensation practices at the institutions involved in the Board's Horizontal Review of Incentive Compensation have changed since the recent financial crisis.

Guidance and the work of FHFA have resulted in improved incentive-based compensation practices, there are even greater benefits possible under rule-based supervision. Using their collective supervisory experiences, the Agencies are proposing a uniform set of enforceable standards applicable to a larger group of institutions supervised by all of the Agencies. The proposed rule would promote better incentive-based compensation practices, while still allowing for some flexibility in the design and operation of incentive-based compensation arrangements among the varied institutions the Agencies supervise, including through the tiered application of the proposed rule's requirements.

### *C. Overview of the 2011 Proposed Rule and Public Comment*

The Agencies proposed a rule in 2011, rather than guidelines, to establish requirements applicable to the incentive-based compensation arrangements of all covered institutions. The 2011 Proposed Rule would have supplemented existing rules, guidance, and ongoing supervisory efforts of the Agencies.

The 2011 Proposed Rule would have prohibited incentive-based compensation arrangements that could encourage inappropriate risks. It would have required compensation practices at regulated financial institutions to be consistent with three key principles—that incentive-based compensation arrangements should appropriately balance risk and financial rewards, be compatible with effective risk management and controls, and be supported by strong corporate governance. The Agencies proposed that financial institutions with \$1 billion or more in assets be required to have policies and procedures to ensure compliance with the requirements of the rule, and submit an annual report to their Federal regulator describing the structure of their incentive-based compensation arrangements.

The 2011 Proposed Rule included two additional requirements for “larger financial institutions.”<sup>31</sup> The first would have required these larger financial institutions to defer 50 percent of the incentive-based compensation for

executive officers for a period of at least three years. The second would have required the board of directors (or a committee thereof) to identify and approve the incentive-based compensation for those covered persons who individually have the ability to expose the institution to possible losses that are substantial in relation to the institution's size, capital, or overall risk tolerance, such as traders with large position limits and other individuals who have the authority to place at risk a substantial part of the capital of the covered institution.

The Agencies received more than 10,000 comments on the 2011 Proposed Rule, including from private individuals, community groups, several members of Congress, pension funds, labor federations, academic faculty, covered institutions, financial industry associations, and industry consultants.

The vast majority of the comments were substantively identical form letters of two types. The first type of form letter urged the Agencies to minimize the incentives for short-term risk-taking by executives by requiring at least a five-year deferral period for executive bonuses at big banks, banning executives' hedging of their pay packages, and requiring specific details from banks on precisely how they ensure that executives will share in the long-term risks created by their decisions. These commenters also asserted that the final rule should apply to the full range of important financial institutions and cover all the key executives at those institutions. The second type of form letter stated that the commenter or the commenter's family had been affected by the financial crisis that began in 2007, a major cause of which the commenter believed to be faulty pay practices at financial institutions. These commenters suggested various methods of improving these practices, including basing incentive-based compensation on measures of a financial institution's safety and stability, such as the institution's bond price or the spread on credit default swaps.

Comments from community groups, members of Congress, labor federations, and pension funds generally urged the Agencies to strengthen the proposed rule and many cited evidence suggesting that flawed incentive-based compensation practices in the financial industry were a major contributing factor to the recent financial crisis. Their suggestions included: Revising the 2011 Proposed Rule's definition of “incentive-based compensation”; defining “excessive compensation”; increasing the length of time for or

amount of compensation subject to the mandatory deferral provision; requiring financial institutions to include quantitative data in their annual incentive-based compensation reports; providing for the annual public reporting by the Agencies of information quantifying the overall sensitivity of incentive-based compensation to long-term risks at major financial institutions; prohibiting stock ownership by board members; and prohibiting hedging strategies used by highly-paid executives on their own incentive-based compensation.

The academic faculty commenters submitted analyses of certain compensation issues and recommendations. These recommendations included: Adopting a corporate governance measure tied to stock ownership by board members; regulating how deferred compensation is reduced at future payment dates; requiring covered institutions' executives to have “skin in the game” for the entire deferral period; and requiring disclosure of personal hedging transactions rather than prohibiting them.

A number of covered institutions and financial industry associations favored the issuance of guidelines instead of rules to implement section 956. Others expressed varying degrees of support for the 2011 Proposed Rule but also requested numerous clarifications and modifications. Many of these commenters raised questions concerning the 2011 Proposed Rule's scope, suggesting that certain types of institutions be excluded from the coverage of the final rule. Some of these commenters questioned the need for the excessive compensation prohibition or requested that the final rule provide specific standards for determining when compensation is excessive. Many of these commenters also opposed the 2011 Proposed Rule's mandatory deferral provision, and some asserted that the provision was unsupported by empirical evidence and potentially harmful to a covered institution's ability to attract and retain key employees. In addition, many of these commenters asserted that the material risk-taker provision in the 2011 Proposed Rule was unclear or imposed on the boards of directors of covered institutions duties more appropriately undertaken by the institutions' management. Finally, these commenters expressed concerns about the burden and timing of the 2011 Proposed Rule.

### *D. International Developments*

The Agencies considered international developments in

<sup>31</sup> In the 2011 Proposed Rule, the term “larger covered financial institution” for the Federal Banking Agencies and the SEC meant those covered institutions with total consolidated assets of \$50 billion or more. For the NCUA, all credit unions with total consolidated assets of \$10 billion or more would have been larger covered institutions. For FHFA, Fannie Mae, Freddie Mac, and all Federal Home Loan Banks with total consolidated assets of \$1 billion or more would have been larger covered institutions.

developing the 2011 Proposed Rule, mindful that some covered institutions operate in both domestic and international competitive environments.<sup>32</sup> Since the release of the 2011 Proposed Rule, a number of foreign jurisdictions have introduced new compensation regulations that require certain financial institutions to meet certain standards in relation to compensation policies and practices. In June 2013, the European Union adopted the Capital Requirements Directive (“CRD”) IV, which sets out requirements for compensation structures, policies, and practices that apply to all banks and investment firms subject to the CRD.<sup>33</sup> The rules require that up to 100 percent of the variable remuneration shall be subject to malus<sup>34</sup> or clawback arrangements, among other requirements.<sup>35</sup> The PRA’s and the FCA’s Remuneration Code requires covered companies to defer 40 to 60 percent of a covered person’s variable remuneration—and recently updated their implementing regulations to extend deferral periods to seven years for senior executives and to five years for certain other covered persons.<sup>36</sup> The PRA also implemented, in July 2014, a policy requiring firms to set specific criteria for the application of malus and clawback. The PRA’s clawback policy requires that variable remuneration be subject to clawback for a period of at least seven years from the date on which it is awarded.<sup>37</sup>

<sup>32</sup> See 76 FR at 21178. See, e.g., FSB Principles and Implementation Standards.

<sup>33</sup> Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 (effective January 1, 2014). The remuneration rules in CRD IV were carried over from CRD III with a few additional requirements. CRD III directed the Committee of European Bank Supervisors (“CEBS”), now the European Banking Authority (“EBA”), to develop guidance on how it expected the compensation principles under CRD III to be implemented. See CEBS Guidelines on Remuneration Policies and Practices (December 10, 2010) (“CEBS Guidelines”), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0076&from=EN>.

<sup>34</sup> Malus is defined by the European Union as “an arrangement that permits the institution to prevent vesting of all or part of the amount of a deferred remuneration award in relation to risk outcomes or performance.” See, PRA expectations regarding the application of malus to variable remuneration—SS2/13 UPDATE, available at: <http://www.bankofengland.co.uk/prd/Documents/publications/ss/2015/ss213update.pdf>.

<sup>35</sup> CRD IV provides that at least 50 percent of total variable remuneration should consist of equity-linked interests and at least 40 percent of any variable remuneration must be deferred over a period of three to five years. In the case of variable remuneration of a particularly high amount, the minimum amount required to be deferred is increased to 60 percent.

<sup>36</sup> See UK Remuneration Rules.

<sup>37</sup> See PRA, “PRA PS7/14: Clawback” (July 2014), available at <http://www.bankofengland.co.uk/prd/Pages/publications/ps/2014/ps714.aspx>.

Also in 2013, the EBA finalized the process and criteria for the identification of categories of staff who have a material impact on the institution’s risk profile (“Identified Staff”).<sup>38</sup> These Identified Staff are subject to provisions related, in particular, to the payment of variable compensation. The standards cover remuneration packages for Identified Staff categories and aim to ensure that appropriate incentives for prudent, long-term oriented risk-taking are provided. The criteria used to determine who is identified are both qualitative (i.e., related to the role and decision-making authority of staff members) and quantitative (i.e., related to the level of total gross remuneration in absolute or in relative terms).

More recently, in December 2015, the EBA released its final Guidelines on Sound Remuneration Policies.<sup>39</sup> The final Guidelines on Sound Remuneration Policies set out the governance process for implementing sound compensation policies across the European Union under CRD IV, as well as the specific criteria for categorizing all compensation components as either fixed or variable pay. The final Guidelines on Sound Remuneration Policies also provide guidance on the application of deferral arrangements and pay-out instruments to ensure that variable pay is aligned with an institution’s long-term risks and that any ex-post risk adjustments can be applied as appropriate. These Guidelines will apply as of January 1, 2017, and will replace the Guidelines on Remuneration Policies and Practices that were published by the CEBS in December 2010.

Other regulators, including those in Canada, Australia, and Switzerland, have taken either a guidance-based approach to the supervision and regulation of incentive-based compensation or an approach that combines guidance and regulation that

<sup>38</sup> EBA Regulatory Technical Standards on criteria to identify categories of staff whose professional activities have a material impact on an institution’s risk profile under Article 94(2) of Directive 2013/36/EU. Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 (December 16, 2013), available at <https://www.eba.europa.eu/documents/10180/526386/EBA-RTS-2013-114-28On-identified-staff%29.pdf/c313a671-269b-45be-a748-29e1c772ee0e>.

<sup>39</sup> EBA, “Guidelines for Sound Remuneration Policies under Articles 74(3) and 75(2) of Directive 2013/36/EU and Disclosures under Article 450 of Regulation (EU) No 575/2013” (December 21, 2015) (“EBA Remuneration Guidelines”), available at <https://www.eba.europa.eu/documents/10180/1314839/EBA-GL-2015-22+Guidelines+on+Sound+Remuneration+Policies.pdf/1b0f3f99-f913-461a-b3e9-fa0064b1946b>.

is generally consistent with the FSB Principles and Implementation Standards. In Australia,<sup>40</sup> all deposit-taking institutions and insurers are expected to comply in full with all the requirements in the APRA’s Governance standard (which includes remuneration provisions). APRA also supervises according to its Remuneration Prudential Practice Guide (guidance). In Canada,<sup>41</sup> all federally regulated financial institutions (domestic and foreign) are expected to comply with the FSB Principles and Implementation Standards, and the six Domestic Systemically Important Banks and three largest life insurance companies are expected to comply with the FSB’s Principles and Implementation Standards. OSFI has also issued a Corporate Governance Guideline that contain compensation provisions.<sup>42</sup> Switzerland’s Swiss Financial Markets Supervisory Authority has also published a principles-based rule on remuneration consistent with the FSB Principles and Implementation Standards that applies to major banks and insurance companies.<sup>43</sup>

As compensation practices continue to evolve, the Agencies recognize that international coordination in this area is important to ensure that internationally active financial organizations are subject to consistent requirements. For this reason, the Agencies will continue to work with their domestic and international counterparts to foster sound compensation practices across the financial services industry. Importantly, the proposed rule is consistent with the FSB Principles and Implementation Standards.

#### E. Overview of the Proposed Rule

The Agencies are re-proposing a rule, rather than proposing guidelines, to establish general requirements applicable to the incentive-based compensation arrangements of all covered institutions. Like the 2011 Proposed Rule, the proposed rule would prohibit incentive-based compensation arrangements at covered institutions that could encourage inappropriate risks by providing excessive compensation or that could lead to a material financial

<sup>40</sup> See APRA, “Prudential Standard CPS 510 Governance” (January 2015), available at <http://www.apra.gov.au/CrossIndustry/Documents/Final-Prudential-Standard-CPS-510-Governance-%28January-2014%29.pdf>; APRA, Prudential Practice Guide PPG 511—Remuneration (November 30, 2009), available at <http://www.apra.gov.au/adi/PrudentialFramework/Pages/adi-prudential-framework.aspx>.

<sup>41</sup> See OSFI Corporate Governance Guidelines and OSFI Supervisory Framework.

<sup>42</sup> See OSFI Corporate Governance Guidelines.

<sup>43</sup> See FINMA Remuneration Circular.

loss. However, the proposed rule reflects the Agencies' collective supervisory experiences since they proposed the 2011 Proposed Rule. These supervisory experiences, which are described above, have allowed the Agencies to propose a rule that incorporates practices that financial institutions and foreign regulators have adopted to address the deficiencies in incentive-based compensation practices that helped contribute to the financial crisis that began in 2007. For that reason, the proposed rule differs in some respects from the 2011 Proposed Rule. This section provides a general overview of the proposed rule and highlights areas in which the proposed rule differs from the 2011 Proposed Rule. A more detailed, section-by-section description of the proposed rule and the reasons for the proposed rule's requirements is provided later in this **SUPPLEMENTARY INFORMATION** section.

*Scope and Initial Applicability.* Similar to the 2011 Proposed Rule, the proposed rule would apply to any covered institution with average total consolidated assets greater than or equal to \$1 billion that offers incentive-based compensation to covered persons.

The compliance date of the proposed rule would be no later than the beginning of the first calendar quarter that begins at least 540 days after a final rule is published in the **Federal Register**. The proposed rule would not apply to any incentive-based compensation plan with a performance period that begins before the compliance date.

*Definitions.* The proposed rule includes a number of new definitions that were not included in the 2011 Proposed Rule. These definitions are described later in the section-by-section analysis in this Supplementary Information section. Notably, the Agencies have added a definition of significant risk-taker, which is intended to include individuals who are not senior executive officers but who are in the position to put a Level 1 or Level 2 covered institution at risk of material financial loss. This definition is explained in more detail below.

*Applicability.* The proposed rule distinguishes covered institutions by asset size, applying less prescriptive incentive-based compensation program requirements to the smallest covered institutions within the statutory scope and progressively more rigorous requirements to the larger covered institutions. Although the 2011 Proposed Rule contained specific requirements for covered financial institutions with at least \$50 billion in total consolidated assets, the proposed

rule creates an additional category of institutions with at least \$250 billion in average total consolidated assets. These larger institutions are subject to the most rigorous requirements under the proposed rule.

The proposed rule identifies three categories of covered institutions based on average total consolidated assets:<sup>44</sup>

- Level 1 (greater than or equal to \$250 billion);
- Level 2 (greater than or equal to \$50 billion and less than \$250 billion); and
- Level 3 (greater than or equal to \$1 billion and less than \$50 billion).<sup>45</sup>

Upon an increase in average total consolidated assets, a covered institution would be required to comply with any newly applicable requirements under the proposed rule no later than the first day of the first calendar quarter that begins at least 540 days after the date on which the covered institution becomes a Level 1, Level 2, or Level 3 covered institution. The proposed rule would grandfather any incentive-based compensation plan with a performance period that begins before such date. Upon a decrease in total consolidated assets, a covered institution would remain subject to the provisions of the proposed rule that applied to it before the decrease until total consolidated assets fell below \$250 billion, \$50 billion, or \$1 billion, as applicable, for four consecutive regulatory reports (e.g., Call Reports).

A covered institution under the Board's, the OCC's, or the FDIC's proposed rule that is a subsidiary of another covered institution under the Board's, the OCC's, or the FDIC's proposed rule, respectively, may meet any requirement of the Board's, OCC's, or the FDIC's proposed rule if the parent covered institution complies with that requirement in such a way that causes the relevant portion of the incentive-based compensation program of the

<sup>44</sup> For covered institutions that are subsidiaries of other covered institutions, levels would generally be determined by reference to the average total consolidated assets of the top-tier parent covered institution. A detailed explanation of consolidation under the proposed rule is included under the heading "Definitions pertaining to covered institutions" below in this Supplementary Information section.

<sup>45</sup> As explained later in this Supplementary Information section, the proposed rule includes a reservation of authority that would allow the appropriate Federal regulator of a Level 3 covered institution with average total consolidated assets greater than or equal to \$10 billion and less than \$50 billion to require the Level 3 covered institution to comply with some or all of the provisions of sections \_\_\_\_\_.5 and \_\_\_\_\_.7 through \_\_\_\_\_.11 of the proposed rule if the agency determines that the complexity of operations or compensation practices of the Level 3 covered institution are consistent with those of a Level 1 or Level 2 covered institution.

subsidiary covered institution to comply with that requirement.

*Requirements and Prohibitions Applicable to All Covered Institutions.* Similar to the 2011 Proposed Rule, the proposed rule would prohibit all covered institutions from establishing or maintaining incentive-based compensation arrangements that encourage inappropriate risk by providing covered persons with excessive compensation, fees, or benefits or that could lead to material financial loss to the covered institution.

Also consistent with the 2011 Proposed Rule, the proposed rule provides that compensation, fees, and benefits will be considered excessive when amounts paid are unreasonable or disproportionate to the value of the services performed by a covered person, taking into consideration all relevant factors, including:

- The combined value of all compensation, fees, or benefits provided to a covered person;
- The compensation history of the covered person and other individuals with comparable expertise at the covered institution;
- The financial condition of the covered institution;
- Compensation practices at comparable institutions, based upon such factors as asset size, geographic location, and the complexity of the covered institution's operations and assets;
- For post-employment benefits, the projected total cost and benefit to the covered institution; and
- Any connection between the covered person and any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the covered institution.

The proposed rule is also similar to the 2011 Proposed Rule in that it provides that an incentive-based compensation arrangement will be considered to encourage inappropriate risks that could lead to material financial loss to the covered institution, unless the arrangement:

- Appropriately balances risk and reward;
- Is compatible with effective risk management and controls; and
- Is supported by effective governance.

However, unlike the 2011 Proposed Rule, the proposed rule specifically provides that an incentive-based compensation arrangement would not be considered to appropriately balance risk and reward unless it:

- Includes financial and non-financial measures of performance;

- Is designed to allow non-financial measures of performance to override financial measures of performance, when appropriate; and

- Is subject to adjustment to reflect actual losses, inappropriate risks taken, compliance deficiencies, or other measures or aspects of financial and non-financial performance.

The proposed rule also contains requirements for the board of directors of a covered institution that are similar to requirements included in the 2011 Proposed Rule. Under the proposed rule, the board of directors of each covered institution (or a committee thereof) would be required to:

- Conduct oversight of the covered institution's incentive-based compensation program;
- Approve incentive-based compensation arrangements for senior executive officers, including amounts of awards and, at the time of vesting, payouts under such arrangements; and
- Approve material exceptions or adjustments to incentive-based compensation policies or arrangements for senior executive officers.

The 2011 Proposed Rule contained an annual reporting requirement, which has been replaced by a recordkeeping requirement in the proposed rule. Covered institutions would be required to create annually and maintain for at least seven years records that document the structure of incentive-based compensation arrangements and that demonstrate compliance with the proposed rule. The records would be required to be disclosed to the covered institution's appropriate Federal regulator upon request.

*Disclosure and Recordkeeping Requirements for Level 1 and Level 2 Covered Institutions.* The proposed rule includes more detailed disclosure and recordkeeping requirements for larger covered institutions than the 2011 Proposed Rule. The proposed rule would require all Level 1 and Level 2 covered institutions to create annually and maintain for at least seven years records that document: (1) The covered institution's senior executive officers and significant risk-takers, listed by legal entity, job function, organizational hierarchy, and line of business; (2) the incentive-based compensation arrangements for senior executive officers and significant risk-takers, including information on the percentage of incentive-based compensation deferred and form of award; (3) any forfeiture and downward adjustment or clawback reviews and decisions for senior executive officers and significant risk-takers; and (4) any material changes to the covered institution's incentive-

based compensation arrangements and policies. Level 1 and Level 2 covered institutions would be required to create and maintain records in a manner that would allow for an independent audit of incentive-based compensation arrangements, policies, and procedures, and to provide the records described above in such form and frequency as the appropriate Federal regulator requests.

*Deferral, Forfeiture and Downward Adjustment, and Clawback Requirements for Level 1 and Level 2 Covered Institutions.* The proposed rule would require incentive-based compensation arrangements that appropriately balance risk and reward. For Level 1 and Level 2 covered institutions, the proposed rule would require that incentive-based compensation arrangements for certain covered persons include deferral of payments, risk of downward adjustment and forfeiture, and clawback to appropriately balance risk and reward. The 2011 Proposed Rule required deferral for three years of 50 percent of annual incentive-based compensation for executive officers of covered financial institutions with \$50 billion or more in total consolidated assets. The proposed rule would apply deferral requirements to significant risk-takers as well as senior executive officers, and, as described below, would require 40, 50, or 60 percent deferral depending on the size of the covered institution and whether the covered person receiving the incentive-based compensation is a senior executive officer or a significant risk-taker. Unlike the 2011 Proposed Rule, the proposed rule would explicitly require a shorter deferral period for incentive-based compensation awarded under a long-term incentive plan. The proposed rule also provides more detailed requirements and prohibitions than the 2011 Proposed Rule with respect to the measurement, composition, and acceleration of deferred incentive-based compensation; the manner in which deferred incentive-based compensation can vest; increases to the amount of deferred incentive-based compensation; and the amount of deferred incentive-based compensation that can be in the form of options.

*Deferral.* Under the proposed rule, the mandatory deferral requirements for Level 1 and Level 2 covered institutions for incentive-based compensation awarded each performance period would be as follows:

- A Level 1 covered institution would be required to defer at least 60 percent of a senior executive officer's "qualifying incentive-based compensation" (as defined in the proposed rule) and 50 percent of a

significant risk-taker's qualifying incentive-based compensation for at least four years. A Level 1 covered institution also would be required to defer for at least two years after the end of the related performance period at least 60 percent of a senior executive officer's incentive-based compensation awarded under a "long-term incentive plan" (as defined in the proposed rule) and 50 percent of a significant risk-taker's incentive-based compensation awarded under a long-term incentive plan. Deferred compensation may vest no faster than on a pro rata annual basis, and, for covered institutions that issue equity or are subsidiaries of covered institutions that issue equity, the deferred amount would be required to consist of substantial amounts of both deferred cash and equity-like instruments throughout the deferral period. Additionally, if a senior executive officer or significant risk-taker receives incentive-based compensation in the form of options for a performance period, the amount of such options used to meet the minimum required deferred compensation may not exceed 15 percent of the amount of total incentive-based compensation awarded for that performance period.

- A Level 2 covered institution would be required to defer at least 50 percent of a senior executive officer's qualifying incentive-based compensation and 40 percent of a significant risk-taker's qualifying incentive-based compensation for at least three years. A Level 2 covered institution also would be required to defer for at least one year after the end of the related performance period at least 50 percent of a senior executive officer's incentive-based compensation awarded under a long-term incentive plan and 40 percent of a significant risk-taker's incentive-based compensation awarded under a long-term incentive plan. Deferred compensation may vest no faster than on a pro rata annual basis, and, for covered institutions that issue equity or are subsidiaries of covered institutions that issue equity, the deferred amount would be required to consist of substantial amounts of both deferred cash and equity-like instruments throughout the deferral period. Additionally, if a senior executive officer or significant risk-taker receives incentive-based compensation in the form of options for a performance period, the amount of such options used to meet the minimum required deferred compensation may not exceed 15 percent of the amount of total incentive-based compensation awarded for that performance period.

The proposed rule would also prohibit Level 1 and Level 2 covered institutions from accelerating the payment of a covered person's deferred incentive-based compensation, except in the case of death or disability of the covered person.

**Forfeiture and Downward Adjustment.** Compared to the 2011 Proposed Rule, the proposed rule provides more detailed requirements for Level 1 and Level 2 covered institutions to reduce (1) incentive-based compensation that has not yet been awarded to a senior executive officer or significant risk-taker, and (2) deferred incentive-based compensation of a senior executive officer or significant risk-taker. Under the proposed rule, "forfeiture" means a reduction of the amount of deferred incentive-based compensation awarded to a person that has not vested. "Downward adjustment" means a reduction of the amount of a covered person's incentive-based compensation not yet awarded for any performance period that has already begun. The proposed rule would require a Level 1 or Level 2 covered institution to make subject to forfeiture all unvested deferred incentive-based compensation of any senior executive officer or significant risk-taker, including unvested deferred amounts awarded under long-term incentive plans. This forfeiture requirement would apply to all unvested, deferred incentive-based compensation for those individuals, regardless of whether the deferral was required by the proposed rule. Similarly, a Level 1 or Level 2 covered institution would also be required to make subject to downward adjustment all incentive-based compensation amounts not yet awarded to any senior executive officer or significant risk-taker for the current performance period, including amounts payable under long-term incentive plans. A Level 1 or Level 2 covered institution would be required to consider forfeiture or downward adjustment of incentive-based compensation if any of the following adverse outcomes occur:

- Poor financial performance attributable to a significant deviation from the covered institution's risk parameters set forth in the covered institution's policies and procedures;
- Inappropriate risk-taking, regardless of the impact on financial performance;
- Material risk management or control failures;
- Non-compliance with statutory, regulatory, or supervisory standards resulting in enforcement or legal action brought by a federal or state regulator or agency, or a requirement that the

covered institution report a restatement of a financial statement to correct a material error; and

- Other aspects of conduct or poor performance as defined by the covered institution.

**Clawback.** In addition to deferral, downward adjustment, and forfeiture, the proposed rule would require a Level 1 or Level 2 covered institution to include clawback provisions in the incentive-based compensation arrangements for senior executive officers and significant risk-takers. The term "clawback" refers to a mechanism by which a covered institution can recover vested incentive-based compensation from a senior executive officer or significant risk-taker if certain events occur. The proposed rule would require clawback provisions that, at a minimum, allow the covered institution to recover incentive-based compensation from a current or former senior executive officer or significant risk-taker for seven years following the date on which such compensation vests, if the covered institution determines that the senior executive officer or significant risk-taker engaged in misconduct that resulted in significant financial or reputational harm to the covered institution, fraud, or intentional misrepresentation of information used to determine the senior executive officer or significant risk-taker's incentive-based compensation. The 2011 Proposed Rule did not include a clawback requirement.

**Additional Prohibitions.** The proposed rule contains a number of additional prohibitions for Level 1 and Level 2 covered institutions that were not included in the 2011 Proposed Rule. These prohibitions would apply to:

- Hedging;
- Maximum incentive-based compensation opportunity (also referred to as leverage);
- Relative performance measures; and
- Volume-driven incentive-based compensation.

**Risk Management and Controls.** The proposed rule's risk management and controls requirements for large covered institutions are generally more extensive than the requirements contained in the 2011 Proposed Rule. The proposed rule would require all Level 1 and Level 2 covered institutions to have a risk management framework for their incentive-based compensation programs that is independent of any lines of business; includes an independent compliance program that provides for internal controls, testing, monitoring, and training with written policies and procedures; and is commensurate with the size and complexity of the covered

institution's operations. In addition, the proposed rule would require Level 1 and Level 2 covered institutions to:

- Provide individuals in control functions with appropriate authority to influence the risk-taking of the business areas they monitor and ensure covered persons engaged in control functions are compensated independently of the performance of the business areas they monitor; and

- Provide for independent monitoring of: (1) Incentive-based compensation plans to identify whether the plans appropriately balance risk and reward; (2) events related to forfeiture and downward adjustment and decisions of forfeiture and downward adjustment reviews to determine consistency with the proposed rule; and (3) compliance of the incentive-based compensation program with the covered institution's policies and procedures.

**Governance.** Unlike the 2011 Proposed Rule, the proposed rule would require each Level 1 or Level 2 covered institution to establish a compensation committee composed solely of directors who are not senior executive officers to assist the board of directors in carrying out its responsibilities under the proposed rule. The compensation committee would be required to obtain input from the covered institution's risk and audit committees, or groups performing similar functions, and risk management function on the effectiveness of risk measures and adjustments used to balance incentive-based compensation arrangements. Additionally, management would be required to submit to the compensation committee on an annual or more frequent basis a written assessment of the effectiveness of the covered institution's incentive-based compensation program and related compliance and control processes in providing risk-taking incentives that are consistent with the risk profile of the covered institution. The compensation committee would also be required to obtain an independent written assessment from the internal audit or risk management function of the effectiveness of the covered institution's incentive-based compensation program and related compliance and control processes in providing risk-taking incentives that are consistent with the risk profile of the covered institution.

**Policies and Procedures.** The proposed rule would require all Level 1 and Level 2 covered institutions to have policies and procedures that, among other requirements:

- Are consistent with the requirements and prohibitions of the proposed rule;

- Specify the substantive and procedural criteria for forfeiture and clawback;
- Document final forfeiture, downward adjustment, and clawback decisions;
- Specify the substantive and procedural criteria for the acceleration of payments of deferred incentive-based compensation to a covered person;
- Identify and describe the role of any employees, committees, or groups authorized to make incentive-based compensation decisions, including when discretion is authorized;
- Describe how discretion is exercised to achieve balance;
- Require that the covered institution maintain documentation of its processes for the establishment, implementation, modification, and monitoring of incentive-based compensation arrangements;
- Describe how incentive-based compensation arrangements will be monitored;
- Specify the substantive and procedural requirements of the independent compliance program; and
- Ensure appropriate roles for risk management, risk oversight, and other control personnel in the covered institution's processes for designing incentive-based compensation arrangements and determining awards, deferral amounts, deferral periods, forfeiture, downward adjustment, clawback, and vesting and assessing the effectiveness of incentive-based compensation arrangements in restraining inappropriate risk-taking.

These policies and procedures requirements for Level 1 and Level 2 covered institutions are generally more detailed than the requirements in the 2011 Proposed Rule.

**Indirect Actions.** The proposed rule would prohibit covered institutions from doing indirectly, or through or by any other person, anything that would be unlawful for the covered institution to do directly under the proposed rule. This prohibition is similar to the evasion provision contained in the 2011 Proposed Rule.

**Enforcement.** For five of the Agencies, the proposed rule would be enforced under section 505 of the Gramm-Leach-Bliley Act, as specified in section 956. For FHFA, the proposed rule would be enforced under subtitle C of the Safety and Soundness Act.

**Conservatorship or Receivership for Certain Covered Institutions.** FHFA's and NCUA's proposed rules contain provisions that would apply to covered institutions that are managed by a government agency or a government-appointed agent, or that are in

conservatorship or receivership or are limited-life regulated entities under the Safety and Soundness Act or the Federal Credit Union Act.<sup>46</sup>

A detailed description of the proposed rule and requests for comments are set forth below.

## II. Section-by-Section Description of the Proposed Rule

### § \_\_\_\_\_.1 Authority, Scope and Initial Applicability

Section \_\_\_\_\_.1 provides that the proposed rule is issued pursuant to section 956. The Agencies also have listed applicable additional rulemaking authority in their respective authority citations.

The OCC is issuing the proposed rule under its general rulemaking authority, 12 U.S.C. 93a and the Home Owners' Loan Act, 12 U.S.C. 1461 *et seq.*, its safety and soundness authority under 12 U.S.C. 1818, and its authority to regulate compensation under 12 U.S.C. 1831p–1.

The Board is issuing the proposed rule under its safety and soundness authority under section 5136 of the Revised Statutes (12 U.S.C. 24), the Federal Reserve Act (12 U.S.C. 321–338a), the FDIA (12 U.S.C. 1818), the Bank Holding Company Act (12 U.S.C. 1844(b)), the Home Owners' Loan Act (12 U.S.C. 1462a and 1467a), and the International Banking Act (12 U.S.C. 3108).

The FDIC is issuing the proposed rule under its general rulemaking authority, 12 U.S.C. 1819 Tenth, as well as its general safety and soundness authority under 12 U.S.C. 1818 and authority to regulate compensation under 12 U.S.C. 1831p–1.

FHFA is issuing the proposed rule pursuant to its authority under the Safety and Soundness Act (particularly 12 U.S.C. 4511(b), 4513, 4514, 4518, 4526, and ch. 46 subch. III.).

NCUA is issuing the proposed rule under its general rulemaking and safety and soundness authorities in the Federal Credit Union Act, 12 U.S.C. 1751 *et seq.*

The SEC is issuing the proposed rule pursuant to its rulemaking authority under the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940 (15 U.S.C. 78q, 78w, 80b–4, and 80b–11).

The approach taken in the proposed rule is within the authority granted by section 956. The proposed rule would prohibit types and features of incentive-

based compensation arrangements that encourage inappropriate risks. As explained more fully below, incentive-based compensation arrangements that result in payments that are unreasonable or disproportionate to the value of services performed could encourage inappropriate risks by providing excessive compensation, fees, and benefits. Further, incentive-based compensation arrangements that do not appropriately balance risk and reward, that are not compatible with effective risk management and controls, or that are not supported by effective governance are the types of incentive-based compensation arrangements that could encourage inappropriate risks that could lead to material financial loss to covered institutions. Because these types of incentive-based compensation arrangements encourage inappropriate risks, they would be prohibited under the proposed rule.

The Federal Banking Agencies have found that any incentive-based compensation arrangement at a covered institution will encourage inappropriate risks if it does not sufficiently expose the risk-takers to the consequences of their risk decisions over time, and that in order to do this, it is necessary that meaningful portions of incentive-based compensation be deferred and placed at risk of reduction or recovery. The proposed rule reflects the minimums that are required to be effective for that purpose, as well as minimum standards of robust governance, and the disclosures that the statute requires. The Agencies' position in this respect is informed by the country's experience in the recent financial crisis, as well as by their experience supervising their respective institutions and their observation of the experience and judgments of regulators in other countries.

Consistent with section 956, section \_\_\_\_\_.1 provides that the proposed rule would apply to a covered institution with average total consolidated assets greater than or equal to \$1 billion that offers incentive-based compensation arrangements to covered persons.

The Agencies propose the compliance date of the proposed rule to be the beginning of the first calendar quarter that begins at least 540 days after the final rule is published in the **Federal Register**. Any incentive-based compensation plan with a performance period that begins before such date would not be required to comply with the requirements of the proposed rule. Whether a covered institution is a Level 1, Level 2, or Level 3 covered

<sup>46</sup> The FDIC's proposed rule would not apply to institutions for which the FDIC is appointed receiver under the FDIA or Title II of the Dodd-Frank Act, as appropriate, as those statutes govern such cases.

institution<sup>47</sup> on the compliance date would be determined based on average total consolidated assets as of the beginning of the first calendar quarter that begins after a final rule is published in the **Federal Register**. For example, if the final rule is published in the **Federal Register** on November 1, 2016, then the compliance date would be July 1, 2018. In that case, any incentive-based compensation plan with a performance period that began before July 1, 2018 would not be required to comply with the rule. Whether a covered institution is a Level 1, Level 2, or Level 3 covered institution on July 1, 2018 would be determined based on average total consolidated assets as of the beginning of the first quarter of 2017.

The Agencies recognize that most incentive-based compensation plans are implemented at the beginning of the fiscal or calendar year. Depending on the date of publication of a final rule, the proposed compliance date would provide at least 18 months, and in most cases more than two years, for covered institutions to develop and approve new incentive-based compensation plans and 18 months for covered institutions to develop and implement the supporting policies, procedures, risk management framework, and governance that would be required under the proposed rule.

1.1. The Agencies invite comment on whether this timing would be sufficient to allow covered institutions to implement any changes necessary for compliance with the proposed rule, particularly the development and implementation of policies and procedures. Is the length of time too long or too short and why? What specific changes would be required to bring existing policies and procedures into compliance with the rule? What constraints exist on the ability of covered institutions to meet the proposed deadline?

1.2. The Agencies invite comment on whether the compliance date should instead be the beginning of the first performance period that starts at least 365 days after the final rule is published in the **Federal Register** in order to have the proposed rule's policies, procedures, risk management, and governance requirements begin when the requirements applicable to incentive-compensation plans and arrangements begin. Why or why not?

Section \_\_\_\_\_.1 also specifies that the proposed rule is not intended to limit

the authority of any Agency under other provisions of applicable law and regulations. For example, the proposed rule would not affect the Federal Banking Agencies' authority under section 39 of the FDIA and the Federal Banking Agency Safety and Soundness Guidelines. The Board's Enhanced Prudential Standards under 12 CFR part 252 (Regulation YY) would not be affected. The OCC's Heightened Standards also would continue to be in effect. The NCUA's authority under 12 U.S.C. 1761a, 12 CFR 701.2, part 701 App. A, Art. VII. section 8, 701.21(c)(8)(i), 701.23(g) (1), 701.33, 702.203, 702.204, 703.17, 704.19, 704.20, part 708a, 712.8, 721.7, and part 750, and the NCUA Examiners Guide, Chapter 7,<sup>48</sup> would not be affected. Neither would the proposed rule affect the applicability of FHFA's executive compensation rule, under section 1318 of the Safety and Soundness Act (12 U.S.C. 4518), 12 CFR part 1230.

The Agencies acknowledge that some individuals who would be considered covered persons, senior executive officers, or significant risk-takers under the proposed rule are subject to other Federal compensation-related requirements. Further, some covered institutions may be subject to SEC rules regarding the disclosure of executive compensation,<sup>49</sup> and mortgage loan originators are subject to the Consumer Financial Protection Bureau's restrictions on compensation. This rule is not intended to affect the application of these other Federal compensation-related requirements.

## § \_\_\_\_\_.2 Definitions

Section \_\_\_\_\_.2 defines the various terms used in the proposed rule. Where the proposed rule uses a term defined in section 956, the proposed rule generally adopts the definition included in section 956.<sup>50</sup>

### Definitions Pertaining to Covered Institutions

Section 956(e)(2) of the Dodd-Frank Act defines the term "covered financial institution" to mean a depository institution; a depository institution holding company; a registered broker-dealer; a credit union; an investment adviser; the Federal National Mortgage

Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") (together, the "Enterprises"); and any other financial institution that the Agencies determine, jointly, by rule, should be treated as a covered financial institution for purposes of section 956. Section 956(f) provides that the requirements of section 956 do not apply to covered financial institutions with assets of less than \$1 billion.

The Agencies propose to jointly, by rule, designate additional financial institutions as covered institutions. The Agencies propose to include the Federal Home Loan Banks as covered institutions because they pose risks similar to those of some institutions covered under the proposed rule and should be subject to the same regulatory regime. The Agencies also propose to include as covered institutions the state-licensed uninsured branches and agencies of a foreign bank, organizations operating under section 25 or 25A of the Federal Reserve Act (*i.e.*, Edge and Agreement Corporations), as well as the other U.S. operations of foreign banking organizations that are treated as bank holding companies pursuant to section 8(a) of the International Banking Act of 1978 (12 U.S.C. 3106). Applying the same requirements to these institutions would be consistent with other regulatory requirements that are applicable to foreign banking organizations operating in the United States and would not distort competition for human resources between U.S. banking organizations and foreign banking organizations operating in the United States. These offices and operations currently are referenced in the Federal Banking Agency Guidance and are subject to section 8 of the FDIA (12 U.S.C. 1818), which prohibits institutions from engaging in unsafe or unsound practices to the same extent as insured depository institutions and bank holding companies.<sup>51</sup>

In addition, the Agencies propose to jointly, by rule, designate state-chartered non-depository trust companies that are members of the Federal Reserve System as covered institutions. The definition of "covered financial institution" under section 956 of the Dodd-Frank Act includes a depository institution as such term is defined in section 3 of the FDIA (12 U.S.C. 1813); that term includes all national banks and any state banks, including trust companies, that are engaged in the business of receiving deposits other than trust funds. As a consequence of these definitions, all

<sup>47</sup> As discussed below, the proposed rule includes baseline requirements for all covered institutions and additional requirements for Level 1 and Level 2 covered institutions, which are larger covered institutions.

<sup>48</sup> The NCUA Examiners Guide, Chapter 7, available at <https://www.ncua.gov/Legal/GuidesEtc/ExaminerGuide/Chapter07.pdf>.

<sup>49</sup> See Item 402 of Regulation S-K. 17 CFR 229.402.

<sup>50</sup> The definitions in the proposed rule would be for purposes of administering section 956 and would not affect the interpretation or construction of the same or similar terms for purposes of any other statute or regulation administered by the Agencies.

<sup>51</sup> See 12 U.S.C. 1813(c)(3) and 1818(b)(4).

national banks, including national banks that are non-depository trust companies, are “depository institutions” within the meaning of section 956, but non-FDIC insured state non-depository trust companies that are members of the Federal Reserve System are not. In order to achieve equal treatment across similar entities with different charters, the Agencies propose to include state-chartered non-depository member trust companies as covered institutions. These institutions would be “regulated institutions” under the definition of “state member bank” in the Board’s rule.

Each Agency’s proposed rule contains a definition of the term “covered institution” that describes the covered financial institutions the Agency regulates.

The Agencies have tailored the requirements of the proposed rule to the size and complexity of covered institutions, and are proposing to designate covered institutions as Level 1, Level 2, or Level 3 covered institutions to effectuate this tailoring. The Agencies have observed through their supervisory experience that large financial institutions typically have complex business activities in multiple lines of business, distinct subsidiaries, and regulatory jurisdictions, and frequently operate and manage their businesses in ways that cross those lines of business, subsidiaries, and jurisdictions. Level 3 covered institutions would generally be subject to only the basic set of prohibitions and disclosure requirements. The proposed rule would apply additional prohibitions and requirements to incentive-based compensation arrangements at Level 1 and Level 2 covered institutions, as discussed below. Whether a covered institution that is a subsidiary of a depository institution holding company is a Level 1, Level 2, or Level 3 covered institution would be based on the average total consolidated assets of the top-tier depository institution holding company. Whether that subsidiary has at least \$1 billion will be based on the subsidiary’s average total consolidated assets.

The Agency definitions of covered institution, Level 1, Level 2, and Level 3 covered institution, and related terms are summarized below.

**Covered Institution and Regulated Institution.** Each Agency has set forth text for its Agency-specific definition of the term “covered institution” that specifies the entities to which that

Agency’s rule applies.<sup>52</sup> Under the proposed rule, a “covered institution” would include all of the following:

- In the case of the OCC:
  - A national bank, Federal savings association, or Federal branch or agency of a foreign bank<sup>53</sup> with average total consolidated assets greater than or equal to \$1 billion; and
  - A subsidiary of a national bank, Federal savings association, or Federal branch or agency of a foreign bank, if the subsidiary (A) is not a broker, dealer, person providing insurance, investment company, or investment adviser; and (B) has average total consolidated assets greater than or equal to \$1 billion.
- In the case of the Board, the proposed definition of the term “covered institution” is a “regulated institution” with average total consolidated assets greater than or equal to \$1 billion, and the Board’s definition of the term “regulated institution” includes:
  - A state member bank, as defined in 12 CFR 208.2(g);
  - A bank holding company, as defined in 12 CFR 225.2(c), that is not a foreign banking organization, as defined in 12 CFR 211.21(o), and a subsidiary of such a bank holding company that is not a depository institution, broker-dealer or investment adviser;
  - A savings and loan holding company, as defined in 12 CFR 238.2(m), and a subsidiary of a savings and loan holding company that is not a depository institution, broker-dealer or investment adviser;
  - An organization operating under section 25 or 25A of the Federal Reserve Act (Edge and Agreement Corporation);
  - A state-licensed uninsured branch or agency of a foreign bank, as defined in section 3 of the FDIA (12 U.S.C. 1813); and
  - The U.S. operations of a foreign banking organization, as defined in 12 CFR 211.21(o), and a U.S. subsidiary of such foreign banking organization that is not a depository institution, broker-dealer, or investment adviser.
- In the case of the FDIC, “covered institution” means a:
  - State nonmember bank, state savings association, and a state insured branch of a foreign bank, as such terms are defined in section 3 of the FDIA, 12 U.S.C. 1813, with average total

consolidated assets greater than or equal to \$1 billion; and

- A subsidiary of a state nonmember bank, state savings association, or a state insured branch of a foreign bank, as such terms are defined in section 3 of the FDIA, 12 U.S.C. 1813, that: (i) Is not a broker, dealer, person providing insurance, investment company, or investment adviser; and (ii) Has average total consolidated assets greater than or equal to \$1 billion.

- In the case of the NCUA, a credit union, as described in section 19(b)(1)(A)(iv) of the Federal Reserve Act, meaning an insured credit union as defined under 12 U.S.C. 1752(7) or credit union eligible to make application to become an insured credit union under 12 U.S.C. 1781. Instead of the term “covered financial institution,” the NCUA uses the term “credit union” throughout its proposed rule, as credit unions are the only type of covered institution NCUA regulates. The scope section of the rule defines the credit unions that will be subject to this rule—that is, credit unions with \$1 billion or more in total consolidated assets.

- In the case of the SEC, a broker or dealer registered under section 15 of the Securities Exchange Act of 1934, 15 U.S.C. 78o; and an investment adviser, as such term is defined in section 202(a)(11) of the Investment Advisers Act of 1940, 15 U.S.C. 80b–2(a)(11).<sup>54</sup> The proposed rule would not apply to persons excluded from the definition of investment adviser contained in section 202(a)(11) of the Investment Advisers Act nor would it apply to such other persons not within the intent of section 202(a)(11) of the Investment Advisers Act, as the SEC may designate by rules and regulations or order. Section 956 does not contain exceptions or exemptions for investment advisers based on registration.<sup>55</sup>

<sup>54</sup> By its terms, the definition of “covered financial institution” in section 956 includes any institution that meets the definition of “investment adviser” under the Investment Advisers Act of 1940 (“Investment Advisers Act”), regardless of whether the institution is registered as an investment adviser under that Act. Banks and bank holding companies are generally excluded from the definition of “investment adviser” under section 202(a)(11) of the Investment Advisers Act, although they would still be “covered institutions” under the relevant Agency’s proposed rule.

<sup>55</sup> Commenters to the 2011 Proposed Rule requested clarification with respect to those entities that are excluded from the definition of “investment adviser” under the Investment Advisers Act and those that are exempt from registration as an investment adviser under the Investment Advisers Act. Section 956 expressly includes any institution that meets the definition of investment adviser regardless of whether the institution is registered under the Investment Advisers Act. See *supra* note 54. Thus, the proposed rule would apply to institutions that meet

<sup>52</sup> The Agency-specific definitions are intended to be applied only for purposes of administering a final rule under section 956.

<sup>53</sup> The term “Federal branch or agency of a foreign bank” refers to both insured and uninsured Federal branches and agencies of foreign banks.

• In the case of FHFA, the proposed definition of the term “covered institution” is a “regulated institution” with average total consolidated assets greater than or equal to \$1 billion, and FHFA’s definition of the term “regulated institution” means an Enterprise, as defined in 12 U.S.C. 4502(10), and a Federal Home Loan Bank.

*Level 1, Level 2, and Level 3 covered institutions.* The Agencies have tailored the requirements of the proposed rule to the size and complexity of covered institutions. All covered institutions would be subject to a basic set of prohibitions and disclosure requirements, as described in section \_\_\_\_\_.4 of the proposed rule.

The Agencies are proposing to group covered institutions into three levels. The first level, Level 1 covered institutions, would generally be covered institutions with average total consolidated assets of greater than \$250 billion and subsidiaries of such institutions that are covered institutions. The next level, Level 2 covered institutions, would generally be covered institutions with average total consolidated assets between \$50 billion and \$250 billion and subsidiaries of such institutions that are covered institutions. The smallest covered institutions, those with average total consolidated assets between \$1 and \$50 billion, would be Level 3 covered institutions and generally would be subject to only the basic set of prohibitions and requirements.<sup>56</sup>

The proposed rule would apply additional prohibitions and requirements to incentive-based compensation arrangements at Level 1 and Level 2 covered institutions, as described in section \_\_\_\_\_.5 and sections \_\_\_\_\_.7 through \_\_\_\_\_.11 of the proposed rule and further discussed below. The specific requirements of the proposed rule that would apply to Level 1 and Level 2 covered institutions are the same, with the exception of the deferral amounts and deferral periods described

the definition of investment adviser under section 202(a)(11) of the Investment Advisers Act and would not exempt any such institutions that may be prohibited or exempted from registering with the SEC under the Investment Advisers Act.

<sup>56</sup> As discussed later in this Supplemental Information section, under section \_\_\_\_\_.6 of the proposed rule, an Agency would be able to require a covered institution with average total consolidated assets greater than or equal to \$10 billion and less than \$50 billion to comply with some or all of the provisions of section \_\_\_\_\_.5 and sections \_\_\_\_\_.7 through \_\_\_\_\_.11, if the Agency determines that the activities, complexity of operations, risk profile, or compensation practices of the covered institution are consistent with those of a Level 1 or Level 2 covered institution.

in section \_\_\_\_\_.7(a)(1) and section \_\_\_\_\_.7(a)(2).

#### Consolidation

Generally, the Agencies also propose that covered institutions that are subsidiaries of other covered institutions would be subject to the same requirements, and defined to be the same level, as the parent covered institution,<sup>57</sup> even if the subsidiary covered institution is smaller than the parent covered institution.<sup>58</sup> This approach of assessing risks at the level of the holding company for a consolidated organization recognizes that financial stress or the improper management of risk in one part of an organization has the potential to spread rapidly to other parts of the organization. Large depository institution holding companies increasingly operate and manage their businesses in such a way that risks affect different subsidiaries within the consolidated organization and are managed on a consolidated basis. For example, decisions about business lines including management and resource allocation may be made by executives and employees in different subsidiaries. Integrating products and operations may offer significant efficiencies but can also result in financial stress or the improper management of risk in one part of a consolidated organization and has the potential to spread risk rapidly to other parts of the consolidated organization. Even when risk is assessed at the level of the holding company, risk will also be assessed at individual institutions within that consolidated organization. For example, a bank subsidiary of a large, complex bank holding company

<sup>57</sup> Commenters on the 2011 Proposed Rule questioned how the requirements would apply in the context of consolidated organizations where a parent holding company structure may include one or more subsidiary banks, broker-dealers, or investment advisers each with total consolidated assets either above or below, or somewhere in between, the relevant thresholds. They also expressed concern that the 2011 Proposed Rule could lead to “regulatory overlap” where the parent holding company and individual subsidiaries are regulated by different agencies.

<sup>58</sup> For the U.S. operations of a foreign banking organization, level would be determined by the total consolidated U.S. assets of the foreign banking organization, including the assets of any U.S. branches or agencies of the foreign banking organization, any U.S. subsidiaries of the foreign banking organization, and any U.S. operations held pursuant to section 2(h)(2) of the Bank Holding Company Act. In contrast, the level of an OCC-regulated Federal branch or agency of a foreign bank would be determined with reference to the assets of the Federal branch or agency. This treatment is consistent with the determination of the level of a national bank or Federal savings association that is not a subsidiary of a holding company and the OCC’s approach to regulation of Federal branches and agencies.

might have a different risk profile than the bank holding company. In that situation, a risk assessment would have different results when conducted at the level of the bank and at the level of the bank holding company.

Moreover, in the experience of the Federal Banking Agencies, incentive-based compensation programs generally are designed at the holding company level and are applied throughout the consolidated organization. Many holding companies establish incentive-based compensation programs in this manner because it can help maintain effective risk management and controls for the entire consolidated organization. More broadly, the expectations and incentives established by the highest levels of corporate leadership set the tone for the entire organization and are important factors of whether an organization is capable of maintaining fully effective risk management and internal control processes. The Board has observed that some large, complex depository institution holding companies have evolved toward comprehensive, consolidated risk management to measure and assess the range of their exposures and the way these exposures interrelate, including in the context of incentive-based compensation programs. In supervising the activities of depository institution holding companies, the Board has adopted and continues to follow the principle that depository institution holding companies should serve as a source of financial and managerial strength for their subsidiary depository institutions.<sup>59</sup>

The proposed rule is designed to reinforce the ability of institutions to establish and maintain effective risk management and controls for the entire consolidated organization with respect to the organization’s incentive-based compensation program. Moreover, the structure of the proposed rule is also consistent with the reality that within many large depository institution holding companies, covered persons may be employed by one legal entity but may do work for one or more of that entity’s affiliates. For example, an employee of a national bank might also perform certain responsibilities on behalf of an affiliated broker-dealer. Applying the same requirements to all subsidiary covered institutions may reduce the possibility of evasion of the more specific standards applicable to certain individuals at Level 1 or Level 2 covered institutions. Finally, this approach may enable holding company structures to more effectively manage

<sup>59</sup> See 12 U.S.C. 18310–1; 12 CFR 225.4(a)(1).

human resources, because applying the same requirements to all subsidiary covered institutions would treat similarly the incentive-based compensation arrangements for similar positions at different subsidiaries within a holding company structure.<sup>60</sup>

The proposed rule would also be consistent with the requirements of overseas regulators who have examined the role that incentive-based compensation plays in institutions. After examining the risks posed by certain incentive-based compensation programs, many foreign regulators are now requiring that the rules governing incentive-based compensation be applied at the group, parent, and subsidiary operating levels (including those in offshore financial centers).<sup>61</sup>

The Agencies are cognizant that the approach being proposed may have some disadvantages for smaller subsidiaries within a larger depository institution holding company structure by applying the more specific provisions of the proposed rule to these smaller institutions that would not otherwise apply to them but for being a subsidiary of a depository institution holding company. As further discussed below, in an effort to reduce burden, the Board's proposed rule would permit institutions that are subsidiaries of depository institution holding companies and that are subject to the Board's proposed rule to meet the requirements of the proposed rule if the parent covered institution complies with the requirements in such a way that causes the relevant portion of the incentive-based compensation program of the subsidiary covered institution to comply with the requirements.<sup>62</sup>

Similarly, the OCC's proposed rule would allow a covered institution subject to the OCC's proposed rule that is a subsidiary of another covered institution subject to the OCC's proposed rule to meet a requirement of the OCC's proposed rule if the parent covered institution complies with that requirement in a way that causes the relevant portion of the incentive-based compensation program of the subsidiary covered institution to comply with that requirement.

The FDIC's proposed rule would similarly allow a covered institution subject to the FDIC's proposed rule that

is a subsidiary of another covered institution subject to the FDIC's proposed rule to meet a requirement of the FDIC's proposed rule if the parent covered institution complies with that requirement in a way that causes the relevant portion of the incentive-based compensation program of the subsidiary covered institution to comply with that requirement.

The SEC is not proposing to require a covered institution under its proposed rule that is a subsidiary of another covered institution under that proposed rule to be subject to the same requirements, and defined to be the same levels, as the parent covered institution. In general, the operations, services, and products of broker-dealers and investment advisers are not typically effected through subsidiaries<sup>63</sup> and it is expected that their incentive-based compensation arrangements are typically derived from the activities of the broker-dealers and investment advisers themselves. Because of this, any inappropriate risks for which the incentive-based compensation programs at these firms may encourage should be localized, and the management of these risks similarly should reside at the broker-dealer or investment adviser. Where that is not the case, individuals that are employed by subsidiaries of a broker-dealer or investment adviser may still be considered to be a "significant risk-taker" for the covered institution and, therefore, subject to the proposed rule.<sup>64</sup> In addition, broker-dealers and investment advisers that are subsidiaries of depository institution holding companies would be consolidated on the basis of such depository institution holding companies generally, where there is often a greater integration of products and operations, public interest,

and assessment and management of risk (including those related to incentive-based compensation) across the depository institution holding companies and their subsidiaries.<sup>65</sup>

#### Level 1, Level 2, and Level 3 Covered Institutions

For purposes of the proposed rule, the Agencies have specified the three levels of covered institutions as:

- In the case of the OCC:
  - A "Level 1 covered institution" means: (i) A covered institution that is a subsidiary of a depository institution holding company with average total consolidated assets greater than or equal to \$250 billion; (ii) a covered institution with average total consolidated assets greater than or equal to \$250 billion that is not a subsidiary of a covered institution or of a depository institution holding company; and (iii) a covered institution that is a subsidiary of a covered institution with average total consolidated assets greater than or equal to \$250 billion.

- A "Level 2 covered institution" means: (i) A covered institution that is a subsidiary of a depository institution holding company with average total consolidated assets greater than or equal to \$50 billion but less than \$250 billion; (ii) a covered institution with average total consolidated assets greater than or equal to \$50 billion but less than \$250 billion that is not a subsidiary of a covered institution or of a depository institution holding company; and (iii) a covered institution that is a subsidiary of a covered institution with average total consolidated assets greater than or equal to \$50 billion but less than \$250 billion.

- A "Level 3 covered institution" means: (i) A covered institution with average total consolidated assets greater

<sup>63</sup> In addition, the SEC's regulatory regime with respect to broker-dealers and investment advisers generally applies on an entity-by-entity basis. For example, subject to certain exclusions, any person that for compensation is engaged in the business of providing advice, making recommendations, issuing reports, or furnishing analyses on securities, either directly or through publications is subject to the Investment Advisers Act. See 15 U.S.C. 80b-2(a)(11).

<sup>64</sup> The proposed rule also prohibits a covered institution from doing indirectly, or through or by any other person, anything that would be unlawful for such covered institution to do directly. See section 303.12. For example, the SEC has stated that it will, based on facts and circumstances, treat as a single investment adviser two or more affiliated investment advisers that are separate legal entities but are operationally integrated. See *Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than \$150 Million in Assets Under Management, and Foreign Private Advisers*, Investment Advisers Act Release No. 3222 (June 22, 2011) 76 FR 39,646 (July 6, 2011); *In the Matter of TL Ventures, Inc.*, Investment Advisers Act Release No. 3859 (June 20, 2014) (settled action); section 15 U.S.C. 80b-8.

<sup>65</sup> As discussed above in this Supplementary Information, the Agencies propose that covered institutions that are subsidiaries of covered institutions that are depository institution holding companies would be subject to the same requirements, and defined to be the same level, as the parent covered institutions. Because the failure of a depository institution may cause losses to the deposit insurance fund, there is a heightened interest in the safety and soundness of depository institutions and their holding companies. Moreover, as noted above, depository institution holding companies should serve as a source of financial and managerial strength for their subsidiary depository institutions. Additionally, in the experience of the Federal Banking Agencies, incentive-based compensation programs generally are designed at the holding company level and are applied throughout the consolidated organization. The Board has observed that complex depository institution holding companies have evolved toward comprehensive, consolidated risk management to measure and assess the range of their exposures and the way these exposures interrelate, including in the context of incentive-based compensation programs.

<sup>60</sup> For example, requirements that apply to certain job functions in one part of a consolidated organization but not to the same job function in another operating unit of the same holding company structure could create uneven treatment across the legal entities.

<sup>61</sup> See, e.g., Article 92 of the CRD IV (2013/36/EU).

<sup>62</sup> See section \_\_\_\_ .3(c) of the proposed rule.

than or equal to \$1 billion but less than \$50 billion; and (ii) a covered institution that is a subsidiary of a covered institution with average total consolidated assets greater than or equal to \$1 billion but less than \$50 billion.

- In the case of the Board:

- A “Level 1 covered institution” means a covered institution with average total consolidated assets greater than or equal to \$250 billion and any subsidiary of a Level 1 covered institution that is a covered institution.

- A “Level 2 covered institution” means a covered institution with average total consolidated assets greater than or equal to \$50 billion that is not a Level 1 covered institution and any subsidiary of a Level 2 covered institution that is a covered institution.

- A “Level 3 covered institution” means a covered institution with average total consolidated assets greater than or equal to \$1 billion that is not a Level 1 or Level 2 covered institution.

- In the case of the FDIC:

- A “Level 1 covered institution” means: (i) A covered institution that is a subsidiary of a depository institution holding company with average total consolidated assets greater than or equal to \$250 billion; (ii) a covered institution with average total consolidated assets greater than or equal to \$250 billion that is not a subsidiary of a depository institution holding company; and (iii) a covered institution that is a subsidiary of a covered institution with average total consolidated assets greater than or equal to \$250 billion.

- A “Level 2 covered institution” means: (i) A covered institution that is a subsidiary of a depository institution holding company with average total consolidated assets greater than or equal to \$50 billion but less than \$250 billion; (ii) a covered institution with average total consolidated assets greater than or equal to \$50 billion but less than \$250 billion that is not a subsidiary of a depository institution holding company; and (iii) a covered institution that is a subsidiary of a covered institution with average total consolidated assets greater than or equal to \$50 billion but less than \$250 billion.

- A “Level 3 covered institution” means: (i) A covered institution that is a subsidiary of a depository institution holding company with average total consolidated assets greater than or equal to \$1 billion but less than \$50 billion; (ii) a covered institution with average total consolidated assets greater than or equal to \$1 billion but less than \$50 billion that is not a subsidiary of a depository institution holding company; and (iii) a covered institution that is a subsidiary of a covered institution with

average total consolidated assets greater than or equal to \$1 billion but less than \$50 billion.

- In the case of the NCUA:

- A “Level 1 credit union” means a credit union with average total consolidated assets of \$250 billion or more.

- A “Level 2 credit union” means a credit union with average total consolidated assets greater than or equal to \$50 billion that is not a Level 1 credit union.

- A “Level 3 credit union” means a credit union with average total consolidated assets greater than or equal to \$1 billion that is not a Level 1 or Level 2 credit union.

- In the case of the SEC:

- A “Level 1 covered institution” means: (i) A covered institution with average total consolidated assets greater than or equal to \$250 billion; or (ii) a covered institution that is a subsidiary of a depository institution holding company that is a Level 1 covered institution pursuant to 12 CFR 236.2.

- A “Level 2 covered institution” means: (i) A covered institution with average total consolidated assets greater than or equal to \$50 billion that is not a Level 1 covered institution; or (ii) a covered institution that is a subsidiary of a depository institution holding company that is a Level 2 covered institution pursuant to 12 CFR 236.2.

- A “Level 3 covered institution” means a covered institution with average total consolidated assets greater than or equal to \$1 billion that is not a Level 1 covered institution or Level 2 covered institution.

- In the case of FHFA:

- A “Level 1 covered institution” means a covered institution with average total consolidated assets greater than or equal to \$250 billion that is not a Federal Home Loan Bank.

- A “Level 2 covered institution” means a covered institution with average total consolidated assets greater than or equal to \$50 billion that is not a Level 1 covered institution and any Federal Home Loan Bank that is a covered institution.

- A “Level 3 covered institution” means a covered institution with average total consolidated assets greater than or equal to \$1 billion that is not a Level 1 covered institution or Level 2 covered institution.

The Agencies considered the varying levels of complexity and risks across covered institutions that would be subject to this proposed rule, as well as the general correlation of asset size with those potential risks, in proposing to distinguish covered institutions by their

asset size.<sup>66</sup> In general, larger financial institutions have more complex structures and operations. These more complex structures make controlling risk-taking more difficult. Moreover, these larger, more complex institutions also tend to be significant users of incentive-based compensation. Significant use of incentive-based compensation combined with more complex business operations can make it more difficult to immediately recognize and assess risks for the institution as a whole. Therefore, the requirements of the proposed rule are tailored to reflect the size and complexity of each of the three levels of covered institutions identified in the proposed rule. The proposed rule assigns covered institutions to one of three levels, based on each institution’s average total consolidated assets.

Additionally, the Agencies considered the exemption in section 956 for institutions with less than \$1 billion in assets along with other asset-level thresholds in the Dodd-Frank Act<sup>67</sup> as an indication that Congress views asset size as an appropriate basis for the requirements and prohibitions established under this proposed rule. Consistent with this approach, the Agencies also looked to asset size to determine the types of prohibitions that would be necessary to discourage inappropriate risks at covered institutions that could lead to material financial loss.

The Agencies are proposing that more rigorous requirements apply to institutions with \$50 billion or more in assets. These institutions with assets of \$50 billion or more tend to be significantly more complex and, the risk-taking of these institutions, and their potential failure, implicates greater risks for the financial system and the overall economy. Tailoring application of the requirements of the proposed rule is consistent with other provisions of the Dodd-Frank Act, which distinguish requirements for institutions with \$50

<sup>66</sup> But see earlier discussion regarding consolidation.

<sup>67</sup> See, e.g., section 116 of the Dodd-Frank Act (12 U.S.C. 5326) (allowing the Financial Stability Oversight Council to require a bank holding company with total consolidated assets of \$50 billion or more to submit reports); section 163 of the Dodd-Frank Act (12 U.S.C. 5363) (requiring prior notice to the Board for certain acquisitions by bank holding companies with total consolidated assets of \$50 billion or more); section 165 of the Dodd-Frank Act (12 U.S.C. 5365) (requiring enhanced prudential standards for bank holding companies with total consolidated assets of \$50 billion or more); section 318(c) of the Dodd-Frank Act (12 U.S.C. 16) (authorizing the Board to collect assessments, fees, and other charges from bank holding companies and savings and loan holding companies with total consolidated assets of \$50 billion or more).

billion or more in total consolidated assets. For example, the enhanced supervision and prudential standards for nonbank financial companies and bank holding companies under section 165<sup>68</sup> apply to bank holding companies with total consolidated assets of \$50 billion or greater. It is also consistent with the definitions of advanced approaches institutions under the Federal Banking Agencies' domestic capital rules,<sup>69</sup> which are linked to the total consolidated assets of an institution. Other statutory and regulatory provisions recognize this difference.<sup>70</sup>

Most of the requirements of the proposed rule would apply to Level 1 and Level 2 covered institutions in a similar manner. Deferral requirements, however, would be different for Level 1 and Level 2 covered institutions, as discussed further below: Incentive-based compensation for senior executive officers and significant risk-takers at covered institutions with average total consolidated assets equal to or greater than \$250 billion would be subject to a higher percentage of deferral, and longer deferral periods. In the experience of the Agencies, covered institutions with assets of \$250 billion or more tend to be significantly more complex and thus exposed to a higher level of risk than those with assets of less than \$250 billion. The risk-taking of these institutions, and their potential failure, implicates the greatest risks for the broader economy and financial system. Other statutory and regulatory provisions recognize this difference. For example, the definitions of advanced approaches institutions under the Federal Banking Agencies' domestic capital rules establish a \$250 billion threshold for coverage. This approach is similar to that used in the international

standards published by the Basel Committee on Banking Supervision, and rules implementing such capital standards, under which banks with consolidated assets of \$250 billion or more are subject to enhanced capital and leverage standards.

As noted above, the Agencies propose to designate the Federal Home Loan Banks as covered institutions. Under FHFA's proposed rule, each Federal Home Loan Bank would be a Level 2 covered institution by definition, as opposed to by total consolidated assets. As long as a Federal Home Loan Bank is a covered institution under this part, with average total consolidated assets greater than or equal to \$1 billion, it is a Level 2 covered institution. FHFA proposes this approach because generally for the Federal Home Loan Banks, asset size is not a meaningful indicator of risk. The Federal Home Loan Banks all operate in a similar enough manner that treating them differently based on asset size is not justifiable. Because of the scalability of the Federal Home Loan Bank business model, it is possible for a Federal Home Loan Bank to pass back and forth over the asset-size threshold without any meaningful change in risk profile. FHFA proposes to designate the Federal Home Loan Banks as Level 2 covered institutions instead of Level 3 covered institutions because at the time of the proposed rule, at least one Federal Home Loan Bank would be a Level 2 covered institution if determined by asset size, and the regulatory requirements under the proposed rule that seem most appropriate for the Federal Home Loan Banks are those of Level 2 covered institutions.

Similar to the approach used by the Federal Banking Agencies in their general supervision of banking organizations, if the proposed rule were adopted, the Agencies would generally expect to coordinate oversight and, to the extent applicable, supervision for consolidated organizations in order to assess compliance throughout the consolidated organization with any final rule. The Agencies are cognizant that effective and consistent supervision generally requires coordination among the Agencies that regulate the various entities within a consolidated organization. The supervisory authority of each appropriate Federal regulator to examine and review its covered institutions for compliance with the proposed rule would not be affected under this approach.

*Affiliate.* For the OCC, the Board, the FDIC, and the SEC, the proposed rule would define "affiliate" to mean any company that controls, is controlled by,

or is under common control with another company. FHFA's proposed rule would not include a definition of "affiliate." The Federal Home Loan Banks have no affiliates, and affiliates of the Enterprises are included as part of the definition of Enterprise in the Safety and Soundness Act, which is referenced in the definition of regulated entity. The NCUA's proposed rule also would not include a definition of "affiliate." While in some cases, credit union service organizations ("CUSOs") might be considered affiliates of a credit union, NCUA has determined that this rule would not apply to CUSOs.

*Average total consolidated assets.* Consistent with section 956, the proposed rule would not apply to institutions with less than \$1 billion in assets. Additionally, as discussed above, under the proposed rule, more specific requirements would apply to institutions with higher levels of assets. The Agencies propose to use average total consolidated assets to measure assets for the purposes of determining applicability of the requirements of this rule. Whether a covered institution that is a subsidiary of a depository institution holding company is a Level 1, Level 2, or Level 3 covered institution would be based on the average total consolidated assets of the top-tier depository institution holding company. Whether that subsidiary has at least \$1 billion will be based on the subsidiary's average total consolidated assets.

For an institution that is not an investment adviser, average total consolidated assets would be determined with reference to the average of the total consolidated assets reported on regulatory reports for the four most recent consecutive quarters. This method is consistent with those used to calculate total consolidated assets for purposes of other rules that have \$50 billion thresholds,<sup>71</sup> and it may reduce administrative burden on institutions—particularly Level 3 covered institutions that become Level 2 covered institutions—if average total consolidated assets are calculated in the same way for the proposed rule. For an institution that does not have a regulatory report for each of the four most recent consecutive quarters to reference, average total consolidated assets would mean the average of total consolidated assets, as reported on the relevant regulatory reports, for the most recent quarter or consecutive quarters available, as applicable. Average total

<sup>68</sup> 12 U.S.C. 5365.

<sup>69</sup> See 12 CFR 3.100(b)(1) (advanced approaches national banks and Federal savings associations); 12 CFR 324.100(b)(1) (advanced approaches state nonmember banks, state savings associations, and insured branches of foreign banks); 12 CFR 217.100(b)(1) (advanced approaches bank holding companies, savings and loan holding companies, and state member banks).

<sup>70</sup> See, e.g., Board, "Regulatory Capital Rules: Implementation of Risk-Based Capital Surcharges for Global Systemically Important Bank Holding Companies," 80 FR 49081 (August 14, 2015); Board, "Single-Counterparty Credit Limits for Large Banking Organizations; Proposed Rule," 81 FR 14327 (March 4, 2016); Board, "Debit Card Interchange Fees and Routing; Final Rule," 76 FR 43393 (July 20, 2011); Board, "Supervision and Regulation Assessments for Bank Holding Companies and Savings and Loan Holding Companies With Total Consolidated Assets of \$50 Billion or More and Nonbank Financial Companies Supervised by the Federal Reserve," 78 FR 52391 (August 23, 2013); OCC, Board, FDIC, "Supplementary Leverage Ratio; Final Rule," 79 FR 57725 (September 26, 2014).

<sup>71</sup> See, e.g., OCC's Heightened Standards (12 CFR part 30, Appendix D); 12 CFR 46.3; 12 CFR 225.8; 12 CFR 243.2; 12 CFR 252.30; 2 CFR 252.132; 12 CFR 325.202; 12 CFR 381.2.

consolidated assets would be measured on the as-of date of the most recent regulatory report used in the calculation of the average. For a covered institution that is an investment adviser, average total consolidated assets would be determined by the investment adviser's total assets (exclusive of non-proprietary assets) shown on the balance sheet for the adviser's most recent fiscal year end.<sup>72</sup>

The Board's proposed rule would require that savings and loan holding companies that do not file a regulatory report within the meaning of section \_\_\_\_\_.2(ee)(3) of the Board's proposed rule report their average total consolidated assets to the Board on a quarterly basis. In addition, foreign banking organizations with U.S. operations would be required to report their total consolidated U.S. assets to the Board on a quarterly basis. These regulated institutions would be required to report their average total consolidated assets to the Board either because they do not file reports of their total consolidated assets with the Board (in the case of savings and loan holding companies that do not file a regulatory report with the Board within the meaning of section \_\_\_\_\_.2(ee)(3) of the Board's proposed rule), or because the reports filed do not encompass the full range of assets (in the case of foreign banking organizations with U.S. operations). Asset information concerning the U.S. operations of foreign banking organizations is filed on form FRY-7Q, but the information does not include U.S. assets held pursuant to section 2(h)(2) of the Bank Holding Company Act. Foreign banking organizations with U.S. operations would report their average total consolidated U.S. assets including assets held pursuant to section 2(h)(2) of the Bank Holding Company Act for

purposes of complying with the requirements of section \_\_\_\_\_.2(ee)(3) of the Board's proposed rule. The Board would propose that reporting forms be created or modified as necessary for these institutions to meet these reporting requirements.

The proposed rule does not specify a method for determining the total consolidated assets of some types of subsidiaries that would be considered covered institutions under the proposed rule, because those subsidiaries do not currently submit regular reports of their asset size to the Agencies. For the subsidiary of a national bank, Federal savings association, or Federal branch or agency of a foreign bank, the OCC would rely on a report of the subsidiary's total consolidated assets prepared by the subsidiary, national bank, Federal savings association, or Federal branch or agency in a form that is acceptable to the OCC. Similarly, for a regulated institution subsidiary of a bank holding company, savings and loan holding company, or foreign banking organization the Board would rely on a report of the subsidiary's total consolidated assets prepared by the bank holding company or savings and loan holding company in a form that is acceptable to the Board.

**Control.** The definition of control in the proposed rule is similar to the definition of the same term in the Bank Holding Company Act.<sup>73</sup> Any company would have control over a bank or any company if: (1) The company directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 percent or more of any class of voting securities of the bank or company; (2) the company controls in any manner the election of a majority of the directors or trustees of the bank or company; or (3) the appropriate Federal regulator determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company.

**Depository institution holding company.** The OCC's, the FDIC's, and the SEC's proposed rules define "depository institution holding company" to mean a top-tier depository institution holding company, where "depository institution holding company" would have the same meaning as in section 3 of the FDIA.<sup>74</sup> In a multi-tiered depository institution holding company, references in the OCC's, FDIC's and SEC's proposed rules to the "depository institution holding

company" would mean the top-tier depository institution holding company of the multi-tiered holding company only.

For example, for the purpose of determining whether a state nonmember bank that is a subsidiary of a depository institution holding company and is within a multi-tiered depository institution holding company structure is a Level 1, Level 2, or Level 3 covered institution under the FDIC's proposed rule, the state nonmember would look to the top-tier depository institution holding company's average total consolidated assets. Thus, in a situation in which a state nonmember bank with average total consolidated assets of \$35 billion is a subsidiary of a depository institution holding company with average total consolidated assets of \$45 billion that is itself a subsidiary of a depository institution holding company with \$75 billion in average total consolidated assets, the state nonmember bank would be treated as a Level 2 covered institution because the top-tier depository institution holding company has average total consolidated assets of \$75 billion (which is greater than or equal to \$50 billion but less than \$250 billion). Similarly, state member banks and national banks within multi-tiered depository institution holding company structures would look to the top-tier depository institution holding company's average total consolidated assets when determining if they are a Level 1, Level 2 or Level 3 covered institution under the Board's and the OCC's proposed rules.

**Subsidiary.** For the OCC, the Board, the FDIC, and the SEC, the proposed rule would define "subsidiary" to mean any company which is owned or controlled directly or indirectly by another company. The Board proposes to exclude from its definition of "subsidiary" any merchant banking investment that is owned or controlled pursuant to 12 U.S.C. 1843(k)(4)(H) and subpart J of the Board's Regulation Y (12 CFR part 225) and any company with respect to which the covered institution acquired ownership or control in the ordinary course of collecting a debt previously contracted in good faith. Depository institution holding companies may hold such investments only for limited periods of time by law. Application of the proposed rule to these institutions directly would not further the purpose of the proposed rule under section 956. The holding company and any nonbanking subsidiary holding these investments would be subject to the proposed rule. For these reasons, the Board is proposing to exclude from the definition

<sup>72</sup> This proposed method of calculation for investment advisers corresponds to the reporting requirement in Item 1.O. of Part 1A of Form ADV, which currently requires an investment adviser to check a box to indicate if it has assets of \$1 billion or more. See Form ADV, Part 1A, Item 1.O.; SEC, "Rules Implementing Amendments to the Investment Advisers Act of 1940, Investment Advisers Release No. IA-3221," 76 FR 42950 (July 19, 2011). Many commenters to the first notice of proposed rulemaking indicated that they understood that the SEC did not intend "total consolidated assets" to include non-proprietary assets, such as client assets under management; others requested clarification that this understanding is correct. The SEC is clarifying in the proposed rule that investment advisers should include only proprietary assets in the calculation—that is, non-proprietary assets, such as client assets under management would not be included, regardless of whether they appear on an investment adviser's balance sheet. The SEC notes that this method is drawn directly from section 956. See section 956(f) (referencing "assets" only).

<sup>73</sup> 12 U.S.C. 1841(a)(2).

<sup>74</sup> See 12 U.S.C. 1813(w).

of subsidiary companies owned by a holding company as merchant banking investments or through debt previously contracted in good faith. These companies would, therefore, not be required to conform their incentive-based compensation programs to the requirements of the proposed rule.

FHFA's proposed rule would not include a definition of "subsidiary." The Federal Home Loan Banks have no subsidiaries, and any subsidiaries of the Enterprises as defined by other Agencies under the proposed rule would be included as affiliates as part of the definition of Enterprise in the Safety and Soundness Act, which is referenced in the definition of regulated entity. The NCUA's proposed rule also would not include a definition of "subsidiary." While in some cases, CUSOs might be considered subsidiaries of a credit union, NCUA has determined that this rule would not apply to CUSOs.

2.1. The Agencies invite comment on whether other financial institutions should be included in the definition of "covered institution" and why.

2.2. The Agencies invite comment on whether any additional financial institutions should be included in the proposed rule's definition of subsidiary and why.

2.3. The Agencies invite comment on whether any additional financial institutions (such as registered investment companies) should be excluded from the proposed rule's definition of subsidiary and why.

2.4. The Agencies invite comment on the definition of average total consolidated assets.

2.5. The Agencies invite comment on the proposed rule's approach to consolidation. Are there any additional advantages to the approach? For example, the Agencies invite comment on the advantages of the proposed rule's approach for reinforcing the ability of an institution to establish and maintain effective risk management and controls for the entire consolidated organization and enabling holding company structures to more effectively manage human resources. Are there advantages to the approach of the proposed rule in helping to reduce the possibility of evasion of the more specific standards applicable to certain individuals at Level 1 or Level 2 covered institutions? Are there any disadvantages to the proposed rule's approach to consolidation? For example, the Agencies invite comment on any disadvantages smaller subsidiaries of a larger covered institution may have by applying the more specific provisions of the proposed rule to these smaller institutions that would not otherwise

apply to them but for being a subsidiary of a larger institution. Is there another approach that the proposed rule should take? The Agencies invite comment on any advantages and disadvantages of the SEC's proposal to not consolidate subsidiaries of broker-dealers and investment advisers that are not themselves subsidiaries of depository institution holding companies. Are the operations, services, and products of broker-dealers and investment advisers not typically effected through subsidiaries? Should the SEC adopt an express requirement to treat two or more affiliated investment advisers or broker-dealers that are separate legal entities (e.g., investment advisers that are operationally integrated) as a single investment adviser or broker-dealer for purposes of the proposed rule's thresholds?

2.6. The Agencies invite comment on whether the three-level structure would be a workable approach for categorizing covered institutions by asset size and why.

2.7. The Agencies invite comment on whether the asset thresholds used in these definitions would divide covered institutions into appropriate groups based on how they view the competitive marketplace. If asset thresholds are not the appropriate methodology for determining which requirements apply, which other alternative methodologies would be appropriate and why?

2.8. Are there instances where it may be appropriate to modify the requirements of the proposed rule where there are multiple covered institutions subsidiaries within a single parent organization based upon the relative size, complexity, risk profile, or business model, and use of incentive-based compensation of the covered institution subsidiaries within the consolidated organization? In what situations would that be appropriate and why?

2.9. Is the Agencies' assumption that incentive-based compensation programs are generally designed and administered at the holding company level for the organization as a whole correct? Why or why not? To what extent do broker-dealers or investment advisers within a holding company structure apply the same compensation standards as other subsidiaries in the parent company?

2.10. Bearing in mind that section 956 by its terms seeks to address incentive-based compensation arrangements that could lead to material financial loss to a covered institution, commenters are asked to provide comments on the proposed method of determining asset size for investment advisers. Are there instances where it may be appropriate to

determine asset size differently, by for example, including client assets under management for investment advisers? In what situations would that be appropriate and why?

2.11. Should the determination of average total consolidated assets for investment advisers exclude non-proprietary assets that are included on a balance sheet under accounting rules, such as certain types of client assets under management required to be included on an investment adviser's balance sheet? Why or why not?

2.12. Should the determination of average total consolidated assets be further tailored for certain types of investment advisers, such as charitable advisers, non-U.S.-domiciled advisers, or insurance companies and, if so, why and in what manner?

2.13. The Agencies invite comment on the methods for determining whether foreign banking organizations and Federal branches and agencies are Level 1, Level 2, or Level 3 covered institutions. Should the same method be used for both foreign banking organizations and Federal branches and agencies? Why or why not?

#### Definitions Pertaining to Covered Persons

*Covered person.* The proposed rule defines "covered person" as any executive officer, employee, director, or principal shareholder who receives incentive-based compensation at a covered institution.<sup>75</sup> The term "executive officer" would include individuals who are senior executive officers, as defined in the proposed rule, as well as other individuals designated as executive officers by the covered institution. As described further below, section \_\_\_\_\_.4 of the proposed rule would apply requirements and prohibitions on all incentive-based compensation arrangements for covered persons at covered institutions.

Included in the class of covered persons are senior executive officers and significant risk-takers, discussed further below. Senior executive officers and significant risk-takers are covered persons that may have the ability to expose a covered institution to significant risk through their positions or actions. Accordingly, the proposed rule would prohibit the incentive-based

<sup>75</sup> Section 956 requires the Agencies to jointly prescribe regulations or guidelines that prohibit certain incentive-based compensation arrangements or features of such arrangements that encourage inappropriate risk by providing an executive officer, employee, director, or principal shareholder with excessive compensation, fees, or benefits or that could lead to material financial loss to the covered financial institution.

compensation arrangements for senior executive officers and significant risk-takers from including certain features that encourage inappropriate risk, consistent with the approach under sections \_\_.5, \_\_.9, \_\_.10, and \_\_.11 of the proposed rule of requiring risk-mitigating features for the incentive-based compensation programs at larger and more complex covered institutions.

For Federal credit unions, only one director, if any, would be considered a covered person because, under section 112 of the Federal Credit Union Act<sup>76</sup> and NCUA's regulations at 12 CFR 701.33, only one director may be compensated as an officer of the board of directors. The insurance and indemnification benefits that are excluded from the definition of "compensation" for purposes of 12 CFR 701.33 would not cause a non-compensated director of a credit union to be included under the definition of "covered person" because these benefits would not be "incentive-based compensation" under the proposed rule.

*Director.* The proposed rule defines "director" as a member of the board of directors of a covered institution. Any member of a covered institution's governing body would be included within this definition.

*Principal shareholder.* Section 956 applies to principal shareholders as well as executive officers, employees, and directors. The proposed rule defines "principal shareholder" as a natural person who, directly or indirectly, or acting through or in concert with one or more persons, owns, controls, or has the power to vote 10 percent or more of any class of voting securities of a covered institution. The 10 percent threshold for identifying principal shareholders is used in a number of bank regulatory contexts.<sup>77</sup> The NCUA's proposed rule does not include this definition because credit unions are not-for-profit financial cooperatives with member owners. The Agencies recognize that some other types of covered institutions, for example, mutual savings associations, mutual savings banks, and some mutual holding companies, do not have principal shareholders.

2.14. The Agencies invite comment on whether the definition of "principal shareholder" reflects a common understanding of who would be a principal shareholder of a covered institution.

*Senior executive officer.* The proposed rule defines "senior executive officer"

as a covered person who holds the title or, without regard to title, salary, or compensation, performs the function of one or more of the following positions at a covered institution for any period of time in the relevant performance period: President, chief executive officer (CEO), executive chairman, chief operating officer, chief financial officer, chief investment officer, chief legal officer, chief lending officer, chief risk officer, chief compliance officer, chief audit executive, chief credit officer, chief accounting officer, or head of a major business line or control function. As described below, a Level 1 or Level 2 covered institution would be required to defer a portion of the incentive-based compensation of a senior executive officer and subject the incentive-based compensation to forfeiture, downward adjustment, and clawback. The proposed rule would also limit the extent to which options could be used to meet the proposed rule's minimum deferral requirements for senior executive officers. The proposed rule would require a covered institution's board of directors, or a committee thereof, to approve incentive-based compensation arrangements for senior executive officers and any material exceptions or adjustments to incentive-based compensation policies or arrangements for senior executive officers. Additionally, Level 1 and Level 2 covered institutions would be required to create and maintain records listing senior executive officers and to document forfeiture, downward adjustment, and clawback decisions for senior executive officers. The proposed rule would limit the extent to which a Level 1 or Level 2 covered institution may award incentive-based compensation to a senior executive officer in excess of the target amount for the incentive-based compensation. Senior executive officers also would not be eligible to serve on the compensation committee of a Level 1 or Level 2 covered institution under the proposed rule.

The 2011 Proposed Rule contained a definition of "executive officer" that included the positions of president, CEO, executive chairman, chief operating officer, chief financial officer, chief investment officer, chief legal officer, chief lending officer, chief risk officer, and head of a major business line. It did not include the positions of chief compliance officer, chief audit executive, chief credit officer, chief accounting officer, or head of a control function. One commenter asserted that the term "executive officer" should not be defined with reference to specific

position, but, rather, should be identified by the board of directors of a covered institution. Other commenters asked the Agencies for additional specificity about the types of executive officers that would be covered at large and small covered institutions, particularly with respect to the heads of major business lines. Some commenters encouraged the Agencies to align the definition of "executive officer" with the Securities Exchange Act of 1934 by focusing on individuals with significant policymaking functions. In the alternative, some of these commenters suggested that the definition be revised to conform to the 2010 Federal Banking Agency Guidance.

The definition of "senior executive officer" in the proposed rule retains the list of positions included in the 2011 Proposed Rule and is consistent with other rules and agency guidance. The list includes the minimum positions that are considered "senior executives" under the Federal Banking Agency Safety and Soundness Guidelines.<sup>78</sup> The Agencies also took into account the positions that would be considered "officers" under section 16 of the Securities Exchange Act of 1934.<sup>79</sup>

In addition to the positions listed in the 2011 Proposed Rule, the proposed definition of "senior executive officer" includes the positions of chief compliance officer, chief audit executive, chief credit officer, chief accounting officer, and other heads of a control function. Individuals in these positions do not generally initiate activities that generate risk of material financial loss, but they play an important role in identifying, addressing, and mitigating that risk. Individuals in these positions have the ability to influence the risk measures and other information and judgments that a covered institution uses for risk management, internal control, or financial purposes.<sup>80</sup> Improperly structured incentive-based compensation arrangements could create incentives for individuals in these positions to use their authority in ways that increase, rather than mitigate, risk of material financial loss. Some larger institutions have designated

<sup>78</sup> These minimum positions include "executive officers," within the meaning of Regulation O (12 CFR 215.2(e)(1)) and "named officers" within the meaning of the SEC's rules on disclosure of executive compensation (17 CFR 229.402). In addition to these minimum positions, the Federal Banking Agency Safety and Soundness Guidelines also apply to individuals "who are responsible for oversight of the organization's firm-wide activities or material business lines." 75 FR at 36407.

<sup>79</sup> See 17 CFR 240.16a-1.

<sup>80</sup> See 2010 Federal Banking Agency Guidance, 75 FR at 36411.

<sup>76</sup> 12 U.S.C. 1761a.

<sup>77</sup> See, e.g., 12 CFR 215.2(m), 12 CFR 225.2(n)(2), and 12 CFR 225.41(c)(2).

individuals in these positions as “covered persons” for purposes of the 2010 Federal Banking Agency Guidance.

The definition of “senior executive officer” also includes a covered person who performs the function of a senior executive officer for a covered institution, even if the covered person’s formal title does not reflect that role or the covered person is employed by a different entity. For example, under the proposed rule, a covered person who is an employee of a bank holding company and also performs the functions of a chief financial officer for the subsidiary bank would, in addition to being a covered person of the bank holding company, also be a senior executive officer of the bank holding company’s subsidiary bank. This approach would address attempts to evade being included within the definition of “senior executive officer” by changing an individual’s title but not that individual’s responsibilities. In some instances, the determination of senior executive officers and compliance with relevant requirements of the proposed rule may be influenced by the covered institution’s organizational structure.<sup>81</sup> If a covered institution does not have any covered person who holds the title or performs the function of one or more of the positions listed in the definition of “senior executive officer,” the proposed rule would not require the covered institution to designate a covered person to fill such position for purposes of the proposed rule. Similarly, if a senior executive officer at one covered institution also holds the title or performs the function of one of more of the positions listed for a subsidiary that is also a covered institution, then that individual would be a senior executive officer for both the parent and the subsidiary covered institutions.

The list of positions in the proposed definition sets forth the types of positions whose incumbents would be considered senior executive officers. The Agencies are proposing this list to aid covered institutions in identifying their senior executive officers while allowing the covered institutions some degree of flexibility in determining which business lines are major business lines.

2.15. The Agencies invite comment on whether the types of positions identified in the proposed definition of senior executive officer are appropriate, whether additional positions should be included, whether any positions should be removed, and why.

2.16. The Agencies invite comment on whether the term “major business line” provides enough information to allow a covered institution to identify individuals who are heads of major business lines. Should the proposed rule refer instead to a “core business line,” as defined in FDIC and FRB rules relating to resolution planning (12 CFR 381.2(d)), to a “principal business unit, division or function,” as described in SEC definitions of the term “executive officer” (17 CFR 240.3b–7), or to business lines that contribute greater than a specified amount to the covered institution’s total annual revenues or profit? Why?

2.17. Should the Agencies include the chief technology officer (“CTO”), chief information security officer, or similar titles as positions explicitly listed in the definition of “senior executive officer”? Why or why not? Individuals in these positions play a significant role in information technology management.<sup>82</sup> The CTO is generally responsible for the development and implementation of the information technology strategy to support the institution’s business strategy in line with its appetite for risk. In addition, these positions are generally responsible for implementing information technology architecture, security, and business resilience.

*Significant risk-taker.* The proposed rule’s definition of “significant risk-taker” is intended to include individuals who are not senior executive officers but are in the position to put a Level 1 or Level 2 covered institution at risk of material financial loss so that the proposed rule’s requirements and prohibitions on incentive-based compensation arrangements apply to such individuals. In order to ensure that incentive-based compensation arrangements for significant risk-takers appropriately balance risk and reward, most of the proposed rule’s requirements for Level 1 and Level 2 covered institutions relating to senior executive officers would also apply to significant risk-takers to some degree. These requirements include the disclosure and recordkeeping requirements of section \_\_\_\_\_.5; the deferral, forfeiture, downward adjustment, and clawback requirements of section \_\_\_\_\_.7 (including the related limitation on options); and the maximum incentive-based compensation opportunity limit of section \_\_\_\_\_.8.

<sup>82</sup> See generally Federal Financial Institutions Examination Council (“FFIEC”) Information Technology Examination Handbook, available at <http://ithandbook.ffiec.gov/it-booklets.aspx>.

The proposed definition of “significant risk-taker” incorporates two tests for determining whether a covered person is a significant risk-taker. A covered person would be a significant risk-taker if either test was met. The first test is based on the amounts of annual base salary and incentive-based compensation of a covered person relative to other covered persons working for the covered institution and its affiliate covered institutions (the “relative compensation test”). This test is intended to determine whether the individual is among the top 5 percent (for Level 1 covered institutions) or top 2 percent (for Level 2 covered institutions) of highest compensated covered persons in the entire consolidated organization, including affiliated covered institutions. The second test is based on whether the covered person has authority to commit or expose 0.5 percent or more of the capital of the covered institution or an affiliate that is itself a covered institution (the “exposure test”).<sup>83</sup>

The definition of significant risk-taker applies to only Level 1 and Level 2 covered institutions. The definition of significant risk-taker does not apply to senior executive officers. Senior

<sup>83</sup> In the proposed rule, the Agencies have tailored the measure of capital to the type of covered institution. For most covered institutions, the exposure test would be based on common equity tier 1 capital. For depository institution holding companies, foreign banking organizations, and affiliates of those institutions that do not report common equity tier 1 capital, the Board would work with covered institutions to determine the appropriate measure of capital. For registered securities brokers or dealers, the exposure test would be based on tentative net capital. See 17 CFR 240.15c3–1(c)(15). For Federal Home Loan Banks, the exposure test would be based on regulatory capital. For the Enterprises, the exposure test would be based on minimum capital. For credit unions, the exposure test would be based on net worth or total capital. For simplicity in describing the exposure test in this SUPPLEMENTARY INFORMATION section, common equity tier 1 capital, tentative net capital, regulatory capital, minimum capital, net worth, and total capital are referred to generally as “capital.” The Agencies expect that a covered institution that is an investment adviser will use common equity tier 1 capital or tentative net capital to the extent it would be a covered institution in another capacity (e.g., if the investment adviser also is a depository institution holding company, a bank, a broker-dealer, or a subsidiary of a depository institution holding company). For an investment adviser that would not be a covered institution in any other capacity, the proposed rule’s exposure test would not be measured against the investment adviser’s capital. For a covered person of such an investment adviser that can commit or expose capital of an affiliated covered institution, the exposure test would be based on common equity tier 1 capital or tentative net capital of that affiliated covered institution. For other covered persons of any investment adviser that would not be a covered institution in any other capacity, no exposure test is proposed to apply. Comment is requested below regarding what measure would be appropriate for an exposure test.

<sup>81</sup> See section \_\_\_\_\_.3(c) of the proposed rule.

executive officers of Level 1 and Level 2 covered institutions would be separately subject to the proposed rule, as discussed earlier in this Supplemental Information section.

The significant risk-taker definition under either test would be applicable only to covered persons who received annual base salary and incentive-based compensation of which at least one-third is incentive-based compensation (one-third threshold), based on the covered person's annual base salary paid and incentive-based compensation awarded during the last calendar year that ended at least 180 days before the beginning of the performance period for which significant risk-takers are being identified.<sup>84</sup> For example, an individual who received \$180,000 in annual base salary during calendar year 2019 and was awarded incentive-based compensation of \$120,000 for performance periods that ended during calendar year 2019 could be a significant risk-taker because one-third of the individual's compensation was incentive-based. Specifically, the individual would be a significant risk-taker for a performance period beginning on or after June 28, 2020 if the individual also met the relative compensation test or the exposure test.<sup>85</sup>

Under the proposed rule, in order for covered persons to be designated as significant risk-takers, the covered persons would have to be awarded a level of incentive-based compensation that would be sufficient to influence their risk-taking behavior. In order to ensure that significant risk-takers are only those covered persons who have incentive-based compensation arrangements that could provide incentives to engage in inappropriate risk-taking, only covered persons who meet the one-third threshold could be significant risk-takers.

The proposed one-third threshold is consistent with the more conservative end of the range identified in industry practice. Institutions in the Board's 2012 LBO Review that would be Level 2 covered institutions under the proposed rule reported that they generally rewarded their self-identified individual risk-takers with incentive-based compensation in the range of 8 percent

to 90 percent of total compensation, with an average range of 32 percent to 71 percent. The proposed threshold of one-third or more falls within the lower end of that average range.

The one-third threshold would also be consistent with other standards regarding compensation. Under the Emergency Economic Stabilization Act of 2008 (as amended by section 7001 of the American Recovery and Reinvestment Act of 2009), recipients of financial assistance under Treasury's Troubled Asset Relief Program ("TARP") were prohibited from paying or accruing any bonus, retention award, or incentive compensation except for the payment of long-term restricted stock if that stock had a value that was not greater than one third of the total amount of annual compensation of the employee receiving the stock.<sup>86</sup> In addition, some international regulators also use a threshold of one-third incentive-based compensation for determining the scope of application for certain compensation standards.<sup>87</sup>

The Agencies included the 180-day period in the one-third threshold of annual base salary and incentive-based compensation because, based upon the supervisory experience of the Federal Banking Agencies and FHFA, this period would allow covered institutions an adequate period of time to calculate the total compensation of their covered persons and, for purposes of the relative compensation test, the individuals receiving incentive-based compensation from their affiliate covered institutions over a full calendar year. The Agencies expect, based on the experience of exceptional assistance recipients under TARP,<sup>88</sup> that 180 days would be a reasonable period of time for Level 1 and Level 2 covered institutions to finalize compensation paid to and awarded to covered persons and to perform the necessary calculations to determine which covered persons are significant risk-takers. This time period would allow covered institutions to

make awards following the end of the performance period, calculate the annual base salary and incentive-based compensation for all employees in the consolidated organization, including affiliated covered institutions, and then implement new compensation arrangements for the significant risk-takers identified, if necessary.

The Agencies recognize that the relative compensation test and the exposure test, combined with the one-third threshold, may not identify all covered persons at Level 1 and Level 2 covered institutions who have the ability to expose a covered institution or its affiliated covered institutions to material financial loss. Accordingly, paragraph (2) of the proposed rule's definition of significant risk-taker would allow covered institutions or the Agencies the flexibility to designate additional persons as significant risk-takers. An Agency would be able to designate a covered person as a significant risk-taker if the covered person has the ability to expose the covered institution to risks that could lead to material financial loss in relation to the covered institution's size, capital, or overall risk tolerance. Each Agency would use its own procedures for making such a designation. Such procedures generally would include reasonable advance written notice of the proposed action, including a description of the basis for the proposed action, and opportunity for the covered person and covered institution to respond.

#### Relative Compensation Test

The relative compensation test in paragraphs (1)(i) and (ii) of the proposed definition of "significant risk-taker" would require a covered institution to determine which covered persons received the most annual base salary and incentive-based compensation among all individuals receiving incentive-based compensation from the covered institution and any affiliates of the covered institution that are also subject to the proposed rule.<sup>89</sup> The

<sup>86</sup> 12 U.S.C. 5221(b)(3)(D).

<sup>87</sup> PRA, "Supervisory Statement LSS8/13, Remuneration Standards: The Application of Proportionality" (April 2013), at 11, available at <http://www.bankofengland.co.uk/publications/Documents/other/pr/policy/2013/remunerationstandardslss8-13.pdf>.

<sup>88</sup> The institutions that accepted "exceptional assistance" under TARP were required to submit to the Office of the Special Master for approval the compensation levels and structures for the five named executive officers and the next 20 most highly compensated executive officers ("Top 25") and the compensation structures for the next 75 most highly compensated employees. The requirement for submission of the Top 25 necessitated the collection of the compensation data for executives worldwide and took considerable time and effort on the part of the institutions.

<sup>84</sup> Incentive-based compensation awarded in a particular calendar year would include any incentive-based compensation awarded with respect to a performance period that ended during that calendar year.

<sup>85</sup> In this example, incentive-based compensation awarded (\$120,000) would be 40 percent of the total \$300,000 received in annual base salary (\$180,000) and incentive-based compensation awarded (\$120,000).

<sup>89</sup> The OCC, Board, FDIC, and SEC's proposed rules include a defined term, "section 956 affiliate," that is intended to function as shorthand for the types of entities that are considered "covered institutions" under the six Agencies' proposed rules. The term "section 956 affiliate" is used only in the definition of "significant risk-taker," and it is not intended to affect the scope of any Agency's rule or the entities considered "covered institutions" under any Agency's rule. Given the proposed location of each Agency's proposed rule in the Code of Federal Regulations, the cross-references used in each of the OCC, Board, FDIC, and SEC's proposed rule differ slightly. NCUA's proposed rule does not include a definition of "section 956 affiliate," because credit unions are not affiliated with the entities that are considered

definition contains two percentage thresholds for measuring whether an individual is a significant risk-taker. For a Level 1 covered institution, a covered person would be a significant risk-taker if the person receives annual base salary and incentive-based compensation for the last calendar year that ended at least 180 days before the performance period that places the person among the highest 5 percent of all covered persons in salary and incentive-based compensation (excluding senior executive officers) of the Level 1 covered institution and, in the cases of the OCC, the Board, the FDIC, and the SEC, any section 956 affiliates of the Level 1 covered institution. For Level 2 covered institutions, the threshold would be 2 percent rather than 5 percent.

For example, if a hypothetical bank holding company were a Level 1 covered institution and had \$255 billion in average total consolidated assets might have a subsidiary national bank with \$253 billion in average total consolidated assets, a mortgage subsidiary with \$1.9 billion in average total consolidated assets, and a wealth management subsidiary with \$100 million in average total consolidated assets.<sup>90</sup> The relative compensation test would analyze the annual base salary and incentive-based compensation of all covered persons (other than senior executive officers) who receive incentive-based compensation at the bank holding company, the subsidiary national bank, and the mortgage subsidiary, which are all covered institutions with assets greater than or equal to \$1 billion. Individuals at the wealth management subsidiary would not be included because that subsidiary has less than \$1 billion in average total consolidated assets. Thus, if the bank holding company, state member bank, and mortgage subsidiary collectively had 150,000 covered persons (excluding senior executive officers), then the covered institution should identify the 7,500 or 5 percent of covered persons (other than senior executive officers) who receive the most annual base salary

and incentive-based compensation out of those 150,000 covered persons, and identify as significant risk-takers any of those 7,500 persons who received annual base salary and incentive-based compensation for the last calendar year that ended at least 180 days before the beginning of the performance period of which at least one-third is incentive-based compensation.<sup>91</sup> Some of those 7,500 covered persons might receive incentive-based compensation from the bank holding company; others might receive incentive-based compensation from the national bank or the mortgage subsidiary. Each covered person that satisfies all requirements would be considered a significant risk-taker of the covered institution from which they receive incentive-based compensation. This example is provided solely for the purpose of illustrating the calculation of the number of significant risk-takers under the relative compensation test as proposed. It does not reflect any specific institution, nor does it reflect the experience or judgment of the Agencies of the number of covered persons or significant risk-takers at any institution that would be a Level 1 covered institution under the proposed rule.

Annual base salary and incentive-based compensation would be measured based on the last calendar year that ended at least 180 days before the beginning of the performance period for the reasons discussed above.

The Agencies propose that Level 1 and Level 2 covered institutions generally should consider a covered person's annual base salary actually paid during the calendar year. If, for example, a covered person was a manager during the first half of the year, with an annual salary of \$100,000, and was then promoted to a senior manager with an annual salary of \$150,000 on July 1 of that year, the annual base salary would be the \$50,000 that person received as manager for the first half of the year plus the \$75,000 received as a senior manager for the second half of the year, for a total of \$125,000.

For the purposes of determining significant risk-takers, covered institutions should consider the incentive-based compensation that was awarded for any performance period that ended during a particular calendar year, regardless of when the performance period began. For example, if a covered person is awarded incentive-based compensation relating to (i) a plan with a three-year

performance period that began on January 1, 2017, (ii) a plan with a two-year performance period that began on January 1, 2018, and (iii) a plan with a one-year performance period that began on January 1, 2019, then all three of these awards would be included in the calculation of incentive-based compensation for calendar year 2019 because all three performance periods would end on December 31, 2019. The amount of previously deferred incentive-based compensation that vests in a particular year would not affect the measure of a covered person's incentive-based compensation for purposes of the relative compensation test.<sup>92</sup>

To reduce the administrative burden of calculating annual base salary and incentive-based compensation, the calculation would not include fringe benefits such as the value of medical insurance or the use of a company car. For purposes of such calculation, any non-cash compensation, such as stock or options, should be valued as of the date of the award.

In the Agencies' supervisory experience, the amount of a covered person's annual base salary and incentive-based compensation can reasonably be expected to relate to the amount of responsibility that the covered person has within an organization, and covered persons with a higher level of responsibility generally either (1) have a greater ability to expose a covered institution to financial loss or (2) supervise covered persons who have a greater ability to expose a covered institution to financial loss. For this reason, the Agencies are proposing to use the relative compensation test as one basis for identifying significant risk-takers.

Although a large number of covered persons may be able to expose a covered institution to a financial loss, the Agencies have limited the relative compensation test to the most highly compensated individuals in order to focus on those covered persons whose behavior can directly or indirectly expose a Level 1 or Level 2 covered institution to a financial loss that is material. Based on an analysis of public disclosures of large, international banking organizations<sup>93</sup> and on the

<sup>90</sup> "covered institutions" under the other Agencies' rules. Similarly, FHFA's proposed rule does not include a definition of "section 956 affiliate" because its regulated institutions are not affiliated with other Agencies' covered institutions.

<sup>91</sup> Under the proposed rule, all of these subsidiaries in this example other than the wealth management subsidiary would be subject to the same requirements as the bank holding company, including the specific requirements applying to identification of significant risk-takers. The wealth management subsidiary would not be subject to the requirements of the proposed rule because it has less than \$1 billion in average total consolidated assets.

<sup>92</sup> The Agencies anticipate that covered institutions that are within a depository institution holding company structure would work together to ensure that significant risk-takers are correctly identified under the relative compensation test.

<sup>93</sup> Level 1 and Level 2 covered institutions would also use this method of calculating a covered person's incentive-based compensation for a particular calendar year for purposes of determining (1) whether such person received annual base salary and incentive-based compensation of which at least one third was incentive-based compensation and (2) the amount of a covered person's annual base salary and incentive-based compensation under the dollar threshold test.

<sup>94</sup> Agencies examined information available through various public reports, including the FSB's

Agencies' own supervision of incentive-based compensation, the top 5 percent most highly compensated covered persons among the covered institutions in the consolidated structure of Level 1 covered institutions are the most likely to have the potential to encourage inappropriate risk-taking by the covered institution because their compensation is excessive (the first test in section 956) or be the personnel who are able to expose the organization to risk of material financial loss (the second test in section 956).

The Board and the OCC, as a part of their supervisory efforts, reviewed a limited sample of banking organizations with total consolidated assets of \$50 billion or more to better understand what types of positions within these organizations would be captured by various thresholds for highly compensated employees. In the review, the Board and the OCC also considered

annual Compensation Progress Report. For instance, many international jurisdictions require firms to identify a population of employees who can expose a firm to material amounts of risk (sometimes called material risk takers or key risk takers), who are subject to specific requirements including deferral. In 2014 the FSB published information indicating that the average percentage of total global employees identified as risk-takers under these various jurisdictions' requirements at a sample of large firms ranged from 0.01 percent of employees of the global consolidated organization to more than 5 percent. The number varied between, but also within, individual jurisdictions and institutions as a result of factors such as specific institutions surveyed, the size of institution, and the nature of business conducted. See FSB, *Implementing the FSB Principles for Sound Compensation Practices and their Implementation Standards Third Progress Report* (November 2014), at 19, available at <http://www.fsb.org/2014/11/fsb-publishes-third-progress-report-on-compensation-practices>.

In addition, the Agencies relied to a certain extent on information disclosed on a legal entity basis as a result of Basel Pillar 3 remuneration disclosure requirements, for instance those required under implementing regulations such as Article 450 of the Capital Requirements Regulation (EU No 575/2013) in the European Union. See, e.g., Morgan Stanley, *Article 450 of CRR Disclosure: Remuneration Policy* (December 31, 2014), available at [http://www.morganstanley.com/about-us-ir/pillar3/2014\\_CRR\\_450\\_Disclosure.pdf](http://www.morganstanley.com/about-us-ir/pillar3/2014_CRR_450_Disclosure.pdf). Remuneration disclosure requirements apply to "significant" firms. CRD IV defines institutions that are significant "in terms of size, internal organisation and nature, scope and complexity of their activities." Under the EBA Guidance on Sound Remuneration Policies, significant institutions means institutions referred to in Article 131 of Directive 2013/36/EU (global systemically important institutions or 'G-SIIs,' and other systemically important institutions or 'O-SIIs'), and, as appropriate, other institutions determined by the competent authority or national law, based on an assessment of the institutions' size, internal organization and the nature, the scope and the complexity of their activities. Some, but not all, national regulators have provided further guidance on interpretation of that term, including the United Kingdom's FCA which provides a form of methodology to determine if a firm is "significant"—based on quantitative tests of balance sheet assets, liabilities, annual fee commission income, client money and client assets.

how far below the CEO within the organizational hierarchy the selected thresholds would reach. Generally, at banking organizations that would be Level 1 covered institutions under the proposed rule, a 5 percent threshold would include positions such as managing directors, directors, senior vice presidents, relationship and sales managers, mortgage brokers, financial advisors, and product managers. Such positions generally have the ability to expose the organization to the risk of material financial loss. Based on this review, the Agencies believe it is reasonable to propose a 5 percent threshold under the relative compensation test for Level 1 covered institutions.

At banking organizations that would be Level 2 covered institutions under the proposed rule, a 5 percent threshold yielded results that went much deeper into the organization and identified roles with individuals who might not individually take significant risks for the organization. Additional review of a limited sample of these banking organizations that would be Level 2 covered institutions under the proposed rule showed that, on average, the institutions in the limited sample identified approximately 2 percent of their total global employees as individual employees whose activities may expose the organization to material amounts of risk, as consistent with the 2010 Federal Banking Agency Guidance. A lower percentage threshold for Level 2 covered institutions relative to Level 1 covered institutions also is consistent with the observation that larger covered institutions generally have more complex structures and use incentive-based compensation more significantly than relatively smaller covered institutions. Based on this analysis, the Agencies chose to propose a 2 percent threshold for Level 2 covered institutions. A lower percentage threshold for Level 2 covered institutions relative to Level 1 covered institutions would reduce the burden on relatively smaller covered institutions.

Under the proposed rule, if an Agency determines, in accordance with procedures established by the Agency, that a Level 1 covered institution's activities, complexity of operations, risk profile, and compensation practices are similar to those of a Level 2 covered institution, then the Agency may apply a 2 percent threshold under the relative compensation test rather than the 5 percent threshold that would otherwise apply. This provision is intended to allow an Agency the flexibility to adjust the number of covered persons who are significant risk-takers with respect to a

Level 1 covered institution if the Agency determines that, notwithstanding the Level 1 covered institution's average total consolidated assets, its actual activities and risks are similar to those of a Level 2 covered institution, and therefore it would be appropriate for the Level 1 covered institution to have fewer significant risk-takers.

#### Exposure Test

Under the exposure test, a covered person would be a significant risk-taker with regard to a Level 1 or Level 2 covered institution if the individual may commit or expose<sup>94</sup> 0.5 percent or more of capital of the covered institution or, and, in the cases of the OCC, the Board, the FDIC, and the SEC, any section 956 affiliates of the covered institution, whether or not the individual is employed by that specific legal entity.

The exposure test relates to a covered person's authority to commit or expose significant amounts of an institution's capital, regardless of whether or not such exposures or commitments are realized. The exposure test would relate to a covered person's authority to cause the covered institution to be subject to credit risk or market risk. The exposure test would not relate to the ability of a covered person to expose a covered institution to other types of risk that may be more difficult to measure or quantify, such as compliance risk.

The measure of capital would relate to a covered person's authority over the course of the most recent calendar year, in the aggregate, and would be based on the maximum amount that the person has authority to commit or expose during the year. For example, a Level 1 or Level 2 covered institution might allocate \$10 million to a particular covered person as an authorized level of lending for a calendar year. For purposes of the exposure test in the proposed rule, the covered person's authority to commit or expose would be \$10 million. This would be true even if the individual only made \$8 million in loans during the year or if the covered institution reduced the authorized amount to \$7.5 million at some point during the year. It would also be true even if the covered person did not have the authority through any single transaction to lend \$10 million, so long as over the course of the year the covered person could lend up to \$10 million in the aggregate. If, however, in

<sup>94</sup> An individual may commit or expose capital of a covered institution or affiliate if the individual has the ability to put the capital at risk of loss due to market risk or credit risk.

the course of the year the covered person received authorization for an additional \$5 million in lending, \$15 million would become the authorization amount for purposes of the exposure test. If a covered person had no specific maximum amount of lending for the year, but instead his or her lending was subject to approval on a rolling basis, then the covered person would be assumed to have an authorized annual lending amount in excess of the 0.5 percent threshold.

As an additional example, a Level 1 or Level 2 covered institution could authorize a particular covered person to trade up to \$5 million per day in a calendar year. For purposes of the exposure test, the covered person's authorized annual lending amount would be \$5 million times the number of trading days in the year (for example, \$5 million times 260 days or \$1.3 billion). This would be true even if the covered person only traded \$1 million per day during the year or if the covered institution reduced the authorized trading amount to \$2.5 million per day at some point during the year. If, however, in the course of the year the covered person received authorization for an additional \$2 million in trading per day, the covered person's authority to commit or expose capital for purposes of the exposure test would be \$1.82 billion (\$7 million times 260 days). The Agencies are aware that institutions may not calculate their exposures in this manner and are requesting comment upon it, as set forth below.

The exposure test would also include individuals who are voting members of a committee that has the decision-making authority to commit or expose 0.5 percent or more of the capital of a covered institution or of a section 956 affiliate of a covered institution. For example, if a committee that is comprised of five covered persons has the authority to make investment decisions with respect to 0.5 percent or more of a state member bank's capital, then each voting member of such committee would have the authority to commit or expose 0.5 percent or more of the state member bank's capital for purposes of the exposure test. However, individuals who participate in the meetings of such a committee but who do not have the authority to exercise voting, veto, or similar rights that lead to the committee's decision would not be included.

The exposure test would also cause a covered person to be considered a significant risk-taker if he or she can commit or expose 0.5 percent or more of the capital of any section 956 affiliate

of the covered institution by which the covered person is employed. For example, if a covered person of a nonbank subsidiary of a bank holding company has the authority to commit 0.5 percent or more of the bank holding company's capital or the capital of the bank holding company's subsidiary national bank (and received annual base salary and incentive-based compensation for the last calendar year that ended at least 180 days before the beginning of the performance period of which at least one-third is incentive-based compensation), then the covered person would be considered a significant risk-taker of the bank holding company or national bank, whichever is applicable. This would be true even if the covered person is not employed by the bank holding company or the bank holding company's subsidiary national bank, and even if the covered person does not have the authority to commit or expose the capital of the nonbank subsidiary that employs the covered person.

The exposure test would require a Level 1 or Level 2 covered institution to consider the authority of an individual to take an action that could result in significant credit or market risk exposures to the covered institution. The Agencies are proposing the exposure test because individuals who have the authority to expose covered institutions to significant amounts of risk can cause material financial losses to covered institutions. For example, in proposing the exposure test, the Agencies were cognizant of the significant losses caused by actions of individuals, or a trading group, at some of the largest financial institutions during and after the financial crisis that began in 2007.<sup>95</sup>

The exposure test would identify significant risk-takers based on the extent of an individual's authority to expose an institution to market risk or credit risk, measured by reference to 0.5 percent of the covered institution's regulatory capital. Measuring this authority by reference to an existing capital standard would provide a uniform and clearly defined metric to apply among covered persons at Level 1 and Level 2 covered institutions. The Agencies have selected credit and market risks as the most relevant types of exposures because the majority of assets on a covered institution's balance sheet generally give rise to market or credit risk exposure.

In proposing a threshold of 0.5 percent of relevant capital, the Agencies considered both the absolute and

relative amount of losses that the threshold would represent for covered institutions, and the fact that incentive-based compensation programs generally apply to numerous employees at a covered institution. In the Agencies' view, the proposed threshold represents a material financial loss within the meaning of section 956 for any institution and multiple losses at the same firm incentivized by a single incentive-based compensation program could impair the firm.

The Agencies considered the cumulative effect of incentive-based compensation arrangements across a covered institution. The Agencies recognize that many covered persons who have the authority to expose a covered institution to risk are subject to similar incentive-based compensation arrangements. The effect of an incentive-based compensation arrangement on a covered institution would be the cumulative effect of the behavior of all covered persons subject to the incentive-based compensation arrangement. If multiple covered persons are incented to take inappropriate risks, their combined risk-taking behavior could lead to a financial loss at the covered institution that is significantly greater than the financial loss that could be caused by any one individual.<sup>96</sup> Although many institutions already have governance and risk management systems to help ensure the commitment of significant amounts of capital is subject to appropriate controls, as noted above, incentive-based compensation arrangements that provide inappropriate risk-taking incentives can weaken those governance and risk management systems. These considerations about the cumulative effect of incentive-based compensation arrangements weigh in favor of a conservative threshold under the exposure test so that large groups of covered persons with the authority to commit a covered institution's capital are not subject to flawed incentive-based compensation arrangements which would incentivize them to subject the covered institution to inappropriate risks.

The Agencies also considered that in another regulatory context, a relatively small decrease in a large institution's capital requires additional safeguards for safety and soundness. Under the capital plan rule in the Board's Regulation Y, well-capitalized bank holding companies with average total consolidated assets of \$50 billion or more are subject to prior approval requirements on incremental capital

<sup>95</sup> See *supra* note 14.

<sup>96</sup> See, e.g., the Subcommittee Report.

distributions if those distributions, as measured over a one-year period, would exceed pre-approved amounts by more than 1 percent of the bank holding company's tier 1 capital.<sup>97</sup> Relative to the capital plan rule, a lower threshold of capital is appropriate in the context of incentive-based compensation in light of the potential cumulative effect of multiple covered persons with incentives to take inappropriate risks and the possibility that correlated inappropriate risk-taking incentives could, in the aggregate, significantly erode capital buffers at Level 1 and Level 2 covered institutions.

Taking into consideration the cumulative impact of incentive-based compensation arrangements described above, the Agencies have proposed a threshold level for the exposure test of 0.5 percent of capital. The exposure test would be measured on an annual basis to align with the common practice at many institutions of awarding incentive-based compensation on an annual basis, taking into account a covered person's performance and risk-taking over 12 months.

The Agencies also considered international compensation regulations that also use a 0.5 percent threshold, but on a per transaction basis.<sup>98</sup> The Agencies are proposing to apply the threshold on an aggregate annual basis because a per transaction basis could permit an individual to evade designation as a significant risk-taker and the related incentive-based compensation restrictions by keeping his or her individual transactions below the threshold, but completing multiple transactions during the course of the year that, in the aggregate, far exceed the threshold.

#### Exposure Test at Certain Affiliates

Paragraph (3) of the definition of significant risk-taker is intended to address potential evasion of the exposure test by a Level 1 or Level 2 covered institution that authorizes an employee of one of its affiliates that is not a covered institution because it has less than \$1 billion in average total

consolidated assets or is not considered a covered institution under one of the six Agencies' proposed rules, to commit or expose 0.5 percent or more of capital of the Level 1 or Level 2 covered institution. The Agencies are concerned that in such a situation, the employee would be functioning as a significant risk-taker at the affiliated Level 1 or Level 2 covered institution but would not be subject to the requirements of the proposed rule that would be applicable to a significant risk-taker at the affiliated Level 1 or Level 2 covered institution. To address this circumstance, the proposed rule would treat such employee as a significant risk-taker with respect to the affiliated Level 1 or Level 2 covered institution for which the employee may commit or expose capital. That Level 1 or Level 2 covered institution would be required to ensure that the employee's incentive-based compensation arrangement complies with the proposed rule.

#### Dollar Threshold Test

As an alternative to the relative compensation test, the Agencies also considered using a specific absolute compensation threshold, measured in dollars, to determine whether an individual is a significant risk-taker. Under this test, a covered person who receives annual base salary and incentive-based compensation<sup>99</sup> in excess of a specific dollar threshold would be a significant risk-taker, regardless of how that covered person's annual base salary and incentive-based compensation compared to others in the consolidated organization (the "dollar threshold test"). A dollar threshold test would include adjustments such as for inflation. If the dollar threshold test replaced the relative compensation test, the definition of "significant risk-taker" would still include only covered persons who received annual base salary and incentive-based compensation of which at least one-third was incentive-based compensation, based on the covered person's annual base salary paid and incentive-based compensation awarded during the last calendar year that ended at least 180 days before the beginning of the performance period.

One advantage of a dollar threshold test compared to the relative compensation test is that it could be less burdensome to implement and monitor. With a dollar threshold test covered institutions can determine whether an

individual covered person meets the dollar threshold test of the significant risk-taker definition by reviewing the compensation of only that single individual. The dollar threshold test would also allow an institution to implement incentive-based compensation structures, policies, and procedures with some foreknowledge of which employees would be covered by them. However, even with adjustment for inflation, a dollar threshold put in place by regulation would assume that a certain dollar threshold is an appropriate level for all Level 1 and Level 2 covered institutions and covered persons. On the other hand, a dollar threshold could set expectations so that individual employees would know based on their own compensation if they are significant risk-takers.

Based on FHFA's supervisory experience analyzing compensation both at FHFA's regulated entities and at other financial institutions, a dollar threshold would be an appropriate approach to identify individuals with the ability to put the covered institution at risk of material loss. FHFA must prohibit its regulated entities from providing compensation to any executive officer of the regulated entity that is not reasonable and comparable with compensation for employment in other similar businesses (including publicly held financial institutions or major financial services companies) involving similar duties and responsibilities.<sup>100</sup> In order to meet this statutory mandate, FHFA analyzes, assesses, and compares the compensation paid to employees of its regulated entities and compensation paid to employees of other financial institutions of various asset sizes. In performing this analysis, FHFA has observed that the amount of a covered person's annual base salary and incentive-based compensation reasonably relates to the level of responsibility that the covered person has within an organization. A dollar threshold test, if set at the appropriate level, would identify covered persons who either (1) have a greater ability to expose a covered institution to financial loss or (2) supervise covered persons who have a greater ability to expose a covered institution to financial loss.

One disadvantage of the dollar threshold test is that it may not appropriately capture all individuals who subject the firm to significant risks. A dollar threshold put in place by regulation that is static across all Level 1 and Level 2 covered institutions also is not sensitive to the compensation

<sup>97</sup> See 12 CFR 225.8(g). Bank holding companies that are well-capitalized and that meet other requirements under the rule must provide the Board with prior notice for incremental capital distributions, as measured over a one-year period, that represent more than 1 percent of their tier 1 capital. *Id.*

<sup>98</sup> See, e.g., EBA, "Regulatory Technical Standards on Criteria to Identify Categories of Staff Whose Professional Activities Have a Material Impact on an Institution's Risk Profile under Article 94(2) of Directive 2013/36/EU" (December 16, 2013), available at <https://www.eba.europa.eu/documents/10180/526386/EBA-RTS-2013-11+%28On-identified-staff%29.pdf/c313a671-269b-45be-a748-29e1c772ee0e>.

<sup>99</sup> For purposes of the dollar threshold test, the measure of annual base salary and incentive-based compensation would be calculated in the same way as the measure for the one-third threshold discussed above.

<sup>100</sup> 12 U.S.C. 4518(a).

practices of an individual organization. The relative compensation test, while not as easy to implement, could be more sensitive to the compensation structure of an organization because it is based on the relative compensation of individuals that the organization concludes should be the mostly highly compensated.

2.18. For purposes of a designation under paragraph (2) of the definition of significant risk-taker, should the Agencies provide a specific standard for what would constitute “material financial loss” and/or “overall risk tolerance”? If so, how should these terms be defined and why?

2.19. The Agencies specifically invite comment on the one-third threshold in the proposed rule. Is one-third of the total of annual base salary and incentive-based compensation an appropriate threshold level of incentive-based compensation that would be sufficient to influence risk-taking behavior? Is using compensation from the last calendar year that ended at least 180 days before the beginning of the performance period for calculating the one-third threshold appropriate?

2.20. The Agencies specifically invite comment on the percentages of employees proposed to be covered under the relative compensation test. Are 5 percent and 2 percent reasonable levels? Why or why not? Would 5 percent and 2 percent include all of the significant risk-takers or include too many covered persons who are not significant risk-takers?

2.21. The Agencies specifically invite comment on the time frame needed to identify significant risk-takers under the relative compensation test. Is using compensation from the last calendar year that ended at least 180 days before the beginning of the performance period appropriate? The Agencies invite comment on whether there is another measure of total compensation that would be possible to measure closer in time to the performance period for which a covered person would be identified as a significant risk-taker.

2.22. The Agencies invite comment on all aspects of the exposure test, including potential costs and benefits, the appropriate exposure threshold and capital equivalent, efficacy at identifying those non-senior executive officers who have the authority to place the capital of a covered institution at risk, and whether an exposure test is a useful complement to the relative compensation test. If so, what specific types of activities or transactions, and at what level of exposure, should the exposure test cover? The Agencies also invite comment on whether the exposure test is workable and why.

What, if any, additional details would need to be specified in order to make the exposure test workable, such as further explanation of the meanings of “commit” or “expose”? In addition to committees, should the exposure test apply to groups of persons, such as traders on a desk? If so, how should it be applied?

2.23. With respect to the exposure test, the Agencies specifically invite comment on the proposed capital commitment levels. Is 0.5 percent of capital of a covered institution a reasonable proxy for material financial loss, or are there alternative levels or dollar thresholds that would better achieve the statutory objectives? If alternative methods would better achieve the statutory objectives, what are the advantages and disadvantages of those alternatives compared to the proposed level? For depository institution holding company organizations with multiple covered institutions, should the capital commitment level be consistent across all such institutions or should it vary depending on specified factors and why? For example, should the levels for covered institutions that are subsidiaries of a parent who is also a covered institution vary depending on: (1) The size of those subsidiaries relative to the parent; and/or (2) whether the entity would be subject to comparable restrictions if it were not affiliated with the parent? What are the advantages and disadvantages of any such variation, and what would be the appropriate levels? The Agencies recognize that certain covered institutions under the Board’s, the OCC’s, the FDIC’s, and the SEC’s proposed rules, such as Federal and state branches and agencies of foreign banks and investment advisers that are not also depository institution holding companies, banks, or broker-dealers or subsidiaries of those institutions, are not otherwise required to calculate common equity tier 1 capital or tentative net capital, as applicable. How should the capital commitment level be determined under the Board’s, the OCC’s, the FDIC’s, and the SEC’s proposed rules for those covered institutions? Is there a capital or other measure that the Agencies should consider for those covered institutions that would achieve similar objectives to common equity tier 1 capital or tentative net capital? If so, what are the advantages and disadvantages of such a capital or other measure?

2.24. The Agencies invite comment on whether it is appropriate to limit the exposure test to market risk and credit risk and why. What other types of risk should be included, if any and how

would such exposures be measured? Should the Agencies prescribe a method for measurement of market risk and credit risk? Should exposures be measured as notional amounts or is there a more appropriate measure? If so, what would it be? Should the exposure test take into account hedging? How should the exposure test be applied to an individual in a situation where a firm calculates an exposure limit for a trading desk comprised of a group of people? Should a de minimis threshold be introduced for any transaction counted toward the 0.5 percent annual exposure test?

2.25. Should the exposure test consider the authority of a covered person to initiate or structure proposed product offerings, even if the covered person does not have final decision-making authority over such product offerings? Why or why not? If so, are there specific types of products with respect to which this approach would be appropriate and why?

2.26. Should the exposure test measure a covered person’s authority to commit or expose (a) through one transaction or (b) as currently proposed, through multiple transactions in the aggregate over a period of time? What would be the benefits and disadvantages of applying the test on a per-transaction versus aggregate basis over a period of time? If measured on an aggregate basis, what period of time is appropriate and why? For example, should paragraph (1)(iii) of the definition of significant risk-taker read: “A covered person of a covered institution who had the authority to commit or expose in any single transaction during the previous calendar year 0.5 percent or more of the capital<sup>101</sup> of the covered institution or of any section 956 affiliate of the covered institution, whether or not the individual is a covered person of that specific legal entity”? Why or why not?

2.27. If the exposure test were based on a single transaction, would 0.5 percent of capital be the appropriate threshold for significant risk-taker status? Why or why not? If not, what would be the appropriate percentage of capital to include in the exposure test and why?

2.28. Should the Agencies introduce an absolute exposure threshold in addition to a percentage of capital test if a per-transaction test was introduced instead of the annual exposure test? Why or why not? For example, would a threshold formulated as “the lesser of 0.5 percent of capital or \$100 million”

<sup>101</sup> Under this alternative language, each Agency’s rule text would include the relevant capital metrics for its covered institutions.

help to level the playing field across Level 1 covered institutions and the smallest Level 2 covered institutions and better ensure that the right set of activities is being considered by all institutions? The Agencies' supervisory experience indicates that many large institutions, for example, require additional scrutiny of significant transactions, which helps to ensure that the potential risks posed by large transactions are adequately considered before such transactions are approved. Would \$100 million be the appropriate level at which additional approval procedures are required before a transaction is approved, or would a lower threshold be appropriate if an absolute dollar threshold were combined with the capital equivalent threshold?

2.29. Should the exposure test measure exposures or commitments actually made, or should the authority to make an exposure or commitment be sufficient to meet the test and why? For example, should paragraph (1)(iii) of the definition of significant risk-taker read: "A covered person of a covered institution who committed or exposed in the aggregate during the previous calendar year 0.5 percent or more of the common equity tier 1 capital, or in the case of a registered securities broker or dealer, 0.5 percent or more of the tentative net capital, of the covered institution or of any section 956 affiliate of the covered institution, whether or not the individual is a covered person of that specific legal entity"?

2.30. Would a dollar threshold test, as described above, achieve the statutory objectives better than the relative compensation test? Why or why not? If using a dollar threshold test, and assuming a mechanism for inflation adjustment, would \$1 million be the right threshold or should it be higher or lower? For example, would a threshold of \$2 million dollars be more appropriate? Why or why not? How should the threshold be adjusted for inflation? Are there other adjustments that should be made to ensure the threshold remains appropriate? What are the advantages and disadvantages of a dollar threshold test compared to the proposed relative compensation test?

2.31. The Agencies specifically invite comment on replacement of the relative compensation test in paragraphs (1)(i) and (ii) of the definition of significant risk-taker with a dollar threshold test, as follows: "a covered person of a Level 1 or Level 2 covered institution who receives annual base salary and incentive-based compensation of \$1 million or more in the last calendar year that ended at least 180 days before the

beginning of the performance period." Under this alternative, the remaining language in the definition of "significant risk-taker" would be unchanged.

2.32. The Agencies invite comment on all aspects of a dollar threshold test, including potential costs and benefits, the appropriate amount, efficacy at identifying those non-senior executive officers who have the ability to place the institution at risk, time frame needed to identify significant risk-takers, and comparison to a relative compensation test such as the one proposed. Is the last calendar year that ended at least 180 days before the beginning of the performance period an appropriate time frame or for the dollar threshold test or would using compensation from the performance period that ended in the most recent calendar year be appropriate? The Agencies specifically invite comment on whether to use an exposure test if a dollar threshold test replaces the relative compensation test and why.

2.33. The Agencies invite comment on all aspects of the definition of "significant risk-taker." The Agencies specifically invite comment on whether the definition should rely solely on the relative compensation test, solely on the exposure test, or on both tests, as proposed. What are the advantages and disadvantages of each of these options?

2.34. In addition to the tests outlined above, are there alternative tests of, or proxies for, significant risk-taking that would better achieve the statutory objectives? What are the advantages and disadvantages of alternative approaches? What are the implementation burdens of any of the approaches, and how could they be addressed?

2.35. How many covered persons would likely be identified as significant risk-takers under the proposed rule? How many covered persons would likely be identified under only the relative compensation test with the one-third threshold? How many covered persons would likely be identified under only the exposure test as measured on an annual basis with the one-third threshold? How many covered persons would be identified under only an exposure test formulated on a per transaction basis with the one-third threshold? How many covered persons would be identified under only the dollar threshold test, assuming the dollar threshold is \$1 million, with the one-third threshold? How many covered persons would be identified under each test individually without a one-third threshold?

## Other Definitions

*To award.* The proposed rule defines "to award" as to make a final determination, conveyed to a covered person, of the amount of incentive-based compensation payable to the covered person for performance over a performance period.

The Agencies acknowledge that some covered institutions use the term "award" to refer to the decisions that covered institutions make about incentive-based compensation structures and performance measure targets before or soon after the relevant performance period begins. However, in the interest of clarity and consistency, the proposed rule uses the phrase "to award" only with reference to final determinations about incentive-based compensation amounts that an institution makes and communicates to the covered person who could receive the award under an incentive-based compensation arrangement for a given performance period.

In most cases, incentive-based compensation will be awarded near the end of the performance period. Neither the length of the performance period nor the decision to defer some or all incentive-based compensation would affect the determination of when incentive-based compensation is awarded for purposes of the proposed rule. For example, at the beginning of a one-year performance period, a covered institution might inform a covered person of the amount of incentive-based compensation that the covered person could earn at the end of the performance period if certain measures and other criteria are met. The covered institution might also inform the covered person that a portion of the covered person's incentive-based compensation will be deferred for a four-year period. The covered person's incentive-based compensation for that performance period—including both the portion that is deferred and the portion that vests immediately—would be "awarded" when the covered institution determines what amount of incentive-based compensation the covered person has earned based on his or her performance during the performance period.

For equity-like instruments, such as stock appreciation rights and options, the date when incentive-based compensation is awarded may be different than from the date when the instruments vest, are paid out, or can be exercised. For example, a covered institution could determine at the end of a performance period that a covered person has earned options on the basis of performance during that performance

period, and the covered institution could provide that the covered person cannot exercise the options for another five years. The options would be considered to have been “awarded” at the end of the performance period, even if they cannot be exercised for five years.

Under the proposed rule, covered institutions would have the flexibility to decide how the determination of the amount of incentive-based compensation would be conveyed to a covered person. For example, some covered institutions may choose to inform covered persons of their award amounts in writing or by electronic message. Others may choose to allow managers to orally inform covered persons of their award amounts.

2.36. The Agencies invite comment on whether the proposed rule’s definition of “to award” should include language on when incentive-based compensation is awarded for purposes of the proposed rule. Specifically, the Agencies invite comment on whether the definition should read: “To award incentive-based compensation means to make a final determination, conveyed to a covered person, at the end of the performance period, of the amount of incentive-based compensation payable to the covered person for performance over that performance period.” Why or why not?

*Board of directors.* The proposed rule defines “board of directors” as the governing body of a covered institution that oversees the activities of the covered institution, often referred to as the board of directors or board of managers. Under the Board’s proposed rule, for a foreign banking organization, “board of directors” would mean the relevant oversight body for the institution’s state insured or uninsured branch, agency, or operations, consistent with the foreign banking organization’s overall corporate and management structure. Under the FDIC’s proposed rule, for a state insured branch of a foreign bank, “board of directors” would refer to the relevant oversight body for the state insured branch consistent with the foreign bank’s overall corporate and management structure. Under the OCC’s proposed rule, for a Federal branch or agency of a foreign bank, “board of directors” would refer to the relevant oversight body for the Federal branch or agency, consistent with its overall corporate and management structure. The OCC would work closely with Federal branches and agencies to determine the appropriate person or committee to undertake the responsibilities assigned to the oversight body. NCUA’s proposed rule defines

“board of directors” as the governing body of a credit union.

*Clawback.* The term “clawback” under the proposed rule refers specifically to a mechanism that allows a covered institution to recover from a senior executive officer or significant risk-taker incentive-based compensation that has vested if the covered institution determines that the senior executive officer or significant risk-taker has engaged in fraud or the types of misconduct or intentional misrepresentation described in section \_\_\_\_\_.7(c) of the proposed rule. Clawback would not apply to incentive-based compensation that has been awarded but is not yet vested. As used in the proposed rule, the term “clawback” is distinct from the terms “forfeiture” and “downward adjustment,” in that clawback provisions allow covered institutions to recover incentive-based compensation that has already vested. In contrast, forfeiture applies only after incentive-based compensation is awarded but before it vests. Downward adjustment occurs only before incentive-based compensation is awarded.

*Compensation, fees, or benefits.* The proposed rule defines “compensation, fees, or benefits” to mean all direct and indirect payments, both cash and non-cash, awarded to, granted to, or earned by or for the benefit of, any covered person in exchange for services rendered to the covered institution. The form of payment would not affect whether such payment meets the definition of “compensation, fees, or benefits.” The term would include, among other things, payments or benefits pursuant to an employment contract, compensation, pension, or benefit agreements, fee arrangements, perquisites, options, post-employment benefits, and other compensatory arrangements. The term is defined broadly under the proposed rule in order to include all forms of incentive-based compensation.

The term “compensation, fees, or benefits” would exclude reimbursement for reasonable and proper costs incurred by covered persons in carrying out the covered institution’s business.

*Control function.* The proposed rule defines “control function” as a compliance, risk management, internal audit, legal, human resources, accounting, financial reporting, or finance role responsible for identifying, measuring, monitoring, or controlling risk-taking.<sup>102</sup> The term would include

<sup>102</sup> The term “control function” would serve a different purpose than, and is not intended to affect

loan review and Bank Secrecy Act roles. Section \_\_\_\_\_.9(b) of the proposed rule would require a Level 1 or Level 2 covered institution to provide individuals engaged in control functions with the authority to influence the risk-taking of the business areas they monitor and ensure that covered persons engaged in control functions are compensated in accordance with the achievement of performance objectives linked to their control functions and independent of the performance of the business areas they monitor. As described below, section \_\_\_\_\_.11 of the proposed rule would also require that a Level 1 or Level 2 covered institution’s policies and procedures provide an appropriate role for control function personnel in the covered institution’s incentive-based compensation program. The heads of control functions would also be considered senior executive officers for purposes of the proposed rule, because such employees can individually affect the risk profile of a covered institution.

Although covered persons in control functions generally do not perform activities designed to generate revenue or reduce expenses, they may nonetheless have the ability to expose covered institutions to risk of material financial loss. For example, individuals in human resources and risk management roles contribute to the design and review of performance measures used in incentive-based compensation arrangements, which may allow them to influence the activities of risk-takers in a covered institution. For that reason, the proposed rule would treat covered persons who are the heads of control functions as senior executive officers who would be subject to certain additional requirements under the proposed rule as described further below.

2.37. The Agencies invite comment on whether and in what circumstances, the proposed definition of “control function” should include additional individuals and organizational units that (a) do not engage in activities designed to generate revenue or reduce expenses; (b) provide operational support or servicing to any organizational unit or function; or (c) provide technology services.

*Deferral.* The proposed rule defines “deferral” as the delay of vesting of incentive-based compensation beyond the date on which the incentive-based compensation is awarded. As discussed below in this Supplementary Information section, under the proposed

the interpretation of, the term “front line unit,” as used in the OCC’s Heightened Standards.

rule, a Level 1 or Level 2 covered institution would be required to defer a portion of the incentive-based compensation of senior executive officers and significant risk-takers. The Agencies would not consider compensation that has vested, but that the covered person then chooses to defer, e.g., for tax reasons, to be deferred incentive-based compensation for purposes of the proposed rule because it would not be subject to forfeiture.

The Agencies note that the deferral period under the proposed rule would not include any portion of the performance period, even for incentive-based compensation plans that have longer performance periods. Deferral involves a “look-back” period that is intended as a stand-alone interval that follows the performance period and allows time for ramifications (such as losses or other adverse consequences) of, and other information about, risk-taking decisions made during the performance period to become apparent.

If incentive-based compensation is paid in the form of options, the period of time between when an option vests and when the option can be exercised would not be considered deferral under the proposed rule. As with other types of incentive-based compensation, an option would count toward the deferral requirement only if it has been awarded but has not yet vested, regardless of when the option could be exercised.<sup>103</sup>

2.38. To the extent covered institutions are already deferring incentive-based compensation, does the proposed definition of deferral reflect current practice? If not, in what way does it differ?

*Deferral period.* The proposed rule defines “deferral period” as the period of time between the date a performance period ends and the last date on which the incentive-based compensation that is awarded for such performance period vests. A deferral period and a performance period that both relate to the same incentive-based compensation award could not occur concurrently. Because sections \_\_\_\_\_.7(a)(1)(iii) and (a)(2)(iii) of the proposed rule would allow for pro rata vesting of deferred amounts during a deferral period, some deferred incentive-based compensation awarded for a performance period could vest before the end of the deferral period following that performance period. As a result, the deferral period would be considered to end on the date that the last tranche of incentive-based

compensation awarded for a performance period vests.

*Downward adjustment.* The proposed rule defines “downward adjustment” as a reduction of the amount of a covered person’s incentive-based compensation not yet awarded for any performance period that has already begun, including amounts payable under long-term incentive plans, in accordance with a forfeiture and downward adjustment review under section \_\_\_\_\_.7(b) of the proposed rule. As explained above, downward adjustment is distinct from clawback and forfeiture because downward adjustment affects incentive-based compensation that has not yet been awarded. It is also distinct from performance-based adjustments that covered institutions might make in determining the amount of incentive-based compensation to award to a covered person, absent or separate from a forfeiture or downward adjustment review. Depending on the results of a forfeiture and downward adjustment review under section \_\_\_\_\_.7(b) of the proposed rule, a covered institution could adjust downward incentive-based compensation that has not yet been awarded to a senior executive officer or significant risk-taker such that the senior executive officer or significant risk-taker is awarded none, or only some, of the incentive-based compensation that could otherwise have been awarded to such senior executive officer or significant risk-taker.

*Equity-like instrument.* The proposed rule defines “equity-like instrument” as (1) equity in the covered institution or of any affiliate of the covered institution; or (2) a form of compensation (i) payable at least in part based on the price of the shares or other equity instruments of the covered institution or of any affiliate of the covered institution; or (ii) that requires, or may require, settlement in the shares of the covered institution or any affiliate of the covered institution. The value of an equity-like instrument would be related to the value of the covered institution’s shares.<sup>104</sup> The definition includes three categories. Shares are an example of the first category, “equity.” Examples of the second category, “a form of compensation payable at least in part based on the price of the shares or other equity instruments of the covered institution or any affiliate of the covered institution,” include restricted stock

units (RSUs), stock appreciation rights, and other derivative instruments that settle in cash. Examples of the third category, “a form of compensation that requires, or may require, settlement in the shares of the covered institution or of any affiliate of the covered institution,” include options and derivative securities that settle, either mandatorily or permissively, in shares. An RSU that offers a choice of settlement in either cash or shares is also an example of this third category. The definition of equity-like instrument would include shares in the holding company of a covered institution, or instruments the value of which is dependent on the value of shares in the holding company of a covered institution. For example, the definition would include incentive-based compensation paid in the form of shares in a bank holding company, even if that incentive-based compensation were provided by a national bank subsidiary of that bank holding company. Covered institutions would determine the specific terms and conditions of the equity-like instruments they award to covered persons.

NCUA’s proposed rule does not include the definition of “equity-like instrument” because credit unions do not have these types of instruments.

2.39. Are there any financial instruments that are used for incentive-based compensation and have a value that is dependent on the performance of a covered institution’s shares, but are not captured by the definition of “equity-like instrument”? If so, what are they, and should such instruments be added to the definition? Why or why not?

*Forfeiture.* The proposed rule defines “forfeiture” as a reduction of the amount of deferred incentive-based compensation awarded to a covered person that has not vested.<sup>105</sup>

<sup>105</sup> Forfeiture is similar to the concept of “malus” common at some covered institutions. Malus is defined in the CEBS Guidelines as “an arrangement that permits the institution to prevent vesting of all or part of the amount of a deferred remuneration award in relation to risk outcomes or performance.” See CEBS Guidelines. The 2011 Proposed Rule did not define the term “forfeiture,” but the concept was implicit in the discussion of adjustments during the deferral period. See 76 FR at 21179, “Deferred payouts may be altered according to risk outcomes either formulaically or based on managerial judgment, though extensive use of judgment might make it more difficult to execute deferral arrangements in a sufficiently predictable fashion to influence the risk-taking behavior of a covered person. To be most effective in ensuring balance, the deferral period should be sufficiently long to allow for the realization of a substantial portion of the risks from the covered person’s activities, and the measures of loss should be clearly explained to covered persons and closely

<sup>103</sup> Section \_\_\_\_\_.7(a)(4)(ii) of the proposed rule limits the portion of the proposed rule’s minimum deferral requirements that can be met in the form of options.

<sup>104</sup> The definition of “equity-like instrument” in the proposed rule is similar to “share-based payment” in Topic 718 of the Financial Accounting Standards Board (FASB) Accounting Standards Codification (formerly FAS 123(R)). Paragraph 718–10–30–20, FASB Accounting Standards Codification.

Depending on the results of a forfeiture and downward adjustment review under section \_\_\_\_\_.7(b) of the proposed rule, a covered institution could reduce a significant risk-taker or senior executive officer's unvested incentive-based compensation such that none, or only some, of the deferred incentive-based compensation vests. As discussed below in this **SUPPLEMENTARY INFORMATION** section, a Level 1 or Level 2 covered institution would be required to place at risk of forfeiture all unvested deferred incentive-based compensation, including amounts that have been awarded and deferred under long-term incentive plans.

*Incentive-based compensation.* The proposed rule defines "incentive-based compensation" as any variable compensation, fees, or benefits that serve as an incentive or reward for performance. The Agencies propose a broad definition to provide flexibility as forms of compensation evolve. Compensation earned under an incentive plan, annual bonuses, and discretionary awards are all examples of compensation that could be incentive-based compensation. The form of payment, whether cash, an equity-like instrument, or any other thing of value, would not affect whether compensation, fees, or benefits meet the definition of "incentive-based compensation."

In response to a similar definition in the 2011 Proposed Rule, commenters asked for clarification about the components of incentive-based compensation. The proposed definition clarifies that compensation, fees, and benefits that are paid for reasons other than to induce performance would not be included. For example, compensation, fees, or benefits that are awarded solely for, and the payment of which is solely tied to, continued employment (e.g., salary or a retention award that is conditioned solely on continued employment) would not be considered incentive-based compensation. Likewise, payments to new employees at the time of hiring (signing or hiring bonuses) that are not conditioned on performance achievement would not be considered incentive-based compensation because they generally are paid to induce a prospective employee to join the institution, not to influence future performance of such employee.

Similarly, a compensation arrangement that provides payments solely for achieving or maintaining a professional certification or higher level of educational achievement would not

be considered incentive-based compensation under the proposed rule. In addition, the Agencies do not intend for this definition to include compensation arrangements that are determined based solely on the covered person's level of fixed compensation and that do not vary based on one or more performance measures (e.g., employer contributions to a 401(k) retirement savings plan computed based on a fixed percentage of an employee's salary). Neither would the proposed definition include dividends paid and appreciation realized on stock or other equity-like instruments that are owned outright by a covered person. However, stock or other equity-like instruments awarded to a covered person under a contract, arrangement, plan, or benefit would not be considered owned outright while subject to any vesting or deferral arrangement (regardless of whether such deferral is mandatory).

2.40. The Agencies invite comment on the proposed definition of incentive-based compensation. Should the definition be modified to include additional or fewer forms of compensation and in what way? Is the definition sufficiently broad to capture all forms of incentive-based compensation currently used by covered institutions? Why or why not? If not, what forms of incentive-based compensation should be included in the definition?

2.41. The Agencies do not expect that most pensions would meet the proposed rule's definition of "incentive-based compensation" because pensions generally are not conditioned on performance achievement. However, it may be possible to design a pension that would meet the proposed rule's definition of "incentive-based compensation." The Agencies invite comment on whether the proposed rule should contain express provisions addressing the status of pensions in relation to the definition of "incentive-based compensation." Why or why not?

*Incentive-based compensation arrangement, incentive-based compensation plan, and incentive-based compensation program.* The proposed rule defines three separate, but related, terms describing how covered institutions provide incentive-based compensation.<sup>106</sup> Under the proposed rule, "incentive-based compensation arrangement" would mean an agreement between a covered institution and a covered person, under which the covered institution provides incentive-

based compensation to the covered person, including incentive-based compensation delivered through one or more incentive-based compensation plans. An individual employment agreement would be an incentive-based compensation arrangement.

"Incentive-based compensation plan" is defined as a document setting forth terms and conditions governing the opportunity for and the delivery of incentive-based compensation payments to one or more covered persons. An incentive-based compensation plan may cover, among other things, specific roles or job functions, categories of individuals, or forms of payment. A covered person may be compensated under more than one incentive-based compensation plan.

"Incentive-based compensation program" means a covered institution's framework for incentive-based compensation that governs incentive-based compensation practices and establishes related controls. A covered institution's incentive-based compensation program would include all of the covered institution's incentive-based compensation arrangements and incentive-based compensation plans.

*Long-term incentive plan.* The proposed rule defines "long-term incentive plan" as a plan to provide incentive-based compensation that is based on a performance period of at least three years. Any incentive-based compensation awarded to a covered person for a performance period of less than three years would not be awarded under a long-term incentive plan, but instead would be considered "qualifying incentive-based compensation" as that term is defined under the proposed rule.<sup>107</sup>

Long-term incentive plans are forward-looking plans designed to reward employees for performance over a multi-year period. These plans generally provide an award of cash or equity at the end of a performance period if the employee meets certain individual or institution-wide performance measures. Because they have longer performance periods, long-term incentive plans allow more time

<sup>107</sup> In the 2011 Proposed Rule, the Agencies did not define the term "long-term incentive plan," but the 2011 Proposed Rule discussed "longer performance periods" as one of four methods used to make compensation more sensitive to risk. 76 FR at 21179 ("Under this method of making incentive-based compensation risk sensitive, the time period covered by the performance measures used in determining a covered person's award is extended (for example, from one year to two years). Longer performance periods and deferral of payment are related in that both methods allow awards or payments to be made after some or all risk outcomes associated with a covered person's activities are realized or better known.").

tied to their activities during the relevant performance period."

<sup>106</sup> The use of these terms under the proposed rule is consistent with how the same terms are used in the 2010 Federal Banking Agency Guidance.

for information about a covered person's performance and risk-taking to become apparent, and covered institutions can take that information into account to balance risk and reward. Under current practice, the performance period for a long-term incentive plan is typically three years.<sup>108</sup>

2.42. The Agencies invite comment on whether the proposed definition of "long-term incentive plan" is appropriate for purposes of the proposed rule. Are there incentive-based compensation arrangements commonly used by financial institutions that would not be included within the definition of "long-term incentive plan" under the proposed rule but that, given the scope and purposes of section 956, should be included in such definition? If so, what are the features of such incentive-based compensation arrangements, why should the definition include such arrangements, and how should the definition be modified to include such arrangements?

*Option.* The proposed rule defines an "option" as an instrument through which a covered institution provides a covered person with the right, but not the obligation, to buy a specified number of shares representing an ownership stake in a company at a predetermined price within a set time period or on a date certain, or any similar instrument, such as a stock appreciation right. Typically, covered persons must wait for a specified time period to conclude before obtaining the

right to exercise an option.<sup>109</sup> The definition of option would also include option-like instruments that mirror some or all of the features of an option. For example, the proposed rule would include stock appreciation rights under the definition of option because the value of a stock appreciation right is based on a stock's price on a future date. As mentioned above, an option would be considered an equity-like instrument, as that term is defined in the proposed rule. NCUA's proposed rule does not include a definition of "option" because credit unions do not issue options.

*Performance period.* The proposed rule defines "performance period" as the period during which the performance of a covered person is assessed for purposes of determining incentive-based compensation. The Agencies intend for the proposed rule to provide covered institutions with flexibility in determining the length and the start and end dates of their employees' performance periods. For example, under the proposed rule, a covered institution could choose to have a performance period that coincided with a calendar year or with the covered institution's fiscal year (if the calendar year and fiscal year were different). A covered institution could also choose to have a performance period of one year for some incentive-based compensation and a performance period of three years for other incentive-based compensation.

2.43. Does the proposed rule's definition of "performance period" meet the goal of providing covered institutions with flexibility in determining the length and start and end dates of performance periods? Why or why not? Would a prescribed performance period, for example, periods that correspond to calendar years, be preferable? Why or why not?

*Qualifying incentive-based compensation.* The proposed rule defines "qualifying incentive-based compensation" as the amount of incentive-based compensation awarded to a covered person for a particular performance period, excluding amounts awarded to such covered person for that particular performance period under a long-term incentive plan. With the exception of long-term incentive plans, all forms of compensation, fees, and benefits that qualify as "incentive-based compensation," including annual bonuses, would be included in the amount of qualifying incentive-based compensation. The deferral

requirements of section \_\_\_\_\_.7(a) of the proposed rule would require a Level 1 or Level 2 covered institution to defer a specified percentage of any qualifying incentive-based compensation awarded to a significant risk-taker or senior executive officer for each performance period.

*Regulatory report.* Each Agency has included a definition of "regulatory report" in its version of the proposed rule that explains which regulatory reports would be required to be used by each of that Agency's covered institutions for the purposes of measuring average total consolidated assets under the proposed rule.

For a national bank, state member bank, state nonmember bank, federal savings association, and state savings association, "regulatory report" would mean the consolidated Reports of Condition and Income ("Call Report").<sup>110</sup> For a U.S. branch or agency of a foreign bank, "regulatory report" would mean the Reports of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks—FFIEC 002. For a bank holding company, "regulatory report" would mean Consolidated Financial Statements for Bank Holding Companies ("FR Y-9C"). For a savings and loan holding company, "regulatory report" would mean FR Y-9C; if a savings and loan holding company is not required to file an FR Y-9C, Quarterly Savings and Loan Holding Company Report ("FR 2320"), if the savings and loan holding company reports consolidated assets on the FR 2320. For a savings and loan holding company that does not file a regulatory report within the meaning of the preceding sentence, "regulatory report" would mean a report of average total consolidated assets filed with the Board on a quarterly basis. For an Edge or Agreement Corporation, "regulatory report" would mean the Consolidated Report of Condition and Income for Edge and Agreement Corporations ("FR 2886b"). For the U.S. operations of a foreign banking organization, "regulatory report" would mean a report of average total consolidated U.S. assets filed with the Board on a quarterly basis. For subsidiaries of national banks, Federal savings associations, and Federal branches or agencies of foreign banking organizations that are not brokers, dealers, persons providing insurance, investment companies, or investment advisers, "regulatory report" would mean a report of the subsidiary's total consolidated assets prepared by the subsidiary, national bank, Federal

<sup>108</sup> See Compensation Advisory Partners, "Large Complex Banking Organizations: Trends, Practices, and Outlook" (June 2012), available at <http://www.capartners.com/uploads/news/id90/capartners.com-capflash-issue31.pdf>; Pearl Meyer & Partners, "Trends in Incentive Compensation: How the Federal Reserve is Influencing Pay" (2013), available at <https://pearlmeier.com/pearl/media/pearlmeier/articles/pmp-art-fedreserveinfluencingpay-so-bankdirector-5-14-2013.pdf>; Meridian Compensation Partners, LLC, "Executive Compensation in the Banking Industry: Emerging Trends and Best Practices, 2014–2015" (June 22, 2015), available at <https://www.meridiancp.com/wp-content/uploads/Executive-Compensation-in-the-Banking-Industry.pdf>; Compensation Advisory Partners, "Influence of Federal Reserve on Compensation Design in Financial Services: An Analysis of Compensation Disclosures of 23 Large Banking Organizations" (April 24, 2013), available at <http://www.capartners.com/uploads/news/id135/capartners.com-capflash-issue45.pdf>; "The 2014 Top 250 Report: Long-term Incentive Grant Practices for Executives" ("Cook Report") (October 2014), available at [http://www.fwcook.com/alert\\_letters/The\\_2014\\_Top\\_250\\_Report\\_Long-Term\\_Incentive\\_Grant\\_Practices\\_for\\_Executives.pdf](http://www.fwcook.com/alert_letters/The_2014_Top_250_Report_Long-Term_Incentive_Grant_Practices_for_Executives.pdf); "Study of 2013 Short- and Long-term Incentive Design Criterion Among Top 200 S&P 500 Companies" (December 2014), available at <http://www.ajg.com/media/1420659/study-of-2013-short-and-long-term-incentive-design-criterion-among-top-200.pdf>.

<sup>109</sup> As explained above in the definition of "deferral," the time period after the option vests but before it may be exercised is not considered part of the deferral period.

<sup>110</sup> Specifically, the OCC will refer to item RCFD 2170 of Schedule RC.

savings association, or Federal branch or agency in a form that is acceptable to the OCC. For a regulated institution that is a subsidiary of a bank holding company, savings and loan holding company, or a foreign banking organization, “regulatory report” would mean a report of the subsidiary’s total consolidated assets prepared by the bank holding company, savings and loan holding company, or subsidiary in a form that is acceptable to the Board.

For FHFA’s proposed rule, “regulatory report” would mean the Call Report Statement of Condition.

For a natural person credit union, “regulatory report” would mean the 5300 Call Report. For corporate credit unions, “regulatory report” would mean the 5310 Call Report.

For a broker or dealer registered under section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o), “regulatory report” would mean the FOCUS Report.<sup>111</sup> For an investment adviser, as such term is defined in section 202(a)(11) of the Investment Advisers Act, and as discussed above, total consolidated assets would be determined by the investment adviser’s total assets (exclusive of non-proprietary assets) shown on the balance sheet for the adviser’s most recent fiscal year end.<sup>112</sup>

**Vesting.** Under the proposed rule, “vesting” of incentive-based compensation means the transfer of ownership<sup>113</sup> of the incentive-based compensation to the covered person to whom the incentive-based compensation was awarded, such that the covered person’s right to the incentive-based compensation is no longer contingent on the occurrence of any event. Amounts awarded under an incentive-based compensation arrangement may vest immediately—for example, when the amounts are paid out to a covered person immediately and are not subject to deferral and forfeiture. As explained above, before

amounts awarded to a covered person vest, the amounts could also be deferred and at risk of forfeiture. After amounts awarded to a covered person vest, the amounts could be subject to clawback, but they would not be at risk of forfeiture.

As described below in this **SUPPLEMENTARY INFORMATION** section, for incentive-based compensation to be counted toward the minimum deferral amount as discussed in section \_\_\_\_\_.7(a) of the proposed rule, a sufficient amount of time must elapse between the end of the performance period and the time when the deferred incentive-based compensation vests (and is no longer subject to forfeiture). During that deferral period, the award would be at risk of forfeiture.

If, after the award date, the covered institution had the right to require forfeiture of the shares or units awarded, then the award would not be considered vested. If, after the award date, the covered institution does not have the right to require forfeiture of the shares or units awarded, then the award would be vested and therefore would not be able to be counted toward the minimum deferral amount even if the shares or units have not yet been transferred to the covered person. For example, a covered institution could award an employee 100 shares of stock appreciation rights that pay out five years after the award date. In other words, five years after the award date, the covered institution will pay the employee the difference between the value of 100 shares of the covered institution’s stock on the award date and the value of 100 shares of the covered institution’s stock five years later. The amount the covered institution pays the employee could vary based on the value of the institution’s shares. If the covered institution does not have the right to adjust the number of shares of stock appreciation rights before the payout, the stock appreciation rights would be considered vested as of the award date (even if the amount paid out could vary based on the value of the institution’s shares). If, however, the covered institution has the right to adjust the number of shares of stock appreciation rights until payout to account for risk outcomes that occur after the award date (for example, by reducing the number of shares of stock appreciation rights from 100 to 50 based on a failure to comply with the institution’s risk management policies), the stock appreciation rights would not be considered vested until payout. Similarly, amounts paid to a covered person pursuant to a dividend equivalent right would vest when the

number of dividend equivalent rights cannot be adjusted by the covered institution on the basis of risk outcomes.

2.44. The Agencies invite comment generally on the proposed rule’s definitions.

#### Relationship Between Defined Terms

The relationship between some of these defined terms can best be explained chronologically. Under the proposed rule, a covered institution’s incentive-based compensation timeline would be as follows:

- **Performance period.** A covered person may have incentive-based compensation targets based on performance measures that would apply during a *performance period*. A covered person’s performance or the performance of the covered institution during this period would influence the amount of incentive-based compensation *awarded* to the covered person. Before incentive-based compensation is *awarded* to a covered person, it should be subject to risk adjustments to reflect actual losses, inappropriate risks taken, compliance deficiencies, or other measures or aspects of financial and non-financial performance, as described in section \_\_\_\_\_.4(d) of the proposed rule. In addition, at any time during the performance period, incentive-based compensation could be subject to *downward adjustment*, as described in section \_\_\_\_\_.7(b) of the proposed rule.

- **Downward adjustment (if needed).** Downward adjustment could occur at any time during a performance period if a Level 1 or Level 2 covered institution conducts a forfeiture and downward adjustment review under section \_\_\_\_\_.7(b) of the proposed rule and the Level 1 or Level 2 covered institution determines that incentive-based compensation not yet awarded for the current performance period should be reduced. In other words, downward adjustment applies to plans where the performance period has not yet ended.

- **Award.** At or near the end of a *performance period*, a covered institution would evaluate the covered person’s or institution’s performance, taking into account adjustments described in section \_\_\_\_\_.4(d)(3) of the proposed rule, and determine the amount of incentive-based compensation, if any, to be awarded to the covered person for that *performance period*. At that time, the covered institution would determine what portion of the incentive-based compensation that is awarded will be *deferred*, as well as the *vesting* schedule for that deferred incentive-based compensation. A Level 1 or Level 2

<sup>111</sup> 17 CFR 240.17a–5(a); 17 CFR 249.617.

<sup>112</sup> The proposed rule would not apply the concept of a regulatory report and the attendant mechanics provided in section \_\_\_\_\_.3 of the proposed rule to covered institutions that are investment advisers because such institutions are not currently required to report the amount of total consolidated assets to any Federal regulators in their capacities as investment advisers. See proposed definition of “average total consolidated assets” for the proposed method by which an investment adviser would determine its asset level for purposes of the proposed rule.

<sup>113</sup> Compensation awarded to a trust or other entity at the direction of, or for the benefit of, a covered person would be treated as compensation awarded to that covered person. If incentive-based compensation awarded to the entity cannot be reduced by forfeiture, the amounts would be treated as having vested at the time of the award.

covered institution could reduce the amount of incentive-based compensation payable to a senior executive officer or significant risk-taker depending on the outcome of a forfeiture and downward adjustment review, as described in section \_\_\_\_\_.7(b) of the proposed rule.

- **Deferral period.** The *deferral period* for incentive-based compensation awarded for a particular performance period would begin at the end of such *performance period*, regardless of when a covered institution awards incentive-based compensation to a covered person for that *performance period*. At any time during a *deferral period*, a covered institution could require *forfeiture* of some or all of the incentive-based compensation that has been *awarded* to the covered person but has not yet *vested*.

- **Forfeiture (if needed).** *Forfeiture* could occur at any time during the *deferral period* (after incentive-based compensation has been *awarded* but before it *vests*). A Level 1 or Level 2 covered institution could require forfeiture of unvested deferred incentive-based compensation payable to a senior executive officer or significant risk-taker based on the result of a forfeiture and downward adjustment review, as described in section \_\_\_\_\_.7(b) of the proposed rule. Depending on the outcome of a forfeiture and downward adjustment review under section \_\_\_\_\_.7(b) of the proposed rule, a covered institution could reduce, or eliminate, the unvested deferred incentive-based compensation of a senior executive officer or significant risk-taker.

- **Vesting.** *Vesting* could occur annually, on a pro rata basis, throughout a *deferral period*. *Vesting* could also occur at a slower than pro rata schedule, such as entirely at the end of a *deferral period* (vesting entirely at the end of a *deferral period* is sometimes called “cliff vesting”). The *deferral period* for a particular performance period would end when all incentive-based compensation awarded for that performance period has *vested*. A covered institution may also evaluate information that has arisen over the *deferral period* about financial losses, inappropriate risks taken, compliance deficiencies, or other measures or aspects of financial and non-financial performance of the covered person at the time of *vesting* to determine if the amount that has been deferred should *vest* in full or should be reduced through forfeiture.

- **Clawback (if needed).** Clawback could be used to recover incentive-based compensation that has already

*vested*. Clawback could be used after a *deferral period* has ended, and it also could be used to recover any portion of incentive-based compensation that *vests* before the end of a *deferral period*. A Level 1 or Level 2 covered institution would be required to include clawback provisions in incentive-based compensation arrangements for senior executive officers and significant risk-takers, as described in section \_\_\_\_\_.7(c) of the proposed rule.

2.45. Is the interplay of the award date, vesting date, performance period, and deferral period clear? If not, why not?

2.46. Have the Agencies made clear the distinction between the proposed definitions of clawback, forfeiture, and downward adjustment? Do these definitions align with current industry practice? If not, in what way do they differ and what are the implications of such differences for both the operations of covered institutions and the effective supervision of compensation practices?

#### *§ \_\_\_\_\_.3 Applicability*

Section \_\_\_\_\_.3 describes which provisions of the proposed rule would apply to an institution that is subject to the proposed rule when an increase or decrease in average total consolidated assets causes it to become a covered institution, transition to another level, or no longer meet the definition of covered institution. This process may differ somewhat depending on whether the institution is a subsidiary of, or affiliated with, another covered institution.

As discussed above, for an institution that is not an investment adviser, average total consolidated assets would be determined by reference to the average of the total consolidated assets reported on regulatory reports for the four most recent consecutive quarters. The Agencies are proposing this calculation method because it is also used to calculate total consolidated assets for purposes of other rules that have \$50 billion thresholds,<sup>114</sup> and it is therefore expected to result in lower administrative burden on some institutions—particularly when those institutions move from Level 3 to Level 2—if the proposed rule requires total consolidated assets to be calculated in the same way as existing rules.

As discussed above, average total consolidated assets for a covered institution that is an investment adviser would be determined by the investment adviser's total assets (exclusive of non-

proprietary assets) shown on the balance sheet for the adviser's most recent fiscal year end. The proposed rule would not apply the concept of a regulatory report and the attendant mechanics provided in section \_\_\_\_\_.3 of the proposed rule to covered institutions that are investment advisers because such institutions are not currently required to report the amount of total consolidated assets to any Federal regulators in their capacities as investment advisers.

#### *(a) When Average Total Consolidated Assets Increase*

Section \_\_\_\_\_.3(a) of the proposed rule describes how the proposed rule would apply to institutions that are subject to the proposed rule when average total consolidated assets increase. It generally provides that an institution that is not a subsidiary of another covered institution becomes a Level 1, Level 2, or Level 3 covered institution when its average total consolidated assets increase to an amount that equals or exceeds \$250 billion, \$50 billion, or \$1 billion, respectively. For subsidiaries of other covered institutions, the Agencies would generally look to the average total consolidated assets of the top-tier parent holding company to determine whether average total consolidated assets have increased.

Given the unique characteristics of the different types of covered institutions subject to each Agency's proposed rule, each Agency's proposed rule contains specific language for subsidiaries that is consistent with the same general approach. For example, under the Board's proposed rule, a regulated institution would become a Level 1, Level 2, or Level 3 covered institution when its average total consolidated assets or the average total consolidated assets of any of its affiliates, equals or exceeds \$250 billion, \$50 billion, or \$1 billion, respectively. Under the OCC's proposed rule, a national bank that is a subsidiary of a bank holding company would become a Level 1, Level 2, or Level 3 covered institution when the top-tier bank holding company's average total consolidated assets equals or exceeds \$250 billion, \$50 billion, or \$1 billion, respectively. Because the Federal Home Loan Banks have no subsidiaries, and subsidiaries of the Enterprises are included as affiliates as part of the definition of the Enterprises, FHFA's proposed rule does not include specific language to address subsidiaries. Because the NCUA's rule does not cover subsidiaries of credit unions and credit unions are not subsidiaries of other types of institutions, NCUA's proposed

<sup>114</sup> See, e.g., OCC's Heightened Standards; 12 CFR 46.3; 12 CFR 225.8; 12 CFR 243.2; 12 CFR 252.30; 2 CFR 252.132; 12 CFR 325.202; 12 CFR 381.2.

rule does not include specific language to address subsidiaries. More detail on each Agency's proposed approach to subsidiaries is provided in the above discussion of definitions relating to covered institutions.

For covered institutions other than investment advisers and the Federal Home Loan Banks, using a rolling average for asset size, rather than measuring asset size at a single point in time, should minimize the frequency with which an institution may fall into or out of a covered institution level. As explained above, if a covered institution has fewer than four regulatory reports, the institution would be required to use the average of its total consolidated assets from its existing regulatory reports for purposes of determining average total consolidated assets. If a covered institution has a mix of two or more different types of regulatory reports covering the relevant period, those would be averaged for purposes of determining average total consolidated assets.

Section \_\_\_\_\_.3(a)(2) of the proposed rule provides a transition period for institutions that were not previously considered covered institutions and for covered institutions moving from a lower level to a higher level due to an increase in average total consolidated assets. Such covered institutions would be required to comply with the requirements for their new level not later than the first day of the first calendar quarter that begins at least 540 days after the date on which they become Level 1, Level 2, or Level 3 covered institutions. Prior to such date, the institutions would be required to comply with the requirements of the proposed rule, if any, that were applicable to them on the day before they became Level 1, Level 2, or Level 3 covered institutions as a result of the increase in assets. For example, if a Level 3 covered institution that is not a subsidiary of a depository institution holding company has average total consolidated assets that increase to more than \$50 billion on December 31, 2015, then such institution would become a Level 2 covered institution on December 31, 2015. However, the institution would not be required to comply with the requirements of the proposed rule that are applicable to a Level 2 covered institution until July 1, 2017. Prior to July 1, 2017, (the compliance date), the institution would remain subject to the requirements of the proposed rule that are applicable to a Level 3 covered institution. The covered institution's controls, risk management, and corporate governance also would be required to comply with

the provisions of the proposed rule that are applicable to a Level 2 covered institution no later than July 1, 2017. The Agencies are proposing this delay between the date when a covered institution's average total consolidated assets increase and the date when the covered institution becomes subject to the requirements related to its new level to provide covered institutions with sufficient time to comply with the new requirements.

The same general rule would apply to covered institutions that are subsidiaries (or, in the case of the Board's proposed rule, affiliates) of other covered institutions. For example, a Level 3 state savings association that is a subsidiary of a Level 3 savings and loan holding company, and a Level 3 subsidiary of that state savings association, would become a Level 2 covered institution on December 31, 2015, if the average total consolidated assets of the savings and loan holding company increased to more than \$50 billion on December 31, 2015, and would not be required to comply with the requirements of the proposed rule that are applicable to a Level 2 covered institution until July 1, 2017.

Section \_\_\_\_\_.3(a)(3) of the proposed rule provides that incentive-based compensation plans with performance periods that begin before the compliance date described in section \_\_\_\_\_.3(a)(2) would not be required to comply with the requirements of the proposed rule that become applicable to the covered institution on the compliance date as a result of the change in its status as a Level 1, Level 2, or Level 3 covered institution. Incentive-based compensation plans with a performance period that begins on or after the compliance date described in section \_\_\_\_\_.3(a)(2) would be required to comply with the rules for the covered institution's new level. In the example described in the previous paragraph, any incentive-based compensation plan with a performance period that begins before July 1, 2017, would not be required to comply with the requirements of the proposed rule that are applicable to a Level 2 covered institution (although any such plan would be required to comply with the requirements of the proposed rule that are applicable to a Level 3 covered institution).

The Agencies have included this grandfathering provision so that covered institutions would not be required to modify incentive-based compensation plans that are already in place when a covered institution's average total consolidated assets increase such that it

moves to a higher level. However, incentive-based compensation plans with performance periods that begin after the compliance date would be subject to the rules that apply to the covered institution's new level. In the previous example, any incentive-based compensation plan for a senior executive officer with a performance period that begins on or after July 1, 2017, would be required to comply with the requirements of the proposed rule that are applicable to a Level 2 covered institution, such as the deferral, forfeiture, downward adjustment, and clawback requirements contained in section \_\_\_\_\_.7 of the proposed rule.

Because institutions that would be covered institutions under the proposed rule commonly use long-term incentive plans with overlapping performance periods or incentive-based compensation plans with performance periods of one year, the Agencies do not anticipate that the grandfathering provision would unduly delay the application of the proposed rule to individual incentive-based compensation arrangements.

3.1. The Agencies invite comment on whether a covered institution's average total consolidated assets (a rolling average) is appropriate for determining a covered institution's level when its total consolidated assets increase. Why or why not? Will 540 days provide covered institutions with adequate time to adjust incentive-based compensation programs to comply with different requirements? If not, why not? In the alternative, is 540 days too long to give covered institutions time to comply with the requirements of the proposed rule? Why or why not?

3.2. The Agencies invite comment on whether the date described in section \_\_\_\_\_.3(a)(2) should instead be the beginning of the first performance period that begins at least 365 days after the date on which the regulated institution becomes a Level 1, Level 2, or Level 3 covered institution in order to have the date on which the proposed rule's corporate governance, policies, and procedures requirements begin coincide with the date on which the requirements applicable to plans begin. Why or why not?

#### (b) When Total Consolidated Assets Decrease

Section \_\_\_\_\_.3(b) of the proposed rule describes how the proposed rule would apply to an institution when assets decrease. A covered institution (other than an investment adviser) that is not a subsidiary of another covered institution would cease to be a Level 1, Level 2, or Level 3 covered institution

if its total consolidated assets, as reported on its regulatory reports, fell below the relevant total consolidated assets threshold for Level 1, Level 2, or Level 3 covered institutions, respectively, for four consecutive quarters. The calculation would be effective on the as-of date of the fourth consecutive regulatory report. For example, a bank holding company that is a Level 2 covered institution with total consolidated assets of \$55 billion on January 1, 2016, might report total consolidated assets of \$48 billion for the first quarter of 2016, \$49 billion for the second quarter of 2016, \$49 billion for the third quarter of 2016, and \$48 billion for the fourth quarter of 2016. On the as-of date of the Y-9C submitted for the fourth quarter of 2016, that bank holding company would become a Level 3 covered institution because its total consolidated assets were less than \$50 billion for four consecutive quarters. In contrast, if that same bank holding company reported total consolidated assets of \$48 billion for the first quarter of 2016, \$49 billion for the second quarter of 2016, \$49 billion for the third quarter of 2016, and \$51 billion for the fourth quarter of 2016, it would still be considered a Level 2 covered institution on the as-of date of the Y-9C submitted for the fourth quarter of 2016 because it had total consolidated assets of less than \$50 billion for only 3 consecutive quarters. If the bank holding company had total consolidated assets of \$49 billion in the first quarter of 2017, it still would not become a Level 3 covered institution at that time because it would not have four consecutive quarters of total consolidated assets of less than \$50 billion. The bank holding company would only become a Level 3 covered institution if it had four consecutive quarters with total consolidated assets of less than \$50 billion *after* the fourth quarter of 2016.

As with section \_\_\_.3(a), a Level 1, Level 2, or Level 3 covered institution that is a subsidiary of another Level 1, Level 2, or Level 3 covered institution would cease to be a Level 1, Level 2, or Level 3 covered institution when the top-tier parent covered institution ceases to be a Level 1, Level 2, or Level 3 covered institution. As with section \_\_\_.3(a), each Agency's proposed rule takes a slightly different approach that is consistent with the same general principle. For example, if a broker-dealer with less than \$50 billion in average total consolidated assets is a Level 2 covered institution because its parent bank holding company has more than \$50 billion in average total consolidated assets, the

broker-dealer would become a Level 3 covered institution if its parent bank holding company had less than \$50 billion in total consolidated assets for four consecutive quarters, thus causing the parent bank holding company itself to become a Level 3 covered institution.

The proposed rule would not require any transition period when a decrease in a covered institution's total consolidated assets causes it to become a Level 2 or Level 3 covered institution or to no longer be a covered institution. The Agencies are not proposing to include a transition period in this case because the new requirements would be less stringent than the requirements that were applicable to the covered institution before its total consolidated assets decreased, and therefore a transition period should be unnecessary. Instead, the covered institution would immediately be subject to the provisions of the proposed rule, if any, that are applicable to it as a result of the decrease in its total consolidated assets. For example, if as a result of having four consecutive regulatory reports with total consolidated assets less than \$50 billion, a bank holding company that was previously a Level 2 covered institution becomes a Level 3 covered institution as of June 30, 2017, then as of June 30, 2017 that bank holding company would no longer be subject to the requirements of the proposed rule that are applicable to Level 2 covered institutions. It would instead be subject to the requirements of the proposed rule that are applicable to Level 3 covered institutions.

A covered institution that is an investment adviser would cease to be a Level 1, Level 2, or Level 3 covered institution effective as of the most recent fiscal year end in which its total consolidated assets fell below the relevant asset threshold for Level 1, Level 2, or Level 3 covered institutions, respectively. For example, an investment adviser that is a Level 1 covered institution during 2015 would cease to be a Level 1 covered institution effective on December 31, 2015 if its total assets (exclusive of non-proprietary assets) shown on its balance sheet for the year ended December 31, 2015 (assuming the investment adviser had a calendar fiscal year) were less than \$250 billion.

3.3. The Agencies invite comment on whether four consecutive quarters is an appropriate period for determining a covered institution's level when its total consolidated assets decrease. Why or why not?

3.4. Should the determination of total consolidated assets for covered

institutions that are investment advisers be by reference to a periodic report or similar concept? Why or why not? Should there be a concept of a rolling average for asset size for covered institutions that are investment advisers and, if so, how should this be structured?

3.5. Should the transition period for an institution that changes levels or becomes a covered institution due to a merger or acquisition be different than an institution that changes levels or becomes a covered institution without a change in corporate structure? If so, why? If so, what transition period would be appropriate and why?

3.6. The Agencies invite comment on whether covered institutions transitioning from Level 1 to Level 2 or Level 2 to Level 3 should be permitted to modify incentive-based compensation plans with performance periods that began prior to their transition in level in such a way that would cause the plans not to meet the requirements of the proposed rule that were applicable to the covered institution at the time when the performance periods for the plans commenced. Why or why not?

#### (c) Compliance of Covered Institutions That Are Subsidiaries of Covered Institutions

Section \_\_\_.3(c) of the Board's, OCC's, or FDIC's proposed rules provide that a covered institution that is subject to the Board's, OCC's, or FDIC's proposed rule, respectively, and that is a subsidiary of another covered institution may meet any requirement of the proposed rule if the parent covered institution complies with such requirement in a way that causes the relevant portion of the incentive-based compensation program of the subsidiary covered institution to comply with the requirement. The Board, the OCC, and the FDIC have included this provision in their proposed rules in order to reduce the compliance burden on subsidiaries that would be subject to the Board's, OCC's, and FDIC's proposed rules and in recognition of the fact that holding companies, national banks, Federal savings associations, state nonmember banks, and state savings associations may perform certain functions on behalf of such subsidiaries.

Subsidiary covered institutions subject to the Board's, OCC's, or FDIC's proposed rule could rely on this provision to comply with, for example, the corporate governance or policies and procedures requirements of the proposed rule. For example, if a parent bank holding company has a compensation committee that performs the requirements of section \_\_\_.4(e) of

the proposed rule with respect to a subsidiary of the parent bank holding company that is a covered institution under the Board's rule by (1) conducting oversight of the subsidiary's incentive-based compensation program, (2) approving incentive-based compensation arrangements for senior executive officers of the subsidiary (including any individuals who are senior executive officers of the subsidiary but not senior executive officers of the parent bank holding company), and (3) approving any material exceptions or adjustments to incentive-based compensation policies or arrangements for such senior executive officers of the subsidiary, then the subsidiary would be deemed to have complied with the requirements of section \_\_\_\_\_.4(e) of the proposed rule. Similarly, under the OCC's proposed rule, if an operating subsidiary of a national bank that is a Level 1 or Level 2 covered institution subject to the OCC's proposed rule uses the policies and procedures for its incentive-based compensation program of its parent national bank that is also a Level 1 or Level 2 covered institution subject to the OCC's proposed rule, and such policies and procedures satisfy the requirements of section \_\_\_\_\_.11 of the proposed rule, then the OCC would consider the subsidiary to have satisfied section \_\_\_\_\_.11 of the proposed rule. Under the FDIC's proposed rule, if a subsidiary of a state nonmember bank or state savings association that is a covered institution subject to the FDIC's proposed rule uses the policies and procedures for its incentive-based compensation program of its parent state nonmember bank or state savings association that is a Level 1 or Level 2 covered institution subject to the FDIC's proposed rule, and such policies and procedures satisfy the requirements of section \_\_\_\_\_.11 of the proposed rule, then the FDIC would consider the subsidiary to have satisfied section \_\_\_\_\_.11 of the proposed rule.

Many parent holding companies, particularly larger banking organizations, design and administer incentive-based compensation programs and associated policies and procedures. Smaller covered institutions that operate within a larger holding company structure may realize efficiencies by incorporating or relying upon their parent company's incentive-based compensation program or certain components of the program, to the extent that the program or its components establish governance, risk management, and recordkeeping frameworks that are appropriate to the

smaller covered institutions and support incentive-based compensation arrangements that appropriately balance risks to the smaller covered institution and rewards for its covered persons. Therefore, it may be less burdensome for covered institution subsidiaries with risk profiles that are similar to those of their parent holding companies to use their parent holding companies' program rather than their own.

The Agencies recognize that the authority of each appropriate Federal regulator to examine and review compliance with the proposed rule, along with requiring corrective action when they deem appropriate, would not be affected by section \_\_\_\_\_.3(c) of the Board's, OCC's, or FDIC's proposed rule. Each appropriate Federal regulator would be responsible for examining, reviewing, and enforcing compliance with the proposed rule by their covered institutions, including any that are owned or controlled by a depository institution holding company. For example, in the situation where a parent holding company controls a subsidiary national bank, state nonmember bank, or broker-dealer, it would be expected that the board of directors of the subsidiary will ensure that the subsidiary is in compliance with the proposed rule. Likewise, the board of directors of a broker-dealer operating subsidiary of a national bank would be expected to ensure that the broker-dealer operating subsidiary is in compliance with the proposed rule.

#### *§ \_\_\_\_\_.4 Requirements and Prohibitions Applicable to All Covered Institutions*

Section \_\_\_\_\_.4 sets forth the general requirements that would be applicable to all covered institutions. Later sections establish more specific requirements that would be applicable for Level 1 and Level 2 covered institutions.

Under the proposed rule, all covered institutions would be prohibited from establishing or maintaining incentive-based compensation arrangements, or any features of any such arrangements, that encourage inappropriate risks by the covered institution (1) by providing covered persons with excessive compensation, fees, or benefits or (2) that could lead to material financial loss to the covered institution. Section \_\_\_\_\_.4 includes considerations for determining whether an incentive-based compensation arrangement provides excessive compensation, fees, or benefits, as required by section 956(a)(1). Section \_\_\_\_\_.4 also establishes requirements that would apply to all covered institutions designed to prevent inappropriate risks that could lead to material financial loss, as required by

section 956(a)(2).<sup>115</sup> The general standards and requirements set forth in sections \_\_\_\_\_.4(a), (b), and (c) of the proposed rule would be consistent with the general standards and requirements set forth in sections \_\_\_\_\_.5(a) and (b) of the 2011 Proposed Rule.

The Agencies do not intend to establish a rigid, one-size-fits-all approach to the design of incentive-based compensation arrangements. Thus, under the proposed rule, the structure of incentive-based compensation arrangements at covered institutions would be expected to reflect the proposed requirements set forth in section \_\_\_\_\_.4 of the proposed rule in a manner tailored to the size, complexity, risk tolerance, and business model of the covered institution. Subject to supervisory oversight, as applicable, each covered institution would be responsible for ensuring that its incentive-based compensation arrangements appropriately balance risk and reward. The methods by which this is achieved at one covered institution may not be effective at another, in part because of the importance of integrating incentive-based compensation arrangements and practices into the covered institution's own risk-management systems and business model. The effectiveness of methods may differ across business lines and operating units as well, so the proposed rule would provide for considerable flexibility in how individual covered institutions approach the design and implementation of incentive-based compensation arrangements that appropriately balance risk and reward.

#### *(a) In General*

Section \_\_\_\_\_.4(a) of the proposed rule is derived from the text of section 956(b) which requires the Agencies to jointly prescribe regulations or guidelines that prohibit any type of incentive-based payment arrangement, or any feature of any such arrangement, that the Agencies determine encourages inappropriate risks by covered institutions (1) by providing an executive officer, employee, director, or principal shareholder of the covered institution with excessive compensation, fees, or benefits or (2) that could lead to material financial loss to the covered institution.

#### *(b) Excessive Compensation*

Section \_\_\_\_\_.4(b) of the proposed rule specifies that compensation, fees, and

<sup>115</sup> In addition to the requirements outlined in section \_\_\_\_\_.4, Level 1 and Level 2 covered institutions would have to meet additional requirements set forth in section \_\_\_\_\_.5 and sections \_\_\_\_\_.7 through \_\_\_\_\_.11.

benefits would be considered excessive for purposes of section \_\_\_\_4(a)(1) when amounts paid are unreasonable or disproportionate to the value of the services performed by a covered person, taking into account all relevant factors. Section 956(c) directs the Agencies to “ensure that any standards for compensation established under subsections (a) or (b) are comparable to the standards established under section [39] of the Federal Deposit Insurance Act (12 U.S.C. 2 [sic] 1831p–1) for insured depository institutions.” Under the proposed rule, the factors for determining whether an incentive-based compensation arrangement provides excessive compensation would be comparable to the Federal Banking Agency Safety and Soundness Guidelines that implement the requirements of section 39 of the FDIA.<sup>116</sup> The proposed factors would include: (1) The combined value of all compensation, fees, or benefits provided to the covered person; (2) the compensation history of the covered person and other individuals with comparable expertise at the covered institution; (3) the financial condition of the covered institution; (4) compensation practices at comparable covered institutions, based upon such factors as asset size, geographic location, and the complexity of the covered institution’s operations and assets; (5) for post-employment benefits, the projected total cost and benefit to the covered institution; and (6) any connection between the covered person and any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the covered institution. The inclusion of these factors is consistent with the requirement under section 956(c) that any standards for compensation under

section 956(a) or (b) must be comparable to the standards established for insured depository institutions under the FDIA and that the Agencies must take into consideration the compensation standards described in section 39(c) of the FDIA.

In response to similar language in the 2011 Proposed Rule, some commenters indicated that this list of factors should include additional factors or allow covered institutions to consider other factors that they deem appropriate. The proposed rule clarifies that all relevant factors would be taken into consideration, and that the list of factors in section \_\_\_\_4(b) would not be exclusive.

Commenters on the 2011 Proposed Rule expressed concern that it would be difficult for some types of institutions, such as grandfathered unitary savings and loan holding companies with retail operations, mutual savings associations, mutual savings banks, and mutual holding companies, to identify comparable covered institutions. Those commenters also expressed concern that it would be difficult for these institutions to identify the compensation practices of comparable institutions that are not public companies or that do not otherwise make public information about their compensation practices. The Agencies intend to work closely with these institutions to identify comparable institutions to help ensure compliance with the proposed rule.

#### (c) Material Financial Loss

Section 956(b)(2) of the Act requires the Agencies to adopt regulations or guidelines that prohibit any type of incentive-based payment arrangement, or any feature of any such arrangement, that the Agencies determine encourages inappropriate risks by a covered financial institution that could lead to material financial loss to the covered institution. In adopting such regulations or guidelines, the Agencies are required to ensure that any standards established under this provision of section 956 are comparable to the standards under Section 39 of the FDIA, including the compensation standards. However, section 39 of the FDIA does not include standards for determining whether compensation arrangements may encourage inappropriate risks that could lead to material financial loss.<sup>117</sup>

<sup>117</sup> Section 39 of the FDIA requires only that the Federal banking agencies prohibit as an unsafe and unsound practice any employment contract, compensation or benefit agreement, fee arrangement, perquisite, stock option plan, postemployment benefit, or other compensatory arrangement that could lead to a material financial

Accordingly, as in the 2011 Proposed Rule, the Agencies have considered the language and purpose of section 956, existing supervisory guidance that addresses incentive-based compensation arrangements that may encourage inappropriate risk-taking,<sup>118</sup> the FSB Principles and Implementation Standards, and other relevant material in considering how to implement this aspect of section 956.

A commenter argued that the provisions of the 2011 Proposed Rule relating to incentive-based compensation arrangements that could encourage inappropriate risks that could lead to material financial loss were not comparable to the standards established under section 39 of the FDIA. More specifically, the commenter believed that the requirements of the 2011 Proposed Rule, including the mandatory deferral requirement, were more “detailed and prescriptive” than the standards established under section 39 of the FDIA.

The Agencies intend that the requirements of the proposed rule implementing section 956(b)(2) of the Act would be comparable to the standards established under section 39 of the FDIA. Section 956(b)(2) of the Act requires that the Agencies prohibit incentive-based compensation arrangements that encourage inappropriate risks by covered institutions that could lead to material financial loss, a requirement that is not discussed in the standards established under section 39 of the FDIA, which, as discussed above, provide guidelines to determine when compensation paid to a particular executive officer, employee, director or principal shareholder would be excessive. In enacting section 956, Congress referred specifically to the standards established under section 39 of the FDIA, and was presumably aware that in the statute there were no such standards articulated that provide guidance for determining whether compensation arrangements could lead to a material financial loss. The provisions of the proposed rule implementing section 956(b)(2) reflect the Agencies’ intent to comply with the statutory mandate under section 956, while ensuring that the proposed rule is comparable to section 39 of the FDIA, which states that compensatory arrangements that could lead to a material financial loss are an unsafe and unsound practice.

loss. See 12 U.S.C. 1831p–1(c)(1)(B). The Federal Banking Agency Safety and Soundness Guidelines satisfy this requirement.

<sup>118</sup> 2010 Federal Banking Agency Guidance.

<sup>116</sup> The Federal Banking Agency Safety and Soundness Guidelines provide: Compensation shall be considered excessive when amounts paid are unreasonable or disproportionate to the services performed by an executive officer, employee, director, or principal shareholder, considering the following: (1) The combined value of all cash and non-cash benefits provided to the individual; (2) The compensation history of the individual and other individuals with comparable expertise at the institution; (3) The financial condition of the institution; (4) Comparable compensation practices at comparable institutions, based upon such factors as asset size, geographic location, and the complexity of the loan portfolio or other assets; (5) For postemployment benefits, the projected total cost and benefit to the institution; (6) Any connection between the individual and any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the institution; and (7) Any other factors the Agencies determines to be relevant. See 12 CFR part 30, Appendix A, III.A; 12 CFR part 364, Appendix A, III.A; 12 CFR part 208, Appendix D–1. These factors are drawn directly from section 39(c)(2) of the FDIA (12 U.S.C. 1831p–1(c)(2)).

Section \_\_\_\_\_.4(c) of the proposed rule sets forth minimum requirements for incentive-based compensation arrangements that would be permissible under the proposed rule, because arrangements without these attributes could encourage inappropriate risks that could lead to material financial loss to a covered institution. These requirements reflect the three principles for sound incentive-based compensation policies contained in the 2010 Federal Banking Agency Guidance: (1) Balanced risk-taking incentives; (2) compatibility with effective risk management and controls; and (3) effective corporate governance.<sup>119</sup> Similarly, section \_\_\_\_\_.4(c) of the proposed rule provides that an incentive-based compensation arrangement at a covered institution could encourage inappropriate risks that could lead to material financial loss to the covered institution, unless the arrangement: (1) Appropriately balances risk and reward; (2) is compatible with effective risk management and controls; and (3) is supported by effective governance.

An example of a feature that could encourage inappropriate risks that could lead to material financial loss would be the use of performance measures that are closely tied to short-term revenue or profit of business generated by a covered person, without any adjustments for the longer-term risks associated with the business generated. Similarly, if there is no mechanism for factoring risk outcomes over a longer period of time into compensation decisions, traders who have incentive-based compensation plans with performance periods that end at the end of the calendar year, could have an incentive to take large risks towards the end of the calendar year to either make up for underperformance earlier in the performance period or to maximize their year-end profits. The same result could ensue if the performance measures themselves are poorly designed or can be manipulated inappropriately by the covered persons receiving incentive-based compensation.

Incentive-based compensation arrangements typically attempt to encourage actions that result in greater revenue or profit for a covered institution. However, short-run revenue or profit can often diverge sharply from actual long-run profit because risk outcomes may become clear only over time. Activities that carry higher risk typically have the potential to yield higher short-term revenue, and a covered person who is given incentives to increase short-term revenue or profit,

without regard to risk, would likely be attracted to opportunities to expose the covered institution to more risk that could lead to material financial loss.

Section \_\_\_\_\_.4(c)(1) of the proposed rule would require all covered institutions to ensure that incentive-based compensation arrangements appropriately balance risk and reward. Incentive-based compensation arrangements achieve balance between risk and financial reward when the amount of incentive-based compensation ultimately received by a covered person depends not only on the covered person's performance, but also on the risks taken in achieving this performance. Conversely, an incentive-based compensation arrangement that provides financial reward to a covered person without regard to the amount and type of risk produced by the covered person's activities would not be considered to appropriately balance risk and reward under the proposed rule.<sup>120</sup> Incentive-based compensation arrangements should balance risk and financial rewards in a manner that does not encourage covered persons to expose a covered institution to inappropriate risk that could lead to material financial loss.

The incentives provided by an arrangement depend on how all features of the arrangement work together. For instance, how performance measures are combined, whether they take into account both current and future risks, which criteria govern the use of risk adjustment before the awarding and vesting of incentive-based compensation, and what form incentive-based compensation takes (*i.e.*, equity-based vehicles or cash-based vehicles) can all affect risk-taking incentives and generally should be considered when covered institutions create such arrangements.

The 2010 Federal Banking Agency Guidance outlined four methods that can be used to make compensation more sensitive to risk—risk adjustments of awards, deferral of payment, longer performance periods, and reduced sensitivity to short-term performance.<sup>121</sup> Consistent with the 2010 Federal Banking Agency Guidance, under the proposed rule, an incentive-based compensation arrangement generally

would have to take account of the full range of current and potential risks that a covered person's activities could pose for a covered institution. Relevant risks would vary based on the type of covered institution, but could include credit, market (including interest rate and price), liquidity, operational, legal, strategic, and compliance risks. Performance and risk measures generally should align with the broader risk management objectives of the covered institution and could be incorporated through use of a formula or through the exercise of judgment. Performance and risk measures also may play a role in setting amounts of incentive-based compensation pools (bonus pools), in allocating pools to individuals' incentive-based compensation, or both. The effectiveness of different types of adjustments varies with the situation of the covered person and the covered institution, as well as the thoroughness with which the measures are implemented.

The analysis and methods for ensuring that incentive-based compensation arrangements appropriately balance risk and reward should also be tailored to the size, complexity, business strategy, and risk tolerance of each institution. The manner in which a covered institution seeks to balance risk and reward in incentive-based compensation arrangements should account for the differences between covered persons—including the differences between senior executive officers and significant risk-takers and other covered persons. Activities and risks may vary significantly both among covered institutions and among covered persons within a particular covered institution. For example, activities, risks, and incentive-based compensation practices may differ materially among covered institutions based on, among other things, the scope or complexity of activities conducted and the business strategies pursued by the institutions. These differences mean that methods for achieving incentive-based compensation arrangements that appropriately balance risk and reward at one institution may not be effective in restraining incentives to engage in imprudent risk-taking at another institution.

The proposed rule would require that incentive-based compensation arrangements contain certain features. Section \_\_\_\_\_.4(d) sets out specific requirements that would be applicable to arrangements for all covered persons at all covered institutions and that are intended to result in incentive-based compensation arrangements that

<sup>120</sup> For example, a covered person who makes a high-risk loan may generate more revenue in the short run than one who makes a low-risk loan. Incentive-based compensation arrangements that reward covered persons solely on the basis of short-term revenue might pay more to the covered person taking more risk, thereby incentivizing employees to take more, and sometimes inappropriate, risk. See 2011 FRB Report at 11.

<sup>121</sup> See 2010 Federal Banking Agency Guidance, 75 FR at 36396.

<sup>119</sup> See 75 FR 36407–36413.

appropriately balance risk and reward. Sections \_\_\_\_\_.7 and \_\_\_\_\_.8 of the proposed rule provide more specific requirements that would be applicable to arrangements at Level 1 and Level 2 covered institutions.

While the proposed rule would require incentive-based compensation arrangements for senior executive officers and significant risk-takers at Level 1 and Level 2 covered institutions to have certain features (such as a certain percentage of the award deferred), those features alone would not be sufficient to balance risk-taking incentives with reward. The extent to which additional balancing methods are required would vary with the size and complexity of a covered institution and with the nature of a covered person's activities.

Section \_\_\_\_\_.4(c)(2) of the proposed rule provides that an incentive-based compensation arrangement at a covered institution would encourage inappropriate risks that could lead to material financial loss to the covered institution unless the arrangement is compatible with effective risk management and controls. A covered institution's risk management processes and internal controls would have to reinforce and support the development and maintenance of incentive-based compensation arrangements that appropriately balance risk and reward required under section \_\_\_\_\_.4(c)(1) of the proposed rule.

One of the reasons risk management is important is that covered persons may seek to evade the processes established by a covered institution to achieve incentive-based compensation arrangements that appropriately balance risk and reward in an effort to increase their own incentive-based compensation. For example, a covered person might seek to influence the risk measures or other information or judgments that are used to make the covered person's incentive-based compensation sensitive to risk. Such actions may significantly weaken the effectiveness of a covered institution's incentive-based compensation arrangements in restricting inappropriate risk-taking and could have a particularly damaging effect if they result in the manipulation of measures of risk, information, or judgments that the covered institution uses for other risk-management, internal control, or financial purposes. In such cases, the covered person's actions may weaken not only the balance of the covered institution's incentive-based compensation arrangements but also the risk-management, internal controls, and

other functions that are supposed to act as a separate check on risk-taking.

All covered institutions would have to have appropriate controls surrounding the design, implementation, and monitoring of incentive-based compensation arrangements to ensure that processes for achieving incentive-based compensation arrangements that appropriately balance risk and reward are followed, and to maintain the integrity of their risk-management and other control functions. The nature of controls likely would vary by size and complexity of the covered institution as well as the activities of the covered person. For example, under the proposed rule, controls surrounding incentive-based compensation arrangements at smaller covered institutions likely would be less extensive and less formalized than at larger covered institutions. Level 1 and Level 2 covered institutions would be more likely to have a systematic approach to designing and implementing their incentive-based compensation arrangements, and their incentive-based compensation programs would more likely be supported by formalized and well-developed policies, procedures, and systems. Level 3 covered institutions, on the other hand, might maintain less extensive and detailed incentive-based compensation programs. Section \_\_\_\_\_.9 of the proposed rule provides additional, specific requirements that would be applicable to Level 1 and Level 2 covered institutions designed to result in incentive-based compensation arrangements at Level 1 and Level 2 covered institutions that are compatible with effective risk management and controls.

Incentive-based compensation arrangements also would have to be supported by an effective governance framework. Section \_\_\_\_\_.4(e) sets forth more detail on requirements for boards of directors of all covered institutions that would be designed to result in incentive-based compensation arrangements that are supported by effective governance, while section \_\_\_\_\_.10 of the proposed rule provides more specific requirements that would be applicable to Level 1 and Level 2 covered institutions.

The proposed requirement for effective governance is an important foundation of incentive-based compensation arrangements that appropriately balance risk and reward. The involvement of the board of directors in oversight of the covered institution's overall incentive-based compensation program should be scaled

appropriately to the scope of the covered institution's incentive-based compensation arrangements and the number of covered persons who have incentive-based compensation arrangements.

#### (d) Performance Measures

The performance measures used in an incentive-based compensation arrangement have an important effect on the incentives provided to covered persons and thus affect the potential for the incentive-based compensation arrangement to encourage inappropriate risk-taking that could lead to material financial loss. Under section \_\_\_\_\_.4(d) of the proposed rule, an incentive-based compensation arrangement would not be considered to appropriately balance risk and reward unless: (1) It includes financial and non-financial measures of performance that are relevant to a covered person's role and to the type of business in which the covered person is engaged and that are appropriately weighted to reflect risk-taking; (2) it is designed to allow non-financial measures of performance to override financial measures when appropriate; and (3) any amounts to be awarded under the arrangement are subject to adjustment to reflect actual losses, inappropriate risks taken, compliance deficiencies, or other measures or aspects of financial and non-financial performance. Each of these requirements is described more fully below.

First, the arrangements would be required to include both financial and non-financial measures of performance. Financial measures of performance generally are measures tied to the attainment of strategic financial objectives of the covered institution, or one of its operating units, or to the contributions by covered persons towards attainment of such objectives, such as measures related to corporate sales, profit, or revenue targets. Non-financial measures of performance, on the other hand, could be assessments of a covered person's risk-taking or compliance with limits on risk-taking. These may include assessments of compliance with the covered institution's policies and procedures, adherence to the covered institution's risk framework and conduct standards, or compliance with applicable laws. These financial and non-financial measures of performance should include considerations of risk-taking, and be relevant to a covered person's role within the covered institution and to the type of business in which the covered person is engaged. They also should be appropriately weighted to

reflect the nature of such risk-taking. The requirement to include both financial and non-financial measures of performance would apply to forms of incentive-based compensation that set out performance measure goals and related amounts near the beginning of a performance period (such as long-term incentive plans) and to forms that do not necessarily specify performance measure goals and related amounts in advance of performance (such as certain bonuses). For example, a senior executive officer may have his or her performance evaluated based upon quantitative financial measures, such as return on equity, and on qualitative, non-financial measures, such as the extent to which the senior executive officer promoted sound risk management practices or provided strategic leadership through a difficult merger. The senior executive officer's performance also may be evaluated on several qualitative non-financial measures that in some instances span multiple calendar and performance years.

Incentive-based compensation should support prudent risk-taking, but should also allow covered institutions to hold covered persons accountable for inappropriate behavior. Reliable quantitative measures of risk and risk outcomes, where available, may be particularly useful in both developing incentive-based compensation arrangements that appropriately balance risk and reward and assessing the extent to which incentive-based compensation arrangements properly balance risk and reward. However, reliable quantitative measures may not be available for all types of risk or for all activities, and in many cases may not be sufficient to fully assess the risks that the activities of covered persons may pose to covered institutions. Poor performance, as assessed by non-financial measures such as quality of risk management, could pose significant risks for the covered institution and may itself be a source of potential material financial loss at a covered institution. For this reason, non-financial performance measures play an important role in reinforcing expectations on appropriate risk, control, and compliance standards and should form a significant part of the performance assessment process.

Under certain circumstances, it may be appropriate for non-financial performance measures, which are the primary measures that relate to risk-taking behavior, to override considerations of financial performance measures. An override might be appropriate when, for example, a covered person conducts trades or other

transactions that increase the covered institution's profit but that create an inappropriate compliance risk for the covered institution. In such a case, an incentive-based compensation arrangement should allow for the possibility that the non-financial measure of compliance risk could override the financial measure of profit when the amount of incentive-based compensation to be awarded to the covered person is determined.

The effective balance of risks and rewards may involve the use of both formulaic arrangements and discretion. At most covered institutions, management retains a significant amount of discretion when awarding incentive-based compensation. Although the use of discretion has the ability to reinforce risk balancing, when improperly utilized, discretionary decisions can undermine the goal of incentive-based compensation arrangements to appropriately balance risk and reward. For example, an incentive-based compensation arrangement that has a longer performance period that could allow risk events to manifest and for awards to be adjusted to reflect risk could be less effective if management makes a discretionary award decision that does not account for, or mitigates, the future impact of those risk events.<sup>122</sup>

Section \_\_\_\_\_.4(d)(3) of the proposed rule would also require that any amounts to be awarded under an incentive-based compensation arrangement be subject to adjustment to reflect actual losses, inappropriate risks taken, compliance deficiencies, or other measures or aspects of financial and non-financial performance. It is important that incentive-based compensation arrangements be balanced in design and implemented so that awards and actual amounts that vest actually vary based on risks or risk outcomes. If, for example, covered persons are awarded or paid substantially all of their potential incentive-based compensation even when they cause a covered institution to take a risk that is inappropriate given the institution's size, nature of operations, or risk profile, or cause the covered institution to fail to comply with legal or regulatory obligations, then covered persons will have less incentive to avoid activities with substantial risk of financial loss or non-compliance with legal or regulatory obligations.

<sup>122</sup> For Level 1 and Level 2 covered institutions, section \_\_\_\_\_.11 of the proposed rule would require policies and procedures that address the institution's use of discretion.

#### (e) Board of Directors

Under section \_\_\_\_\_.4(e) of the proposed rule, the board of directors, or a committee thereof, would be required to: (1) Conduct oversight of the covered institution's incentive-based compensation program; (2) approve incentive-based compensation arrangements for senior executive officers, including the amounts of all awards and, at the time of vesting, payouts under such arrangements; and (3) approve any material exceptions or adjustments to incentive-based compensation policies or arrangements for senior executive officers.

Section \_\_\_\_\_.4(e)(1) of the proposed rule would require the board of directors, or a committee thereof, of a covered institution to conduct oversight of the covered institution's incentive-based compensation program. Such oversight generally should include overall goals and purposes. For example, boards of directors, or a committee thereof, of covered institutions generally should oversee senior management in the development of an incentive-based compensation program that incentivizes behaviors consistent with the long-term health of the covered institution, and provide sufficient detail to enable senior management to translate the incentive-based compensation program into objectives, plans, and arrangements for each line of business and control function. Such oversight also generally should include holding senior management accountable for effectively executing the covered institution's incentive-based compensation program and for communicating expectations regarding acceptable behaviors and business practices to covered persons. Boards of directors should actively engage with senior management, including challenging senior management's incentive-based compensation assessments and recommendations when warranted.

In addition to the general program oversight requirement set forth in section \_\_\_\_\_.4(e)(1) of the proposed rule, a board of directors, or a committee thereof, would also be required by sections \_\_\_\_\_.4(e)(2) and \_\_\_\_\_.4(e)(3) to approve incentive-based compensation arrangements for senior executive officers, including the amounts of all awards and payouts, at the time of vesting, under such arrangements, and to approve any material exceptions or adjustments to those arrangements.

Although risk-adjusting incentive-based compensation for senior executive officers responsible for the covered institution's overall risk posture and

performance may be challenging given that quantitative measures of institution-wide risk are difficult to produce and allocating responsibility among the senior executive team for achieving risk objectives can be a complex task, the role of senior executive officers in managing the overall risk-taking activities of an institution is important. Accordingly the proposed rule would require the board of directors, or a committee thereof, to approve compensation arrangements involving senior executive officers. When a board of directors, or a committee thereof, is considering an award or a payout, it should consider risks to ensure that the award or payout is consistent with broader risk management and strategic objectives.

(f) Disclosure and Recordkeeping Requirements and (g) Rule of Construction

Section \_\_\_\_\_.4(f) of the proposed rule would establish disclosure and recordkeeping requirements for all covered institutions, as required by section 956(a)(1).<sup>123</sup> Under the proposed rule, each covered institution would be required to create and maintain records that document the structure of all of the institution's incentive-based compensation arrangements and demonstrate compliance with the proposed rule, and to disclose these records to the appropriate Federal regulator upon request. The proposed rule would require covered institutions to create such records on an annual basis and to maintain such records for at least seven years after they are created. The Agencies recognize that the exact timing for recordkeeping will vary from institution to institution, but this requirement would ensure that covered institutions create such records for their incentive-based compensation arrangements at least once every 12 months. The requirement to maintain records for at least seven years generally aligns with the clawback period described in section \_\_\_\_\_.7(c) of the proposed rule.

The proposed rule would require that the records maintained by a covered institution, at a minimum, include copies of all incentive-based compensation plans, a list of who is subject to each plan, and a description of how the covered institution's incentive-based compensation program is compatible with effective risk management and controls. These records would be the minimum required information to determine whether the structure of the covered institution's

incentive-based compensation arrangements provide covered persons with excessive compensation or could lead to material financial loss to the covered institution. As specified in section 956(a)(2) and section \_\_\_\_\_.4(g) of the proposed rule, a covered institution would not be required to report the actual amount of compensation, fees, or benefits of individual covered persons as part of this requirement.<sup>124</sup>

The 2011 Proposed Rule would have implemented section 956(a)(1) by requiring all covered financial institutions to submit an annual report to their appropriate Federal regulator, in a format specified by their appropriate Federal regulator, that described in narrative form the structure of the covered financial institution's incentive-based compensation arrangements for covered persons and the policies governing such arrangements.<sup>125</sup> Some commenters on the 2011 Proposed Rule favored annual reporting requirements, while other commenters opposed any requirement for institutions to make periodic submissions of information about incentive-based compensation arrangements to regulators, noting concerns about burden, particularly for smaller covered financial institutions. A few commenters requested an annual certification requirement instead of a reporting requirement. While there is value in receiving reports, the burden of producing them would potentially be great on smaller covered institutions. Accordingly, the Agencies determined not to include a requirement for covered institutions to submit annual narrative reports.

Given the variety of covered institutions and asset sizes, the Agencies are not proposing a specific format or template for the records that

<sup>124</sup> The Agencies note that covered institutions may be required to report actual compensation under other provisions of law. For example, corporate credit unions must disclose compensation of certain executive officers to their natural person credit union members under NCUA's corporate credit union rule. 12 CFR 704.19. The proposed rule would not affect the requirements in 12 CFR 704.19 or in any other reporting provision under any other law or regulation.

The SEC requires an issuer that is subject to the requirements of section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) to disclose information regarding the compensation of its principal executive officer, principal financial officer, and three other most highly compensated executive officers, as well as its directors, in the issuer's proxy statement, its annual report on Form 10-K, and registration statements for offerings of securities. The requirements are generally found in Item 402 of Regulation S-K (17 CFR 229.402).

<sup>125</sup> See 2011 Proposed Rule, at 21177. The 2011 Proposed Rule also would have set forth additional more detailed requirements for covered financial institutions with total consolidated assets of \$50 billion or more.

must be maintained by all covered institutions. According to the Agencies' supervisory experience, as discussed further above, many covered institutions already maintain information about their incentive-based compensation programs comparable to the types of information described above (*e.g.*, in support of public company filings).

Several commenters on the 2011 Proposed Rule expressed concern regarding the confidentiality of the reported compensation information. In light of the nature of the information that would be provided to the Agencies under section \_\_\_\_\_.4(f) of the proposed rule, and the purposes for which the Agencies are requiring the information, the Agencies would view the information disclosed to the Agencies as nonpublic and expect to maintain the confidentiality of that information, to the extent permitted by law.<sup>126</sup> When providing information to one of the Agencies pursuant to the proposed rule, covered institutions should request confidential treatment by that Agency.

4.1. The Agencies invite comment on the requirements for performance measures contained in section \_\_\_\_\_.4(d) of the proposed rule. Are these measures sufficiently tailored to allow for incentive-based compensation arrangements to appropriately balance risk and reward? If not, why?

4.2. The Agencies invite comment on whether the terms "financial measures of performance" and "non-financial measures of performance" should be defined. If so, what should be included in the defined terms?

4.3. Would preparation of annual records be appropriate or should another method be used? Would covered institutions find a more specific list of topics and quantitative information for the content of required records helpful? Should covered institutions be required to maintain an inventory of all such records and to maintain such records in a particular format? If so, why? How would such specific requirements increase or decrease burden?

<sup>126</sup> For example, Exemption 4 of the Freedom of Information Act ("FOIA") provides an exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). FOIA Exemption 6 provides an exemption for information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). FOIA Exemption 8 provides an exemption for matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." 5 U.S.C. 552(b)(8).

<sup>123</sup> 12 U.S.C. 5641(a)(1).

4.4. Should covered institutions only be required to create new records when incentive-based compensation arrangements or policies change? Should the records be updated more frequently, such as promptly upon a material change? What should be considered a "material change"?

4.5. Is seven years a sufficient time to maintain the records required under section \_\_\_\_\_.4(f) of the proposed rule? Why or why not?

4.6. Do covered institutions generally maintain records on incentive-based compensation arrangements and programs? If so, what types of records and related information are maintained and in what format? What are the legal or institutional policy requirements for maintaining such records?

4.7. For covered institutions that are investment advisers or broker-dealers, is there particular information that would assist the SEC in administering the proposed rule? For example, should the SEC require its reporting entities to report whether they utilize incentive-based compensation or whether they are Level 1, Level 2 or Level 3 covered institutions?

#### *§ \_\_\_\_\_.5 Additional Disclosure and Recordkeeping Requirements for Level 1 and Level 2 Covered Institutions*

Section \_\_\_\_\_.5 of the proposed rule would establish additional and more detailed recordkeeping requirements for Level 1 and Level 2 covered institutions.

Under section \_\_\_\_\_.5(a) of the proposed rule, a Level 1 or Level 2 covered institution would be required to create annually, and maintain for at least seven years, records that document: (1) Its senior executive officers and significant risk-takers listed by legal entity, job function, organizational hierarchy, and line of business; (2) the incentive-based compensation arrangements for senior executive officers and significant risk-takers, including information on percentage of incentive-based compensation deferred and form of award; (3) any forfeiture and downward adjustment or clawback reviews and decisions for senior executive officers and significant risk-takers; and (4) any material changes to the covered institution's incentive-based compensation arrangements and policies.

The proposed recordkeeping and disclosure requirements at Level 1 and Level 2 covered institutions would assist the appropriate Federal regulator in monitoring whether incentive-based compensation structures, and any changes to such structures, could result in Level 1 and Level 2 covered

institutions maintaining incentive-based compensation structures that encourage inappropriate risks by providing excessive compensation, fees, or benefits or could lead to material financial loss. The more detailed reporting requirement for Level 1 and Level 2 covered institutions under section \_\_\_\_\_.5(a) of the proposed rule reflects the information that would assist the appropriate Federal regulator in most effectively evaluating the covered institution's compliance with the proposed rule and identifying areas of potential concern with respect to the structure of the covered institution's incentive-based compensation arrangements.

For example, the recordkeeping requirement in section \_\_\_\_\_.5(a)(2) of the proposed rule regarding amounts of incentive-based compensation deferred and the form of payment of incentive-based compensation for senior executive officers and significant risk-takers would help Federal regulators determine compliance with the requirement in section \_\_\_\_\_.7(a) of the proposed rule for certain amounts of incentive-based compensation of senior executive officers and significant risk-takers to be deferred for specific periods of time. Similarly, the recordkeeping requirement in section \_\_\_\_\_.5(a)(3) of the proposed rule would require Level 1 and Level 2 covered institutions to document the rationale for decisions under forfeiture and downward adjustment reviews and to keep timely and accurate records of the decision. This documentation would provide information useful to Federal regulators for determining compliance with the requirements in sections \_\_\_\_\_.7(b) and (c) of the proposed rule regarding specific forfeiture and clawback policies at Level 1 and Level 2 covered institutions that are further discussed below.

The proposed recordkeeping requirements in section \_\_\_\_\_.5(a) of the proposed rule relate to the proposed substantive requirements in section \_\_\_\_\_.7 of the proposed rule and would help the appropriate Federal regulator to closely monitor incentive-based compensation payments to senior executive officers and significant risk-takers and to determine whether those payments have been adjusted to reflect risk outcomes. This approach also would be responsive to comments received on the 2011 Proposed Rule suggesting that specific qualitative and quantitative information, instead of a narrative description, be the basis of a reporting requirement for larger covered institutions.

Section \_\_\_\_\_.5(b) of the proposed rule would require a Level 1 or Level 2 covered institution to create and maintain records sufficient to allow for an independent audit of incentive-based compensation arrangements, policies, and procedures, including those required under section \_\_\_\_\_.11 of the proposed rule. A standard which reflects the level of detail required in order to perform an independent audit of incentive-based compensation would be appropriate given the importance of regular monitoring of incentive-based compensation programs by independent control functions. Such a standard also would be consistent with the monitoring requirements set out in section \_\_\_\_\_.11 of the proposed rule.

As with the requirements applicable to all covered institutions under section \_\_\_\_\_.4(f) of the proposed rule, the Agencies are not proposing to require that a Level 1 or Level 2 covered institution annually file a report with the appropriate Federal regulator. Instead, section \_\_\_\_\_.5(c) of the proposed rule would require a Level 1 or Level 2 covered institution to disclose its records to the appropriate Federal regulator in such form and with such frequency as requested by the appropriate Federal regulator. The required form and frequency of recordkeeping may vary among the Agencies and across categories of covered institutions, although the records described in section \_\_\_\_\_.5(a) of the proposed rule, along with any other records a covered institution creates to satisfy the requirements of section \_\_\_\_\_.5(f) of the proposed rule, would be required to be created at least annually. Some Agencies may require Level 1 and Level 2 covered institutions to provide their records on an annual basis, alone or with a standardized form of report. Level 1 and Level 2 covered institutions should seek guidance concerning the reporting requirement from their appropriate Federal regulator.

Generally, the Agencies would expect the volume and detail of information disclosed by a covered institution under section \_\_\_\_\_.5 of the proposed rule to be tailored to the nature and complexity of business activities at the covered institution, and to the scope and nature of its use of incentive-based compensation arrangements. The Agencies recognize that smaller covered institutions with less complex and less extensive incentive-based compensation arrangements likely would not create or retain records that are as extensive as those that larger covered institutions with relatively complex programs and business activities would likely create. The tailored recordkeeping and

disclosure provisions for Level 1 and Level 2 covered institutions in the proposed rule are designed to provide the Agencies with streamlined and well-focused records that would allow the Agencies to promptly and effectively identify and address any areas of concern.

Similar to the provision of information under section \_\_\_\_\_.4(f) of the proposed rule, the Agencies expect to treat the information provided to the Agencies under section \_\_\_\_\_.5 of the proposed rule as nonpublic and to maintain the confidentiality of that information to the extent permitted by law.<sup>127</sup> When providing information to one of the Agencies pursuant to the proposed rule, covered institutions should request confidential treatment by that Agency.

5.1. Should the level of detail in records created and maintained by Level 1 and Level 2 covered institutions vary among institutions regulated by different Agencies? If so, how? Or would it be helpful to use a template with a standardized information list?

5.2. In addition to the proposed records, what types of information should Level 1 and Level 2 covered institutions be required to create and maintain related to deferral and to forfeiture, downward adjustment, and clawback reviews?

#### *§ \_\_\_\_\_.6 Reservation of Authority for Level 3 Covered Institutions*

Section \_\_\_\_\_.6 of the proposed rule would allow the appropriate Federal regulator to require certain Level 3 covered institutions to comply with some or all of the more rigorous requirements applicable to Level 1 and Level 2 covered institutions. Specifically, an Agency would be able to require a covered institution with average total consolidated assets greater than or equal to \$10 billion and less than \$50 billion to comply with some or all of the more rigorous provisions of section \_\_\_\_\_.5 and sections \_\_\_\_\_.7 through \_\_\_\_\_.11 of the proposed rule, if the appropriate Federal regulator determined that the covered institution's complexity of operations or compensation practices are consistent with those of a Level 1 or Level 2 covered institution, based on the covered institution's activities, complexity of operations, risk profile, or compensation practices. In such cases, the Agency that is the Level 3 covered institution's appropriate Federal regulator, in accordance with procedures established by the Agency, would notify the institution in writing

that it must satisfy the requirements and other standards contained in section \_\_\_\_\_.5 and sections \_\_\_\_\_.7 through \_\_\_\_\_.11 of the proposed rule. As with the designation of significant risk-takers discussed above, each Agency's procedures generally would include reasonable advance written notice of the proposed action, including a description of the basis for the proposed action, and opportunity for the covered institution to respond.

As noted previously, the Agencies have determined that it may be appropriate to apply only basic prohibitions and disclosure requirements to Level 3 covered institutions, in part because these institutions generally have less complex operations, incentive-based compensation practices, and risk profiles than Level 1 and Level 2 covered institutions.<sup>128</sup> However, the Agencies recognize that there is a wide spectrum of business models and risk profiles within the \$10 to \$50 billion range and believe that some Level 3 covered institutions with between \$10 and \$50 billion in total consolidated assets may have incentive-based compensation practices and operational complexity comparable to those of a Level 1 or Level 2 covered institution. In such cases, it may be appropriate for the Agencies to provide a process for determining that such institutions should be held to the more rigorous standards.

The Agencies are proposing \$10 billion as the appropriate threshold for the low end of this range based upon the general complexity of covered institutions above this size. The threshold is also used in other statutory and regulatory requirements. For example, the stress testing provisions of the Dodd-Frank Act require banking organizations with total consolidated assets of more than \$10 billion to conduct annual stress tests.<sup>129</sup> For deposit insurance assessment purposes, the FDIC distinguishes between small and large banks based on a \$10 billion asset size.<sup>130</sup> For supervisory purposes, the Board defines community banks by reference to the \$10 billion asset size threshold.<sup>131</sup>

The Agencies would consider the activities, complexity of operations, risk profile, and compensation practices to

determine whether a Level 3 covered institution's operations or compensation practices warrant application of additional standards pursuant to the proposed rule. For example, a Level 3 covered institution could have significant levels of off-balance sheet activities, such as derivatives that may entail complexities of operations and greater risk than balance sheet measures would indicate, making the institution's risk profile more akin to that of a Level 1 or Level 2 covered institution. Additionally, a Level 3 covered institution might be involved in particular high-risk business lines, such as lending to distressed borrowers or investing or trading in illiquid assets, and make significant use of incentive-based compensation to reward risk-takers. Still other Level 3 covered institutions might have or be part of a complex organizational structure, such as operating with multiple legal entities in multiple foreign jurisdictions.

Section \_\_\_\_\_.6 of the proposed rule would permit the appropriate Federal regulator of a Level 3 covered institution with total consolidated assets of between \$10 and \$50 billion to require the institution to comply with some or all of the provisions of section \_\_\_\_\_.5 and sections \_\_\_\_\_.7 through \_\_\_\_\_.11 of the proposed rule. This approach would allow the Agencies to take a flexible approach in the proposed rule provisions applicable to all Level 3 covered institutions while retaining authority to apply more rigorous standards where the Agencies determine appropriate based on the Level 3 covered institution's complexity of operations or compensation practices. The Agencies expect they only would use this authority on an infrequent basis. This approach has been used in other rules for purposes of tailoring the application of requirements and providing flexibility to accommodate the variations in size, complexity, and overall risk profile of financial institutions.<sup>132</sup>

6.1. The Agencies invite general comment on the reservation of authority in section \_\_\_\_\_.6 of the proposed rule.

<sup>132</sup> For example, the OCC, FDIC, and Board's domestic capital rules include a reservation of authority whereby the agency may require an institution to hold an amount of regulatory capital greater than otherwise required under the capital rules. 12 CFR 3.1(d) (OCC); 12 CFR 324.1(d)(1) through (6) (FDIC); 12 CFR 217.1(d) (Board). The OCC, FDIC, and the Board's Liquidity Coverage Ratio rule includes a reservation of authority whereby each agency may impose heightened standards on an institution. 12 CFR 50.2 (OCC); 12 CFR 329.2 (FDIC); 12 CFR 249.2 (Board). The FDIC's stress testing rules include a reservation of authority to require a \$10 billion to \$50 billion covered bank to use reporting templates for larger banks. 12 CFR 325.201.

<sup>127</sup> See *supra* note 126.

<sup>128</sup> See section 3 of Part II of this Supplementary Information for more discussions on Level 1, Level 2, and Level 3 covered institutions.

<sup>129</sup> 12 U.S.C. 5365(i)(2).

<sup>130</sup> See 12 CFR 327.8(e) and (f).

<sup>131</sup> See Federal Reserve SR Letter 12-7, "Supervisory Guidance on Stress Testing for Banking Organizations with More Than \$10 Billion in Total Consolidated Assets" (May 14, 2012).

6.2. The Agencies based the \$10 billion dollar floor of the reservation of authority on existing similar reservations of authority that have been drawn at that level. Did the Agencies set the correct threshold or should the floor be set lower or higher than \$10 billion? If so, at what level and why?

6.3. Are there certain provisions in section \_\_\_\_\_.5 and sections \_\_\_\_\_.7 through \_\_\_\_\_.11 of the proposed rule that would not be appropriate to apply to a covered institution with total consolidated assets of \$10 billion or more and less than \$50 billion regardless of its complexity of operations or compensation practices? If so, which provisions and why?

6.4. The Agencies invite comment on the types of notice and response procedures the Agencies should use in determining that the reservation of authority should be used. The SEC invites comment on whether notice and response procedures based on the procedures for a proceeding initiated upon the SEC's own motion under Advisers Act rule 0–5 would be appropriate for this purpose.

6.5. What specific features of incentive-based compensation programs or arrangements at a Level 3 covered institution should the Agencies consider in determining such institution should comply with some or all of the more rigorous requirements within the rule and why? What process should be followed in removing such institution from the more rigorous requirements?

*§ \_\_\_\_\_.7 Deferral, Forfeiture and Downward Adjustment, and Clawback Requirements for Level 1 and Level 2 Covered Institutions*

As discussed above, allowing covered institutions time to measure results with the benefit of hindsight allows for a more accurate assessment of the consequences of risks to which the institution has been exposed. This approach may be particularly relevant, for example, where performance is difficult to measure because performance results and risks take time to observe (e.g., assessing the future repayment prospects of loans written during the current year).

In order to achieve incentive-based compensation arrangements that appropriately balance risk and reward, including closer alignment between the interests of senior executive officers and significant risk-takers within the covered institution and the longer-term interests of the covered institution itself, it is important for information on performance, including information on misconduct and inappropriate risk-taking, to affect the incentive-based

compensation amounts received by covered persons. Covered institutions may use deferral, forfeiture and downward adjustment, and clawback to address information about performance that comes to light after the conclusion of the performance period, so that incentive-based compensation arrangements are able to appropriately balance risk and reward. Section \_\_\_\_\_.7 of the proposed rule would require Level 1 and Level 2 covered institutions to incorporate these tools into the incentive-based compensation arrangements of senior executive officers and significant risk-takers.

Under the proposed rule, an incentive-based compensation arrangement at a Level 1 or Level 2 covered institution would not be considered to appropriately balance risk and reward, as would be required by section \_\_\_\_\_.4(c)(1), unless the deferral, forfeiture, downward adjustment, and clawback requirements of section \_\_\_\_\_.7 are met. These requirements would apply to incentive-based compensation arrangements provided to senior executive officers and significant risk-takers at Level 1 and Level 2 covered institutions. Institutions may, of course, take additional steps to address risks that may mature after the performance period.

The requirements of section \_\_\_\_\_.7 of the proposed rule would apply to Level 1 and Level 2 covered institutions; that is, to covered institutions with \$50 billion or more in average total consolidated assets. The requirements of section \_\_\_\_\_.7 would not be applicable to Level 3 covered institutions.<sup>133</sup> As discussed above, the Agencies recognize that larger covered institutions have more complex business activities and generally rely more on incentive-based compensation programs, and, therefore, it is appropriate to impose specific deferral, forfeiture and downward adjustment reviews and clawback requirements on these institutions. It has been recognized that larger financial institutions can present greater potential systemic risks. The Board, for example, has expressed the view that institutions with more than \$250 billion in total consolidated assets are more likely than other institutions to pose systemic risk

<sup>133</sup> As explained earlier in this Supplementary Information section, the appropriate Federal regulator of a Level 3 covered institution with average total consolidated assets greater than or equal to \$10 billion and less than \$50 billion may require the covered institution to comply with some or all of the provisions of section \_\_\_\_\_.5 and sections \_\_\_\_\_.7 through \_\_\_\_\_.11 of the proposed rule if the Agency determines that the complexity of operations or compensation practices of the Level 3 covered institution are consistent with those of a Level 1 or 2 covered institution.

to U.S. financial stability.<sup>134</sup> Because of these risks that could be created by excessive risk-taking at the largest covered institutions, additional safeguards are needed against inappropriate risk-taking at Level 1 covered institutions. For these reasons, the Agencies are proposing a required minimum deferral percentage and a required minimum deferral period for Level 1 covered institutions that are greater than those for Level 2 covered institutions.

The requirements of section \_\_\_\_\_.7 of the proposed rule would apply to incentive-based compensation arrangements for senior executive officers and significant risk-takers of Level 1 and Level 2 covered institutions. The decisions of senior executive officers can have a significant impact on the entire consolidated organization and often involve substantial strategic or other risks that can be difficult to measure and model—particularly at larger covered institutions—during or at the end of the performance period, and therefore can be difficult to address adequately by risk adjustments in the awarding of incentive-based compensation.<sup>135</sup> Supervisory experience and a review of the academic literature<sup>136</sup> suggest that incentive-based compensation arrangements for the most senior decision-makers and risk-takers at the largest institutions appropriately balance risk and reward when a significant portion of the incentive-based compensation awarded under those arrangements is deferred for an adequate amount of time.

As discussed above, in addition to the institution's senior executive officers, the significant risk-takers at Level 1 and Level 2 covered institutions may have the ability to expose the institution to the risk of material financial loss. In order to help ensure that the incentive-based compensation arrangements for these individuals appropriately balance risk and reward and do not encourage

<sup>134</sup> Board, Regulatory Capital Rules: Implementation of Risk-Based Capital Surcharges for Global Systemically Important Bank Holding Companies, 80 FR 49082, 49084 (August 14, 2015).

<sup>135</sup> This premise was identified in the 2010 Federal Banking Agency Guidance, 75 FR at 36409, and was highlighted in the 2011 FRB White Paper. The report reiterated the recommendation that “[a] substantial fraction of incentive compensation awards should be deferred for senior executives of the firm because other methods of balancing risk taking incentives are less likely to be effective by themselves for such individuals.” 2011 FRB White Paper, at 15.

<sup>136</sup> Gopalan, Milbourn, Song and Thakor, “Duration of Executive Compensation” (December 18, 2012), at 29–30, available at <http://apps.olin.wustl.edu/faculty/thakor/Website%20Papers/Duration%20of%20Executive%20Compensation.pdf>.

them to engage in inappropriate risk-taking that could lead to material financial loss, the proposed rule would extend the deferral requirement to significant risk-takers at Level 1 and Level 2 covered institutions. Deferral for significant risk-takers as well as executive officers helps protect against material financial loss at the largest covered institutions.

#### § \_\_\_\_\_.7(a) Deferral

As a tool to balance risk and reward, deferral generally consists of four components: the proportion of incentive-based compensation required to be deferred, the time horizon of the deferral, the speed at which deferred incentive-based compensation vests, and adjustment during the deferral period to reflect risks or inappropriate conduct that manifest over that period of time.

Section \_\_\_\_\_.7(a) of the proposed rule would require Level 1 and Level 2 covered institutions, at a minimum, to defer the vesting of a certain portion of all incentive-based compensation awarded (the deferral amount) to a senior executive officer or significant risk-taker for at least a specified period of time (the deferral period). The minimum required deferral amount and minimum required deferral period would be determined by the size of the covered institution, by whether the covered person is a senior executive officer or significant risk-taker, and by whether the incentive-based compensation was awarded under a long-term incentive plan or is qualifying incentive-based compensation. Minimum required deferral amounts range from 40 percent to 60 percent of the total incentive-based compensation award, and minimum required deferral periods range from one year to four years, as detailed below.

Deferred incentive-based compensation of senior executive officers and significant risk-takers at Level 1 and Level 2 covered institutions would also be required to meet the following other requirements:

- Vesting of deferred amounts may occur no faster than on a pro rata annual basis beginning on the one-year anniversary of the end of the performance period;
- Unvested deferred amounts may not be increased during the deferral period;
- For most Level 1 and Level 2 covered institutions, substantial portions of deferred incentive-based compensation must be paid in the form of both equity-like instruments and deferred cash;

- Vesting of unvested deferred amounts may not be accelerated except in the case of death or disability;<sup>137</sup> and
- All unvested deferred amounts must be placed at risk of forfeiture and subject to a forfeiture and downward adjustment review pursuant to section \_\_\_\_\_.7(b).

Except for the prohibition against accelerated vesting, the prohibitions and requirements in section \_\_\_\_\_.7(a) of the proposed rule would apply to all unvested deferred incentive-based compensation, regardless of whether the deferral of the incentive-based compensation was necessary to meet the requirements of the proposed rule. For example, if a covered institution chooses to defer incentive-based compensation above the amount required to be deferred under the rule, the additional amount would be required to be subject to forfeiture. In another example, if a covered institution would be required to defer a portion of a particular covered person's incentive-based compensation for four years, but chooses to defer that compensation for ten years, the deferral would be subject to forfeiture during the entire ten-year deferral period. Applying the requirements and prohibitions of section \_\_\_\_\_.7(a) to all unvested deferred incentive-based compensation is intended to maximize the balancing effect of deferred incentive-based compensation, to make administration of the requirements and prohibitions easier for covered institutions, and to facilitate the Agencies' supervision for compliance.

Compensation that is not incentive-based compensation and is deferred only for tax purposes would not be considered "deferred incentive-based compensation" for purposes of the proposed rule.

#### § \_\_\_\_\_.7(a)(1) and § \_\_\_\_\_.7(a)(2) *Minimum Deferral Amounts and Deferral Periods for Qualifying Incentive-Based Compensation and Incentive-Based Compensation Awarded Under a Long-Term Incentive Plan*

The proposed rule would require a Level 1 covered institution to defer at least 60 percent of each senior executive officer's qualifying incentive-based compensation<sup>138</sup> for at least four years,

<sup>137</sup> For covered persons at credit unions, NCUA's rule also permits acceleration of payment if the covered person must pay income taxes on the entire amount of an award, including deferred amounts, at the time of award.

<sup>138</sup> As described above, incentive-based compensation that is not awarded under a long-term incentive plan would be defined as qualifying incentive-based compensation under the proposed rule.

and at least 60 percent of each senior executive officer's incentive-based compensation awarded under a long-term incentive plan for at least two years beyond the end of that plan's performance period. A Level 1 covered institution would be required to defer at least 50 percent of each significant risk-taker's qualifying incentive-based compensation for at least four years, and at least 50 percent of each significant risk-taker's incentive-based compensation awarded under a long-term incentive plan for at least two years beyond the end of that plan's performance period.

Similarly, the proposed rule would require a Level 2 covered institution to defer at least 50 percent of each senior executive officer's qualifying incentive-based compensation for at least three years, and at least 50 percent of each senior executive officer's incentive-based compensation awarded under a long-term incentive plan for at least one year beyond the end of that plan's performance period. A Level 2 covered institution would be required to defer at least 40 percent of each significant risk-taker's qualifying incentive-based compensation for at least three years, and at least 40 percent of each significant risk-taker's incentive-based compensation awarded under a long-term incentive plan for at least one year beyond the end of that plan's performance period.

In practice, a Level 1 or Level 2 covered institution typically evaluates the performance of a senior executive officer or significant risk-taker during and after the performance period. As the performance period comes to a close, the covered institution determines an amount of incentive-based compensation to award the covered person for that performance period. Senior executive officers and significant risk-takers may be awarded incentive-based compensation at a given time under multiple incentive-based compensation plans that have performance periods that come to a close at that time. Although they end at the same time, those performance periods may have differing lengths, and therefore may not completely overlap. For example, long-term incentive plans, which have a minimum performance period of three years, would consider performance in at least two years prior to the year the performance period ends, while annual incentive plans would only consider performance in the year of the performance period.

For purposes of determining the amount of incentive-based compensation that would be required to be deferred and the actual amount that

would be deferred, a Level 1 or Level 2 covered institution generally should use the present value of the incentive-based compensation at the time of the award. In determining the value of awards for this purpose, Level 1 and Level 2 covered institutions generally should use reasonable valuation methods consistent with methods used in other contexts.<sup>139</sup>

#### Pro Rata Vesting

The requirements of this section would permit the covered institution to immediately pay, or allow to vest, all of the incentive-based compensation that is awarded that is not required to be deferred. All incentive-based compensation that is deferred would be subject to a deferral period that begins only once the performance period comes to a close. During this deferral period, indications of inappropriate risk-taking may arise, leading the covered institution to consider whether the covered person should not be paid the entire amount originally awarded.

The incentive-based compensation that would be required by the rule to be deferred would not be permitted to vest faster than on a pro rata annual basis beginning no earlier than the first anniversary of the end of the performance period for which the compensation was awarded. In other words, a covered institution would be allowed to make deferred incentive-based compensation eligible for vesting during the deferral period on a schedule that paid out equal amounts on each anniversary of the end of the relevant performance period. A covered institution would also be permitted to make different amounts eligible for vesting each year, so long as the cumulative total of the deferred incentive-based compensation that has been made eligible for vesting on each anniversary of the end of the performance period is not greater than the cumulative total that would have been eligible for vesting had the covered institution made equal amounts eligible for vesting each year.

For example, if a Level 1 covered institution is required to defer \$100,000 of a senior executive officer's incentive-based compensation for four years, the covered institution could choose to make \$25,000 available for vesting on each anniversary of the end of the performance period for which the \$100,000 was awarded. The Level 1 covered institution could also choose to make different amounts available for

vesting at different times during the deferral period, as long as: The total amount that is made eligible for vesting on the first anniversary is not more than \$25,000; the total amount that has been made eligible for vesting by the second anniversary is not more than \$50,000; and the total amount that has been made eligible for vesting by the third anniversary is not more than \$75,000. In this example, the Level 1 covered institution would be permitted to make eligible for vesting \$10,000 on the first anniversary, \$30,000 on the second anniversary (bringing the total for the first and second anniversaries to \$40,000), \$30,000 on the third anniversary (bringing the total for the first, second, and third anniversaries to \$70,000), and \$30,000 on the fourth anniversary.

A Level 1 or Level 2 covered institution should consider the vesting schedule at the time of the award, and the present value at time of award of each form of incentive-based compensation, for the purposes of determining compliance with this requirement. Level 1 and Level 2 covered institutions generally should use reasonable valuation methods consistent with methods used in other contexts in valuing awards for purposes of this rule.

This approach would provide a covered institution with some flexibility in administering its specific deferral program. For example, a covered institution would be permitted to make the full deferred amount of incentive-based compensation awarded for any given year eligible for vesting in a lump sum at the conclusion of the deferral period (*i.e.*, "cliff vesting"). Alternatively, a covered institution would be permitted to make deferred amounts eligible for vesting in equal increments at the end of each year of the deferral period. Except in the case of acceleration allowed in sections \_\_\_\_\_.7(a)(1)(iii)(B) and \_\_\_\_\_.7(a)(2)(iii)(B), the proposed rule does not allow for vesting of amounts required to be deferred (1) faster than on a pro rata annual basis; or (2) beginning earlier than the first anniversary of the award date.

The Agencies recognize that some or all of the incentive-based compensation awarded to a senior executive officer or significant risk-taker may be forfeited before it vests. For an example of how these requirements would work in practice, please see Appendix A of this Supplementary Information section.

This restriction is intended to prevent covered institutions from defeating the purpose of the deferral requirement by allowing vesting of most of the required

deferral amounts immediately after the award date. In addition, the proposed approach aligns with both what the Agencies understand is common practice in the industry and with the requirements of many foreign supervisors.

#### Acceleration of Payments

The Agencies propose that the acceleration of vesting and subsequent payment of incentive-based compensation that is required to be deferred under this proposed rule generally be prohibited for covered persons at Level 1 and Level 2 covered institutions. This restriction would apply to all deferred incentive-based compensation required to be deferred under the proposed rule, whether it was awarded as qualifying incentive-based compensation or under a long-term incentive plan. This prohibition on acceleration would not apply to compensation that the employee or the employer elects to defer in excess of the amounts required under the proposed rule or for time periods that exceed the required deferral periods or in certain other limited circumstances, such as the death or disability of the covered person.

NCUA's proposed rule would permit acceleration of payment if covered persons at credit unions were subject to income taxes on the entire amount of an incentive-based compensation award even before deferred amounts vest. Incentive-based compensation for executives of not-for-profit entities is subject to income taxation under a different provision of the Internal Revenue Code<sup>140</sup> than that applicable to executives of other covered institutions. The result is that credit union executives' incentive-based compensation awards may be subject to immediate taxation on the entire award, even deferred amounts.<sup>141</sup> The ability to accelerate payment would be a limited exception only applicable to income tax liability and would only apply to the extent credit union executives must pay income tax on unvested amounts during the deferral period. Also, any amounts advanced to pay income tax liabilities for deferrals must be taken in proportion to the vesting schedule. For example, a credit union executive may have deferrals of \$200,000 for each of three years (\$600,000 total) and a total tax liability of \$240,000 for the deferred amount of an award. The advanced tax

<sup>140</sup> 26 U.S.C. 457(f).

<sup>141</sup> The Agencies understand that the taxation of unvested deferred awards of covered persons at other covered institutions is based on other provisions of the Internal Revenue Code. *See, e.g.*, 26 U.S.C. 409A.

<sup>139</sup> *See, e.g.*, Topic 718 of the FASB Accounting Standards Codification (formerly FAS 123(R)); Black-Scholes method for valuing options.

payments would result in an annual reduction of \$80,000 per deferred payment, resulting in a new vesting amount of \$120,000 for each year of the deferral period.

Many institutions currently allow for accelerated vesting in the case of death or disability. Some current incentive-based compensation arrangements, such as separation agreements, between covered persons and covered institutions provide for accelerated vesting and payment of deferred incentive-based compensation that has not yet vested upon the occurrence of certain events.<sup>142</sup> Many institutions also currently provide for the accelerated vesting of deferred incentive-based compensation awarded to their senior executive officers, particularly compensation awarded in the form of equity, in connection with a change in control of the company<sup>143</sup> (sometimes as part of a “golden parachute”). Shareholder proxy firms and some institutional investors have raised concerns about such golden parachutes,<sup>144</sup> and golden parachutes are restricted by law under certain circumstances, including if an institution is in troubled condition.<sup>145</sup> Finally, in current incentive-based compensation arrangements, events triggering acceleration commonly include leaving the employment of a covered institution for a new position (either any new position or only certain new positions, such as employment at a government agency), an acquisition or change in control of the covered

institution, or upon the death or disability of the employee.<sup>146</sup>

The Federal Banking Agencies have found that the acceleration of deferred incentive-based compensation to covered persons is generally inappropriate because it weakens the balancing effect of deferral and eliminates the opportunity for forfeiture during the deferral period as information concerning risks taken during the performance period becomes known. The acceleration of vesting and payment of deferred incentive-based compensation in other circumstances, such as when the covered person voluntarily leaves the institution, could also provide covered persons with an incentive to retire or leave a covered institution if the covered person is aware of risks posed by the covered person's activities that are not yet apparent to or fully understood by the covered institution. Acceleration of payment could skew the balance of risk-taking incentives provided to the covered person if the circumstances under which acceleration is allowed are within the covered person's control. The proposed rule would prohibit acceleration of deferred compensation that is required to be deferred under this proposed rule in most circumstances given the potential to undermine risk balancing mechanisms.

In contrast, the circumstances under which the Agencies would allow acceleration of payment, namely death or disability of the covered person, generally are not subject to the covered person's control, and, therefore, are less likely to alter the balance of risk-taking incentives provided to the covered person. In other cases where acceleration is permitted, effective governance and careful assessment of potential risks, as well as specific facts and circumstances are necessary in order to protect against creating precedents that could undermine more generally the risk balancing effects of deferral. Therefore, the Agencies have proposed to permit only these limited exceptions.

Under the proposed rule, the prohibition on acceleration except in cases of death or disability would apply only to deferred amounts that are required by the proposed rule so as not to discourage additional deferral, or affect institutions that opt to defer

incentive-based compensation exceeding the requirements. For example, if an institution defers compensation until retirement as a retention tool, but the institution then merges into another company and ceases to exist, retention may not be a priority. Thus, acceleration would be permitted for any deferred incentive-based compensation amounts above the amount required to be deferred or that was deferred longer than the minimum deferral period to allow those amounts to be paid out closer in time to the merger.

Similarly, the acceleration of payment NCUA's rule permits if a covered person of a credit union faces up-front income tax liability on the deferred amounts of an award is not an event subject to the covered person's control. This exception will not apply unless the covered person is actually subject to income taxes on deferred amounts for which the covered person has not yet received payment, and equalizes the effect of deferral for covered persons at credit unions and covered persons at most other covered institutions. This limited exception is not intended to alter the balance of risk-taking incentives.

#### Qualifying Incentive-Based Compensation and Incentive-Based Compensation Awarded Under a Long-Term Incentive Plan

The minimum required deferral amounts would be calculated separately for qualifying incentive-based compensation and incentive-based compensation awarded under a long-term incentive plan, and those amounts would be required to be deferred for different periods of time. For the purposes of calculating qualifying incentive-based compensation awarded for any performance period, a covered institution would aggregate incentive-based compensation awarded under any incentive-based compensation plan that is not a long-term incentive plan. The required deferral percentage (40, 50, or 60 percent) would be multiplied by that total amount to determine the minimum deferral amount. In a given year, if a senior executive officer or significant risk-taker is awarded qualifying incentive-based compensation under multiple plans that have the same performance period (which is less than three years), the award under each plan would not be required to meet the minimum deferral requirement, so long as the total amount that is deferred from all of the amounts awarded under those plans meets the minimum required percentage of total qualifying incentive-based compensation relevant to that covered person.

<sup>142</sup> Several commenters argued that the 2011 Proposed Rule's deferral requirements should not apply upon the death, disability, retirement, or acceptance of government employment of covered persons, or a change in control of the covered institution, effectively arguing for the ability of covered institutions to accelerate incentive-based compensation under these circumstances.

<sup>143</sup> See, e.g., Equilar, “Change-in-Control Equity Acceleration Triggers” (March 19, 2014), available at <http://www.equilar.com/reports/8-change-in-control-equity-acceleration-triggers.html> (Noting that although neither Institutional Shareholder Services (ISS) nor Glass Lewis state that a single trigger plan will automatically result in an “against” recommendation, both make it clear that they view the single versus double trigger issue as an important factor in making their decisions. ISS, in particular, suggests in its policies that double trigger vesting of equity awards is currently the best market practice).

<sup>144</sup> Institutional Shareholders Services, “2015 U.S. Compensation Policies, Frequently Asked Questions” (February 9, 2015) (“ISS Compensation FAQs”), available at <https://www.issgovernance.com/file/policy/2015-us-comp-faqs.pdf>; and Institutional Shareholders Services, “U.S. Corporate Governance Policy: 2013 Updates” (November 16, 2012), available at <https://www.issgovernance.com/file/files/2013USPolicyUpdates.pdf>.

<sup>145</sup> See 12 U.S.C. 1828(k) and 12 CFR part 359 (generally applicable to banks and holding companies).

<sup>146</sup> See, e.g., 2012 James F. Reda & Associates, “Study of Executive Termination Provisions Among Top 200 Public Companies (December 2012), available at [www.jfreda.com](http://www.jfreda.com); Equilar, “Change-in-Control Equity Acceleration Triggers” (March 19, 2014), available at <http://www.equilar.com/reports/8-change-in-control-equity-acceleration-triggers.html>.

For example, under the proposal, a significant risk-taker at a Level 2 covered institution might be awarded \$60,000 under a plan with a one-year performance period that applies to all employees in her line of business and \$40,000 under a plan with a one-year performance period that applies to all employees of the covered institution. For that performance period, the significant risk-taker has been awarded a total of \$100,000 in qualifying incentive-based compensation, so she would be required to defer a total of \$40,000. The covered institution could defer amounts awarded under either plan or under both plans, so long as the total amount deferred was at least \$40,000. For example, the covered institution could choose to defer \$20,000 from the first plan and \$20,000 from the second plan. The covered institution could also choose to defer nothing awarded under the first plan and the entire \$40,000 awarded under the second plan.

For a full example of how these requirements would work in the context of a more complete incentive-based compensation arrangement, please see Appendix A of this preamble.

In contrast, the minimum required deferral percentage would apply to all incentive-based compensation awarded under each long-term incentive plan separately. In a given year, if a senior executive officer or significant risk-taker is awarded incentive-based compensation under multiple long-term incentive plans that have performance periods of three years or more, each award under each plan would be required to meet the minimum deferral requirement.<sup>147</sup> Based on supervisory experience, the Federal Banking Agencies have found that it would be extremely rare for a covered person to be awarded incentive-based compensation under multiple long-term incentive plans in one year.

The proposed rule would require deferral for the same percentage of qualifying incentive-based compensation as of incentive-based compensation awarded under a long-term incentive plan. However, the

proposed rule would require that deferred qualifying incentive-based compensation meet a longer minimum deferral period than deferred incentive-based compensation awarded under a long-term incentive plan. As with the shorter performance period for qualifying incentive-based compensation, the period over which performance is measured under a long-term incentive plan is not considered part of the deferral period.

Under the proposed rule, both deferred qualifying incentive-based compensation and deferred incentive-based compensation awarded under a long-term incentive plan would be required to meet the vesting requirements separately. In other words, deferred qualifying incentive-based compensation would not be permitted to vest faster than on a pro rata annual basis, even if deferred incentive-based compensation awarded under a long-term incentive plan vested on a slower than pro rata basis. Each deferred portion is bound by the pro rata requirement.

For an example of how these requirements would work in practice, please see Appendix A of this Supplementary Information section.

Incentive-based compensation provides an inducement for a covered person at a covered institution to advance the strategic goals and interests of the covered institution while enabling the covered person to share in the success of the covered institution. Incentive-based compensation may also encourage covered persons to take undesirable or inappropriate risks, or to sell unsuitable products in the hope of generating more profit and thereby increasing the amount of incentive-based compensation received. Covered persons may also be tempted to manipulate performance results in an attempt to make performance measurements look better or to understate the actual risks such activities impose on the covered institution's balance sheet.<sup>148</sup> Incentive-based compensation should therefore also provide incentives for prudent risk-taking in the long term and for sound risk management.

Deferral of incentive-based compensation awards involves a delay in the vesting and payout of an award

to a covered person beyond the end of the performance period. The deferral period allows for amounts of incentive-based compensation to be adjusted for actual losses to the covered institution or for other aspects of performance that become clear during the deferral period before those amounts vest or are paid. These aspects include inappropriate risk-taking and misconduct on the part of the covered person. More generally, deferral periods that lengthen the time between the award of incentive-based compensation and vesting, combined with forfeiture, are important tools for aligning the interests of risk-takers with the longer-term interests of covered institutions.<sup>149</sup> Deferral periods that are sufficiently long to allow for a substantial portion of the risks from the covered person's activities to manifest are likely to be most effective in ensuring that risks and rewards are adequately balanced.<sup>150</sup>

Deferral periods allow covered institutions an opportunity to more accurately judge the nature and scale of risks imposed on covered institutions' balance sheets by a covered person's performance for which incentive-based compensation has been awarded, and to better understand and identify risks that

<sup>149</sup> There have been a number of academic papers that argue that deferred compensation provides incentives for executives to consider the long-term health of the firm. For example, Eaton and Rosen (1983) note that delaying compensation is a way of bonding executives to the firm and providing incentives for them to focus on long-term performance of the firm. See Eaton and Rosen, "Agency, Delayed Compensation, and the Structure of Executive Remuneration," 38 *Journal of Finance* 1489, at 1489–1505; see also Park and Sturman, "How and What You Pay Matters: The Relative Effectiveness of Merit Pay, Bonus, and Long-Term Incentives on Future Job Performance" (2012), available at <http://scholarship.sha.cornell.edu/cgi/viewcontent.cgi?article=1121&context=articles>.

<sup>150</sup> The length of the deferral period has been a topic of discussion in the literature. Edmans (2012) argues that deferral periods of two to three years are too short. He also argues that deferral should be longer for institutions where the decisions of the executives have long-term consequences. Bebchuk et al (2010) argue that deferral provisions alone will not prevent executives from putting emphasis on short-term prices because executives that have been in place for many years will have the opportunity to regularly cash out. They argue that executives should be required to hold a substantial number of shares and options until retirement. See also Edmans, Alex, "How to Fix Executive Compensation," *The Wall Street Journal* (February 27, 2012); Bebchuk, Lucian, Cohen, and Spamann, "The Wages of Failure: Executive Compensation at Bear Stearns and Lehman 2000–2008," 27 *Yale Journal on Regulation* 257, 257–282 (2010); Bhagat, Sanjai, Bolton and Romano, "Getting Incentives Right: Is Deferred Bank Executive Compensation Sufficient?," 31 *Yale Journal on Regulation* 523 (2014); Bhagat, Sanjai and Romano, "Reforming Financial Executives' Compensation for the Long Term," *Research Handbook on Executive Pay* (2012); Bebchuk and Fried, "Paying for Long-Term Performance," 158 *University of Pennsylvania Law Review*, 1915 (2010).

<sup>147</sup> For example, if a Level 1 covered institution awarded a senior executive officer \$100,000 under one long-term incentive plan and \$200,000 under another long-term incentive plan, the covered institution would be required to defer at least \$60,000 of the amount awarded under the first long-term incentive plan and at least \$120,000 of the amount awarded under the second long-term incentive plan. The Level 1 covered institution would not be permitted to meet the deferral requirements by deferring, for example, \$10,000 awarded under the first long-term incentive plan and \$170,000 awarded under the second long-term incentive plan.

<sup>148</sup> For example, towards the end of the performance period, covered persons who have not yet met the target performance measures could be tempted to amplify risk taking or take other actions to meet those targets and receive the maximum incentive-based compensation. Without deferral, there would be no additional review applied to the risk-taking activities that were taken during the defined performance period to achieve those target performance measures.

result from such activities as they are realized. These include risks imposed by inappropriate risk-taking or misconduct, and risks that may manifest as a result of lapses in risk management or risk oversight. For example, the risks associated with some business lines, such as certain types of lending, may require many years before they materialize.

Though it is difficult to set deferral periods that perfectly match the time it takes risks undertaken by the covered persons of covered institutions to become known, longer periods allow more time for incentive-based compensation to be adjusted between the time of award and the time incentive-based compensation vests.<sup>151</sup> At the same time, deferral periods that are inordinately long may reduce the effectiveness of incentive-based compensation arrangements because employees more heavily discount the potential impact of such arrangements. Thus, it is important to strike a reasonable balance between providing effective incentives and allowing sufficient time to validate performance measures over a reasonable period of deferral. The specific deferral periods and amounts proposed in the proposed rule are also consistent with current practice at many institutions that would be Level 1 or Level 2 covered institutions, and with compensation requirements in other countries.<sup>152</sup> In drafting the requirements in sections 7(a)(1) and 7(a)(2), the Agencies took into account the comments received regarding similar requirements in the 2011 Proposed Rule.<sup>153</sup>

<sup>151</sup> Some empirical literature has found a link between the deferral of compensation and firm value, firm performance, risk, and the manipulation of earnings. Gopalan et al (2014) measure the duration of executive compensation by accounting for the vesting schedules in compensation. They argue that the measure is a proxy for the executives' horizon. They find that longer duration of compensation is present at less risky institutions and institutions with better past stock performance. They also find that longer duration is associated with less manipulation of earnings. Chi and Johnson (2009) find that longer vesting periods for stocks and options are related to higher firm value. See Gopalan, Radhakrishnan, Milbourn, Song and Thakor, "Duration of Executive Compensation," 59 *The Journal of Finance* 2777 (2014); Chi, Jianxin, and Johnson, "The Value of Vesting Restrictions on Managerial Stock and Option Holdings" (March 9, 2009) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1136298](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1136298).

<sup>152</sup> Moody's Investor Service, "Global Investment Banks: Reformed Pay Policies Still Pose Risks to Bondholders" ("Moody's Report") (December 9, 2014); McLagan, "Mandatory Deferrals in Incentive Programs" (March 2013), available at [http://www.mclagan.com/crb/downloads/McLagan\\_Mandatory\\_Deferral\\_Flash\\_Survey\\_Report\\_3-29-2013.pdf](http://www.mclagan.com/crb/downloads/McLagan_Mandatory_Deferral_Flash_Survey_Report_3-29-2013.pdf).

<sup>153</sup> Commenters on the 2011 Proposed Rule expressed differing views on the proposed deferral

The Agencies have proposed the three- and four-year minimum deferral periods because these deferral periods, taken together with the typically one-year performance period, would allow a Level 1 or Level 2 covered institution four to five years, or the majority of a traditional business cycle, to identify outcomes associated with a senior executive officer's or significant risk-taker's performance and risk-taking activities. The business cycle reflects periods of economic expansion or recession, which typically underpin the performance of the financial sector. The Agencies recognize that credit cycles, which revolve around access to and demand for credit and are influenced by various economic and financial factors, can be longer.<sup>154</sup>

requirements and the deferral-related questions posed by the Agencies. For example, some commenters expressed the view that the deferral requirements for incentive-based compensation awards for executive officers were appropriate. Some commenters argued that deferral would create a longer-term focus for executives and help to ensure they are not compensated on the basis of short-term returns that fail to account for long-term risks. Many commenters also argued that the deferral requirements should be strengthened by extending the required minimum deferral period or minimum percentage of incentive compensation deferred. For example, these commenters urged the Agencies to require a five-year deferral period, instead of the three-year period that was proposed, or to disallow "pro rata" payments within the proposed three-year deferral period. These commenters also expressed the view that the Agencies' proposal to require covered financial institutions to defer 50 percent of their annual compensation would result in an insufficient amount of incentive-based compensation being at risk of potential adjustment, because the risks posed by those executive officer can take longer to become apparent. Other commenters argued that all covered institutions subject to this rulemaking should comply with the deferral requirements regardless of their size.

On the other hand, many commenters recommended that deferral not be required or argued that, if deferral were to be required, the three-year and 50 percent deferral minimums provided in the 2011 Proposed Rule were sufficient. Some commenters recommended that the deferral requirements not be applied to smaller covered institutions. Some commenters also suggested that unique aspects of certain types of covered institutions, such as investment advisers or smaller banks within a larger consolidated organization, should be considered when imposing deferral and other requirements on incentive-based compensation arrangements. A number of commenters suggested that applying a prescriptive deferral requirement, together with other requirements under the 2011 Proposed Rule, would make it more difficult for covered institutions to attract and retain key employees in comparison to the ability of organizations not subject to such requirements to recruit and retain the same employees.

<sup>154</sup> From 1945 to 2009, the average length of the business cycle in the U.S. was approximately 5.7 years. See The National Bureau of Economic Research, "U.S. Business Cycle Expansions and Contractions," available at <http://www.nber.org/cycles/cyclesmain.html>. Many researchers have found that credit cycles are longer than business cycles. For example, Drehmann et al (2012) estimate

However, the Agencies are also concerned with striking the right balance between allowing covered persons to be fairly compensated and not encouraging inappropriate risk-taking. The Agencies are concerned that extending deferral periods for too long may lead to a covered person placing little or no value on the incentive-based compensation that only begins to vest far out in the future. This type of discounting of the value of long-deferred awards may be less effective as an incentive, positive or negative, and consequently for balancing the benefit of these types of awards.<sup>155</sup>

As described above, since the Agencies proposed the 2011 Proposed Rule, the Agencies have gained significant supervisory experience while encouraging covered institutions to adopt improved incentive-based compensation practices. The Federal Banking Agencies note in particular improvements in design of incentive-based compensation arrangements that help to more appropriately balance risk and reward. Regulatory requirements for sound incentive-based compensation arrangements at financial institutions have continued to evolve, including those being implemented by foreign regulators. Consideration of international practices and standards is particularly relevant in developing incentive-based compensation standards for large financial institutions because they often compete for talented personnel internationally.

Based on supervisory experience, although exact amounts deferred may vary across employee populations at large covered institutions, the Federal Banking Agencies have observed that, since the financial crisis that began in 2007, most deferral periods at financial institutions range from three to five years, with three years being the most common deferral period.<sup>156</sup> Consistent with this observation, the FSB standards suggest deferral periods "not less than

an average duration of credit cycles from 10 to 20 years. See Drehmann, Mathias, Borio and Tsatsaronis, "Characterising the Financial Cycle: Don't Lose Sight of the Medium Term!" Bank for International Settlements, Working Paper, No. 380 (June 2012), available at <http://www.bis.org/publ/work380.htm>. Aikman et al (2015) found that the credit cycle ranges from eight to 20 years. See Aikman, Haldane, and Nelson, "Curbing the Credit Cycle," 125 *The Economic Journal* 1072 (June 2015).

<sup>155</sup> See Pepper and Gore, "The Economic Psychology of Incentives: An International Study of Top Managers," 49 *Journal of World Business* 289 (2014); PRA, Consultation Paper PRA CP15/14/FCA CP14/14: Strengthening the alignment of risk and reward: new remuneration rules (July 2014) available at <http://www.bankofengland.co.uk/pr/ Documents/publications/cp/2014/cp1514.pdf>.

<sup>156</sup> See 2011 FRB White Paper, at 15.

three years,” and the average deferral period at significant institutions in FSB member countries is now between three and four years.<sup>157</sup> The PRA requires deferral of seven years for senior managers as defined under the Senior Managers Regime, five years for risk managers as defined under the EBA regulatory technical standard on identification of material risk-takers, and three to five years as per the CRD IV minimum for all other material risk-takers.<sup>158</sup> CRD IV sets a minimum deferral period of “at least three to five years.” For senior management, significant institutions<sup>159</sup> are expected to apply deferral of “at least five years.”<sup>160</sup> Swiss regulations<sup>161</sup> require that for members of senior management, persons with relatively high total remuneration, and persons whose activities have a significant influence on the risk profile of the firm, the time period for deferral should last “at least three years.”

The requirements in the proposed rule regarding amounts deferred are also consistent with observed better practices and the standards established by foreign regulators. The Board’s summary overview of findings during the early stages of the 2011 FRB White Paper<sup>162</sup> observed that “deferral fractions set out in the FSB Principles and Implementation Standards<sup>163</sup> are

sometimes used as a benchmark (60 percent or more for senior executives, 40 percent or more for other individual “material risk takers,” which are not the same as “covered employees”) and concluded that deferral fractions were at or above these benchmarks at both the U.S. banking organizations and foreign banking organizations that participated in the horizontal review.

The proportion of incentive-based compensation awards observed to be deferred at financial institutions during the Board’s horizontal review was substantial. For example, on average senior executives report more than 60 percent of their incentive-based compensation is deferred,<sup>164</sup> and some of the most senior executives had more than 80 percent of their incentive-based compensation deferred with additional stock retention requirements after deferred stock vests. Most institutions assigned deferral rates to employees using a fixed schedule or “cash/stock table” under which employees that received higher incentive-based compensation awards generally were subject to higher deferral rates, although deferral rates for the most senior executives were often set separately and were higher than those for other employees.<sup>165</sup> The proposed rule’s higher deferral rates for senior executive officers would be consistent with this observed industry practice of requiring higher deferral rates for the most senior executives. Additionally, by their very nature, senior executive officer positions tend to have more responsibility for strategic decisions and oversight of multiple areas of operations, and these responsibilities warrant requiring higher percentages of deferral and longer deferral periods to safeguard against inappropriate risk-taking.

This proposed rule is also consistent with standards being developed internationally. The PRA expects that “where any employee’s variable remuneration component is £500,000 or more, at least 60 percent should be deferred.”<sup>166</sup> European Union regulations require that “institutions

a period of years” and that “proportions should increase significantly along with the level of seniority and/or responsibility . . . for the most senior management and the most highly paid employees, the percentage of variable compensation that is deferred should be substantially higher, for instance, above 60 percent.”

<sup>164</sup> “Deferral” for these reports is defined by the institutions and may include long-term incentive plans without additional deferral.

<sup>165</sup> See 2011 FRB White Paper, at 15.

<sup>166</sup> See PRA, Supervisory Statement SS27/15: Remuneration (June 2015), available at <http://www.bankofengland.co.uk/prs/Documents/publications/ss/2015/ss2715.pdf>.

should set an appropriate portion of remuneration that should be deferred for a category of identified staff or a single identified staff member at or above the minimum proportion of 40 percent or respectively 60 percent for particularly high amounts.”<sup>167</sup> The EU also publishes a report on *Benchmarking of Remuneration Practices at Union Level and Data on High Earners*<sup>168</sup> that provides insight into amounts deferred across various lines of business within significant institutions across the European Union. While amounts varied by areas of operations, average deferral levels for identified staff range from 54 percent in retail banking to more than 73 percent in investment banking.

The proposed rule’s enhanced requirements for Level 1 institutions are consistent with international standards. Many regulators apply compensation standards in a proportional or tiered fashion. The PRA, for example, classifies three tiers of firms based on asset size and applies differentiated standards across this population. Proportionality Level 1 includes firms with greater than £50 billion in consolidated assets; Proportionality Level 2 includes firms with between £15 billion and £50 billion in consolidated assets; and Proportionality Level 3 includes firms with less than £15 billion in consolidated assets. The PRA also recognizes “significant” firms. Proportionality Level 3 firms are typically not subject to provisions on retained shares, deferral, or performance adjustment.

Under the proposed rule, incentive-based compensation awarded under a long-term incentive plan would be treated separately and differently than amounts of incentive-based compensation awarded under annual performance plans (and other qualifying incentive-based compensation) for the purposes of the deferral requirements. Deferral of incentive-based compensation and the use of longer performance periods (which is the hallmark of a long-term incentive plan) both are useful tools for balancing risk and reward in incentive-based compensation arrangements because both allow for the passage of time that allows the covered institution to have more information about a covered person’s risk-taking activity and its possible outcomes. Both methods allow

<sup>167</sup> See EBA Remuneration Guidelines.

<sup>168</sup> See, e.g., EBA, *Benchmarking of Remuneration Practices at Union Level and Data on High Earners*, at 39, Figure 46 (September 2015), available at <http://www.eba.europa.eu/-/eba-updates-on-remuneration-practices-and-high-earners-data-for-2013-across-the-eu>.

<sup>157</sup> FSB, *Implementing the FSB Principles for Sound Compensation Practices and their Implementation Standards: Fourth Progress Report* (“2015 FSB Compensation Progress Report”) (2015), available at <http://www.fsb.org/2015/11/fsb-publishes-fourth-progress-report-on-compensation-practices>.

<sup>158</sup> See UK Remuneration Rules. The United Kingdom deferral standards apply on a group-wide basis and apply to banks, building societies, and PRA-designated investment firms, but do not currently cover investment advisors outside of consolidated firms.

<sup>159</sup> CRD IV defines institutions that are significant “in terms of size, internal organisation and nature, scope and complexity of their activities.” Under the EBA Guidance on Sound Remuneration Policies, significant institutions means institutions referred to in Article 131 of Directive 2013/36/EU (global systemically important institutions or “G-SIIs,” and other systemically important institutions or “O-SIIs”), and, as appropriate, other institutions determined by the competent authority or national law, based on an assessment of the institutions’ size, internal organisation and the nature, the scope and the complexity of their activities. Some, but not all, national regulators have provided further guidance on interpretation of that term, including the FCA which provides a form of methodology to determine if a firm is “significant” based on quantitative tests of balance sheet assets, liabilities, annual fee commission income, client money and client assets.

<sup>160</sup> See EBA Remuneration Guidelines.

<sup>161</sup> See FINMA Remuneration Circular 2010.

<sup>162</sup> See FRB 2011 Report, at 31.

<sup>163</sup> Specifically, the FSB Implementation Standards encourage that “a substantial portion of variable compensation, such as 40 to 60 percent, should be payable under deferral arrangements over

awards or payments to be made after some or all risk outcomes are realized or better known. However, longer performance periods and deferral of vesting are distinct risk balancing methods.<sup>169</sup>

As noted above, the Agencies took into account the comments received regarding similar deferral requirements in the 2011 Proposed Rule. In response to the proposed deferral requirement in the 2011 Proposed Rule, which did not distinguish between incentive-based compensation awarded under a long-term incentive plan and other incentive-based compensation, several commenters argued that the Agencies should allow incentive-based compensation arrangements that use longer performance periods, such as a three-year performance period, to count toward the mandatory deferral requirement. In particular, some commenters argued that institutions that use longer performance periods should be allowed to start the deferral period at the beginning of the performance period. In this way, they argued, a payment made at the end of a three-year performance period has already been deferred for three years for the purposes of the deferral requirement.

As discussed above, deferral allows for time to pass after the conclusion of the performance period. It introduces a period of time in between the end of the performance period and vesting of the incentive-based compensation during which risks may mature without the employee taking additional risks to affect that earlier award.

Currently, institutions commonly use long-term incentive plans without subsequent deferral and thus there is no period following the multi-year performance period that would permit the covered institution to apply forfeiture or other reductions should it become clear that the covered person engaged in inappropriate risk-taking. Without deferral, the incentive-based compensation is awarded and vests at the end of the multi-year performance period.<sup>170</sup> In contrast, during the

deferral period, the covered person's incentive-based compensation award is fixed and the vesting could be affected by information about a covered person's risk-taking activities during the performance period that becomes known during the deferral period.

For a long-term incentive plan, the period of time between the beginning of the performance period and when incentive-based compensation is awarded is longer than that of an annual plan. However, the period of time between the end of the performance period and when incentive-based compensation is awarded is the same for both the long-term incentive plan and for the annual plan. Consequently, while a covered institution may have more information about the risk-taking activities of a covered person that occurred near the beginning of the performance period for a long-term incentive plan than for an annual plan, the covered institution would have no more information about risk-taking activities that occur near the end of the performance period. The incentive-based compensation awarded under the long-term incentive plan would be awarded without the benefit of additional information about risk-taking activities near the end of the performance period.

Therefore, the proposed rule would treat incentive-based compensation awarded under a long-term incentive plan similarly to, but not the same as, qualifying incentive-based compensation for purposes of the deferral requirement. Under the proposed rule, the incentive-based compensation awarded under a long-term incentive plan would be required to be deferred for a shorter amount of time than qualifying incentive-based compensation, although the period of time elapsing between the beginning of the performance period and the actual vesting would be longer. A shorter deferral period would recognize the fact that the longer performance period of a long-term incentive plan allows some time for information to surface about risk-taking activities undertaken at the beginning of the performance period. The longer performance period allows covered institutions to adjust the amount awarded under long-term incentive plans for poor performance during the performance period. Yet, since no additional time would pass between risk-taking activities at the end of the performance period and the

those targets and receive the maximum long-term incentive plan award with no additional review applied to the risk-taking activities that were taken during the defined performance period to achieve those target performance measures.

award date, the proposed rule would allow a shorter deferral period than would be necessary for qualifying incentive-based compensation.

The percentage of incentive-based compensation awarded that would be required to be deferred would be the same for incentive-based compensation awarded under a long-term incentive plan and for qualifying incentive-based compensation. However, because of the difference in the minimum required deferral period, the minimum deferral amounts for qualifying incentive-based compensation and for incentive-based compensation awarded under a long-term incentive plan would be required to be calculated separately. In other words, any amount of qualifying incentive-based compensation that a covered institution chooses to defer above the minimum required would not decrease the minimum amount of incentive-based compensation awarded under a long-term plan that would be required to be deferred, and vice versa.

For example, a Level 2 covered institution that awards a senior executive officer \$50,000 of qualifying incentive-based compensation and \$20,000 under a long-term incentive plan would be required to defer at least \$25,000 of the qualifying incentive-based compensation and at least \$10,000 of the amounts awarded under the long-term incentive plan. The Level 2 covered institution would not be permitted to defer, for example, \$35,000 of qualifying incentive-based compensation and no amounts awarded under the long-term incentive plan, even though that would result in the deferral of 50 percent of the senior executive officer's total incentive-based compensation. For a full example of how these requirements would work in the context of a more complete incentive-based compensation arrangement, please see Appendix A of this preamble.

For incentive-based compensation awarded under a long-term incentive plan, section \_\_\_\_\_.7(a)(2) of the proposed rule would require that minimum deferral periods for senior executive officers and significant risk-takers at a Level 1 covered institution extend to two years after the award date and minimum deferral periods at a Level 2 covered institution extend to one year after the award date. For long-term incentive plans with performance periods of three years,<sup>171</sup> this

<sup>169</sup> The 2011 Proposed Rule expressly recognized this distinction ("The Proposed Rule identifies four methods that currently are often used to make compensation more sensitive to risk. These methods are Risk Adjustment of Awards . . . Deferral of Payment . . . Longer Performance Periods . . . Reduced Sensitivity to Short-Term Performance."). See 76 FR at 21179.

<sup>170</sup> An employee may be incentivized to take additional risks near the end of the performance period to attempt to compensate for poor performance early in the period of the long-term incentive compensation plan. For example, as noted above, towards the end of a multi-year performance period, covered persons who have not yet met the target performance measures could be tempted to amplify risk taking or take other actions to meet

<sup>171</sup> Many studies of incentive-based compensation at large institutions have found that long-term incentive plans commonly have performance periods of three years. See Cook Report; Moody's Report.

requirement would delay the vesting of the last portion of this incentive-based compensation until five years after the beginning of the performance period at Level 1 covered institutions and four years after the beginning of the performance period at Level 2 covered institutions. Thus, while the deferral period from the award date is shorter for incentive-based compensation awarded under a long-term incentive plan, the delay in vesting from the beginning of the performance period would generally be the same under the most common qualifying incentive-based compensation and long-term incentive plans.

Under the proposed rule, the incentive-based compensation that would be required by the rule to be deferred would not be permitted to vest faster than on a pro rata annual basis beginning no earlier than the first anniversary of the end of the performance period. This requirement would apply to both deferred qualifying incentive-based compensation and deferred incentive-based compensation awarded under a long-term incentive plan.

The Federal Banking Agencies have also observed that the minimum required deferral amounts and deferral periods that would be required under the proposed rule are generally consistent with industry practice at larger covered institutions that are currently subject to the 2010 Federal Banking Agency Guidance, although the Agencies recognize that some institutions would need to revise their individual incentive-based compensation programs and others were not subject to the 2010 Federal Banking Agency Guidance. In part because the 2010 Federal Banking Agency Guidance and compensation regulations imposed by international regulators<sup>172</sup> currently encourage banking institutions to increase the proportion of compensation that is deferred to reflect higher levels of seniority or responsibility, current practice for the largest international banking institutions reflects substantial levels of deferral for such individuals.

<sup>172</sup> Most members of the FSB, for instance, have issued regulations, or encourage through guidance and supervisory practice, deferral standards that meet the minimums set forth in the FSB's Implementation Standards. See 2015 FSB Compensation Progress Report (concluding "almost all FSB jurisdictions have now fully implemented the P&S for banks."). The FSB standards state that "a substantial portion of variable compensation, such as 40 to 60 percent, should be payable under deferral arrangements over a period of years and these proportions should increase significantly along with the level of seniority and/or responsibility. The deferral period should not be less than three years. See FSB Principles and Implementation Standards.

Many of those individuals would be senior executive officers and significant risk-takers under the proposed rule. Under current practice, deferral typically ranges from 40 percent for less senior significant risk-takers to more than 60 percent for senior executives.<sup>173</sup> The Agencies note that current practice for the largest international banking institutions reflects average deferral periods of at least three years.<sup>174</sup>

The deferral requirements of the proposed rule for senior executive officers and significant risk-takers at the largest covered institutions are also consistent with international standards on compensation. The European Union's 2013 law on remuneration paid by financial institutions requires deferral for large firms, among other requirements.<sup>175</sup> The PRA and the FCA initially adopted the European Union's law and requires covered companies to defer 40 to 60 percent of "senior manager," "risk manager," and "material risk-taker" compensation. The PRA and FCA recently updated their implementing regulations to extend deferral periods to seven years for senior managers and up to five years for certain other persons.<sup>176</sup> The proposed deferral requirements are also generally consistent with the FSB's Principles for Sound Compensation Practices and their related implementation standards issued in 2009.<sup>177</sup> Having standards that are generally consistent across jurisdictions would be important both to enable institutions subject to multiple regimes to fulfill the requirements of all applicable regimes, and to ensure that covered institutions in the United States

<sup>173</sup> FSB member jurisdictions provided data for the purposes of the 2015 FSB Compensation Progress Report indicating that while the percentage of variable remuneration deferred varies significantly between institutions and across categories of staff, for the surveyed population of senior executives, the percentage of deferred incentive-based compensation averaged approximately 50 percent. See 2015 FSB Compensation Progress Report.

<sup>174</sup> See Moody's Report.

<sup>175</sup> In June 2013, the European Union adopted CRD IV, which sets out requirements on compensation structures, policies, and practices that applies to all banks and investment firms subject to the CRD. CRD IV provides that at least 50 percent of total variable remuneration should consist of equity-linked interests and at least 40 percent of the variable component must be deferred over a period of three to five years. Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 (effective January 1, 2014).

<sup>176</sup> See UK Remuneration Rules. In the case of a material risk-taker who performs a PRA senior management function, the pro rata vesting requirement applies only from year three onwards (i.e., the required deferral period is seven years, with no vesting to take place until three years after award).

<sup>177</sup> FSB Principles and Implementation Standards.

would be on a level playing field compared to their non-U.S. peers in the global competition for talent.

7.1. The Agencies invite comment on the proposed requirements in sections .7(a)(1) and (a)(2).

7.2. Are minimum required deferral periods and percentages appropriate? If not, why not? Should Level 1 and Level 2 covered institutions be subject to different deferral requirements, as in the proposed rule, or should they be treated more similarly for this purpose and why? Should the minimum required deferral period be extended to, for example, five years or longer in certain cases and why?

7.3. Is a deferral requirement for senior executive officers and significant risk-takers at Level 1 and Level 2 covered institutions appropriate to promote the alignment of employees' incentives with the risk undertaken by such covered persons? If not, why not? For example, comment is invited on whether deferral is generally an appropriate method for achieving incentive-based compensation arrangements that appropriately balance risk and reward for each type of senior executive officer and significant risk-taker at these institutions or whether there are alternative or more effective ways to achieve such balance.

7.4. Commenters are also invited to address the possible impact that the required minimum deferral provisions for senior executive officers and significant risk-takers may have on larger covered institutions and whether any deferral requirements should apply to senior executive officers at Level 3 institutions.

7.5. A number of commenters to the 2011 Proposed Rule suggested that applying a prescriptive deferral requirement, together with other requirements under that proposal, would make it more difficult for covered institutions to attract and retain key employees in comparison to the ability of organizations not subject to such requirements to recruit and retain the same employees. What implications does the proposed rule have on "level playing fields" between covered institutions and non-covered institutions in setting forth minimum deferral requirements under the rule?

7.6. The Agencies invite comment on whether longer performance periods can provide risk balancing benefits similar to those provided by deferral, such that the shorter deferral periods for incentive-based compensation awarded under long-term incentive plans in the proposed rule would be appropriate.

7.7. Would the proposed distinction between the deferral requirements for

qualifying incentive-based compensation and incentive-based compensation awarded under a long-term incentive plan pose practical difficulties for covered institutions or increase compliance burdens? Why or why not?

7.8. Would the requirement in the proposed rule that amounts awarded under long-term incentive plans be deferred result in covered institutions offering fewer long-term incentive plans? If so, why and what other compensation plans will be used in place of long-term incentive plans and what negative or positive consequences might result?

7.9. Are there additional considerations, such as tax or accounting considerations, that may affect the ability of Level 1 or Level 2 covered institutions to comply with the proposed deferral requirement or that the Agencies should consider in connection with this provision in the final rule? Commenters on the 2011 Proposed Rule noted that employees of an investment adviser to a private fund hold partnership interests and that any incentive allocations paid to them are typically taxed at the time of allocation, regardless of whether these allocations have been distributed, and consequently, employees of an investment adviser to a private fund that would have been subject to the deferral requirement in the 2011 Proposed Rule would have been required to pay taxes relating to incentive allocations that they were required to defer. Should the determination of required deferral amounts under the proposed rule be adjusted in the context of investment advisers to private funds and, if so, how? Could the tax liabilities immediately payable on deferred amounts be paid from the compensation that is not deferred?

7.10. The Agencies invite comment on the circumstances under which acceleration of payment should be permitted. Should accelerated vesting be allowed in cases where employees are terminated without cause or cases where there is a change in control and the covered institution ceases to exist and why? Are there other situations for which acceleration should be allowed? If so, how can such situations be limited to those of necessity?

7.11. The Agencies received comment on the 2011 Proposed Rule that stated it was common practice for some private fund adviser personnel to receive payments in order to enable the recipients to make tax payments on unrealized income as they became due. Should this type of practice to satisfy tax liabilities, including tax liabilities

payable on unrealized amounts of incentive-based compensation, be permissible under the proposed rule, including, for example, as a permissible acceleration of vesting under the proposed rule? Why or why not? Is this a common industry practice?

*§ \_\_\_\_\_.7(a)(3) Adjustments of Deferred Qualifying Incentive-Based Compensation and Deferred Long-Term Incentive Plan Compensation Amounts*

Under section \_\_\_\_\_.7(a)(3) of the proposed rule, during the deferral period, a Level 1 or Level 2 covered institution would not be permitted to increase a senior executive or significant risk-taker's unvested deferred incentive-based compensation.<sup>178</sup> In other words, any deferred incentive-based compensation, whether it was awarded as qualifying incentive-based compensation or under a long-term incentive plan, would be permitted to vest in an amount equal to or less than the amount awarded, but would not be permitted to increase during the deferral period.<sup>179</sup> Deferred incentive-based compensation may be decreased, for example, under a forfeiture and downward adjustment review as would be required under section \_\_\_\_\_.7(b) of the proposed rule, discussed below. It may also be adjusted downward as a result of performance that falls short of agreed upon performance measure targets.

As discussed in section 8(b), under some incentive-based compensation plans, covered persons can be awarded amounts in excess of their target amounts if the covered institution or covered person's performance exceed performance targets. As explained in the discussion on section 8(b), this type of upside leverage in incentive-based compensation plans may encourage covered persons to take inappropriate risks. Therefore, the proposed rule would limit maximum payouts to between 125 and 150 percent of the pre-set target. In a similar vein, the Agencies are concerned that allowing Level 1 and Level 2 covered institutions to provide for additional increases in amounts that are awarded but deferred may encourage senior executive officers and significant risk-takers to take more risk during the deferral period and thus may not balance risk-taking incentives. This concern is especially acute when covered institutions require covered

persons to meet more aggressive goals than those established at the beginning of the performance period in order to "re-earn" already awarded, but deferred incentive-based compensation.

Although increases in the amount awarded, as described above, would be prohibited by the proposed rule, increases in the value of deferred incentive-based compensation due solely to a change in share value, a change in interest rates, or the payment of reasonable interest or a reasonable rate of return according to terms set out at the award date would not be considered increases in the amount awarded for purposes of this restriction. Thus, a Level 1 or Level 2 covered institution would be permitted to award incentive-based compensation to a senior executive officer or significant risk-taker in the form of an equity or debt instrument, and, if that instrument increased in market value or included a provision to pay a reasonable rate of interest or other return that was set at the time of the award, the vesting of the full amount of that instrument would not be in violation of the proposed rule.

For an example of how these requirements would work in practice, please see Appendix A of this SUPPLEMENTARY INFORMATION section.

7.12. The Agencies invite comment on the requirement in section \_\_\_\_\_.7(a)(3).

*§ \_\_\_\_\_.7(a)(4) Composition of Deferred Qualifying Incentive-Based Compensation and Deferred Long-Term Incentive Plan Compensation for Level 1 and Level 2 Covered Institutions*

Section \_\_\_\_\_.7(a)(4) of the proposed rule would require that deferred qualifying incentive-based compensation or deferred incentive-based compensation awarded under a long-term incentive plan of a senior executive officer or significant risk-taker at a Level 1 or Level 2 covered institution meet certain composition requirements.

**Cash and Equity-Like Instruments**

Covered institutions award incentive-based compensation in a number of forms, including cash-based awards, equity-like instruments, and in a smaller number of cases, incentive-based compensation in the form of debt or debt-like instruments such as deferred cash. First, the proposed rule would require that, at Level 1 and Level 2 covered institutions<sup>180</sup> that issue equity

<sup>178</sup> This requirement is distinct from the prohibition in section 8(b) of the proposed rule, discussed below.

<sup>179</sup> Accelerated vesting would be permitted in limited circumstances under sections \_\_\_\_\_.7(a)(1)(iii)(B) and \_\_\_\_\_.7(a)(2)(iii)(B), as described above.

<sup>180</sup> In the cases of the Board, FDIC and OCC, this requirement would not apply to a Level 1 and Level 2 covered institution that does not issue equity itself and is not an affiliate of an institution that issues equity. Credit unions and certain mutual

or are the affiliates of covered institutions that issue equity, deferred incentive-based compensation for senior executive officers and significant risk-takers include substantial portions of both deferred cash and equity-like instruments throughout the deferral period. The Agencies recognize that the form of incentive-based compensation that a senior executive officer or significant risk-taker receives can have an impact on the incentives provided and thus their behavior. In particular, having incentive-based compensation in the form of equity-like instruments can align the interests of the senior executive officers and significant risk-takers with the interests of the covered institution's shareholders. Thus, the proposed rule would require that a senior executive officer's or significant risk-taker's deferred incentive-based compensation include a substantial portion of equity-like instruments.

Similarly, having incentive-based compensation in the form of cash can align the interests of the senior executive officers and significant risk-takers with the interests of other stakeholders in the covered institution.<sup>181</sup> Thus, the proposed rule would require that a senior executive officer's or significant risk-taker's deferred incentive-based compensation include a substantial portion of cash.

The value of equity-like instruments received by a covered person increases or decreases in value based on the value of the equity of the covered institution, which provides an implicit method of adjusting the underlying value of compensation as the share price of the covered institution changes as a result of better or worse operational performance. Deferred cash may increase in value over time pursuant to an interest rate, but its value generally does not vary based on the performance of the covered institution. These two forms of incentive-based compensation present a covered person with different incentives for performance, just as a covered institution itself faces different

incentives when issuing debt or equity-like instruments.<sup>182</sup>

For purposes of this proposed rule, the Agencies consider incentive-based compensation paid in equity-like instruments to include any form of payment in which the final value of the award or payment is linked to the price of the covered institution's equity, even if such compensation settles in the form of cash. Deferred cash can be structured to share many attributes of a debt instrument. For instance, while equity-like instruments have almost unlimited upside (as the value of the covered institution's shares increase), deferred cash that is structured to resemble a debt instrument can be structured so as to offer limited upside and can be designed with other features that align more closely with the interests of the covered institution's debtholders than its shareholders.<sup>183</sup>

<sup>182</sup> Jensen and Meckling (1976) were the first to point out that the structure of compensation should reflect all of the stakeholders in the firm—both equity and debt holders, an idea further explored by Edmans and Liu (2013). Faulkender et al. (2012) argue that a compensation program that relies too heavily on stock-based compensation can lead to excessive risk taking, manipulation, and distract from long-term value creation. Empirical research has found that equity-based pay increases risk at financial firms Balachandran et al. (2010). See Jensen and Metckling, "Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure," 3 *Journal of Financial Economics* 305 (July 1, 1976); Edmans and Liu, "Inside Debt," 15 *Review of Finance* 75 (June 29, 2011); Faulkender, Kadyrzhanova, Prabhala, and Senbet, "Executive Compensation: An Overview of Research on Corporate Practices and Proposed Reforms," 22 *Journal of Applied Corporate Finance* 107 (2010); and Balachandran, Kogut, and Harnal, "The Probability of Default, Excess Risk and Executive Compensation: A Study of Financial Service Firms from 1995 to 2008," working paper (June 2010), available at [http://www.insead.edu/facultyresearch/areas/accounting/events/documents/excess\\_risk\\_bank\\_revisedjune21bk.pdf](http://www.insead.edu/facultyresearch/areas/accounting/events/documents/excess_risk_bank_revisedjune21bk.pdf).

<sup>183</sup> There has been a recent surge in research on the use of compensation that has a payoff structure similar to debt, or "inside debt." See, e.g., Wei and Yermack, "Investor Reactions to CEOs Inside Debt Incentives," 24 *Review of Financial Studies* 3813 (2011) (finding that bond prices rise, equity prices fall, and the volatility of both bond and stock prices fall for firms where the CEO has sizable inside debt and arguing the results indicate that firms with higher inside debt have lower risk; Cassell, Huang, Sanchez, and Stuart, "Seeking Safety: The Relation between CEO Inside Debt Holding and the Riskiness of Firm Investment and Financial Policies," 103 *Journal of Financial Economics* 518 (2012) (finding higher inside debt is associated with lower volatility of future firm stock returns, research and development expenditures, and financial leverage, and more diversification and higher asset liquidity and empirical research finding that debt holders recognize the benefits of firms including debt-like components in their compensation structure); Anantharaman, Divya, Fang, and Gong, "Inside Debt and the Design of Corporate Debt Contracts," 60 *Management Science* 1260 (2013) (finding that higher inside debt is associated with a lower cost of debt and fewer debt covenants); Bennett, Guntay and Unal, "Inside Debt and Bank Default Risk and Performance During the Crisis," FDIC Center for

Where possible, it is important for the incentive-based compensation of senior executive officers and significant risk-takers at Level 1 and Level 2 covered institutions to have some degree of balance between the amounts of deferred cash and equity-like instruments received. With the exception of the limitation of use of options discussed below, the Agencies propose to provide covered institutions with flexibility in meeting the general balancing requirement under section \_\_\_\_\_.7(a)(4)(i) and thus have not proposed specific percentages of deferred incentive-based compensation that must be paid in each form.

Similar to the rest of section \_\_\_\_\_.7, the requirement in section \_\_\_\_\_.7(a)(4)(i) would apply to deferred incentive-based compensation of senior executive officers and significant risk-takers of Level 1 and Level 2 covered institutions. As discussed above, these covered persons are the ones most likely to have a material impact on the financial health and risk-taking of the covered institution. Importantly for this requirement, these covered persons are also the most likely to be able to influence the value of the covered institution's equity and debt.

7.13. The Agencies invite comment on the composition requirement set out in section \_\_\_\_\_.7(a)(4)(i) of the proposed rule.

Financial Research Working Paper No. 2012–3 (finding that banks that had higher inside debt before the recent financial crisis had lower default risk and higher performance during the crisis and that banks with higher inside debt had supervisory ratings that indicate that they had stronger capital positions, better management, stronger earnings, and being in a better position to withstand market shocks in the future); Srivastav, Abhishek, Armitage, and Hagendorff, "CEO Inside Debt Holdings and Risk-shifting: Evidence from Bank Payout Policies," 47 *Journal of Banking & Finance* 41 (2014) (finding that banks with higher inside debt holdings have a more conservative dividend payout policy); Chen, Dou, and Wang, "Executive Inside Debt Holdings and Creditors' Demand for Pricing and Non-Pricing Protections," working paper (2010) (finding that higher inside debt is associated with lower interest rates and less restrictive debt covenants and that in empirical research, specifically on banks, similar patterns emerge). In addition, the Squam Lake Group has done significant work on the use of debt based structures. See, e.g., Squam Lake Group, "Aligning Incentives at Systemically Important Financial Institutions" (2013) available at <http://www.squamlakegroup.org/Squam%20Lake%20Bonus%20Bonds%20Memo%20Mar%202019%202013.pdf>. In their paper "Enhancing Financial Stability in the Financial Services Industry: Contribution of Deferred Cash Compensation," forthcoming in the Federal Reserve Bank of New York's *Economic Policy Review* (available at <https://www.newyorkfed.org/research/epr/index.html>), Hamid Mehran and Joseph Tracy highlight three channels through which deferred cash compensation can help mitigate risk: Promoting conservatism, inducing internal monitoring, and creating a liquidity buffer.

savings associations, mutual savings banks, and mutual holding companies do not issue equity and do not have a parent that issues equity. For those institutions, imposing this requirement would have little benefit, as no equity-like instruments would be based off of the equity of the covered institution or one of its parents. In the case of FHFA, this requirement would not apply to a Level 1 or Level 2 covered institution that does not issue equity or is not permitted by FHFA to use equity-like instruments as compensation for senior executive officers and significant risk-takers.

<sup>181</sup> Generally, in the case of resolution or bankruptcy, deferred incentive-based compensation in the form of cash would be treated similarly to other unsecured debt.

7.14. In order to allow Level 1 and Level 2 covered institutions sufficient flexibility in designing their incentive-based compensation arrangements, the Agencies are not proposing a specific definition of “substantial” for the purposes of this section. Should the Agencies more precisely define the term “substantial” (for example, one-third or 40 percent) and if so, should the definition vary among covered institutions and why? Should the term “substantial” be interpreted differently for different types of senior executive officers or significant risk-takers and why? What other considerations should the Agencies factor into level of deferred cash and deferred equity required? Are there particular tax or accounting implications attached to use of particular forms of incentive-based compensation, such as those related to debt or equity?

7.15. The Agencies invite comment on whether the use of certain forms of incentive-based compensation in addition to, or as a replacement for, deferred cash or deferred equity-like instruments would strengthen the alignment between incentive-based compensation and prudent risk-taking.

7.16. The Agencies invite commenters’ views on whether the proposed rule should include a requirement that a certain portion of incentive-based compensation be structured with debt-like attributes. Do debt instruments (as opposed to equity-like instruments or deferred cash) meaningfully influence the behavior of senior executive officers and significant risk-takers? If so, how? How could the specific attributes of deferred cash be structured, if at all, to limit the amount of interest that can be paid? How should such an interest rate be determined, and how should such instruments be priced? Which attributes would most closely align use of a debt-like instrument with the interest of debt holders and promote risk-taking that is not likely to lead to material financial loss?

#### Options

Under section \_\_\_\_\_.7(a)(4)(ii), for senior executive officers and significant risk-takers at Level 1 and Level 2 covered institutions that receive incentive-based compensation in the form of options, the total amount of such options that may be used to meet the minimum deferral amount requirements is limited to, no more than 15 percent of the amount of total incentive-based compensation awarded for a given performance period. A Level 1 or Level 2 covered institution would be permitted to award incentive-based compensation to senior executive

officers and significant risk-takers in the form of options in excess of this limitation, and could defer such compensation, but the incentive-based compensation in the form of options in excess of the 15 percent limit would not be counted towards meeting the minimum deferral requirements for senior executive officers and significant risk-takers at these covered institutions.

For example, a Level 1 covered institution might award a significant risk-taker \$100,000 in incentive-based compensation at the end of a performance period: \$80,000 in qualifying incentive-based compensation, of which \$25,000 is in options, and \$20,000 under a long-term incentive plan, all of which is delivered in cash. The Level 1 covered institution would be required to defer at least \$40,000 of the qualifying incentive-based compensation and at least \$10,000 of the amount awarded under the long-term incentive plan. Under the draft proposed rule, the amount that could be composed of options and count toward the overall deferral requirement would be limited to 15 percent of the total amount of incentive-based compensation awarded. In this example, the Level 1 covered institution could count \$15,000 in options (15 percent of \$100,000) toward the requirement to defer \$40,000 of qualifying incentive-based compensation. For an example of how these requirements would work in the context of a more complete incentive-based compensation arrangement, please see Appendix A of this preamble.

This requirement would thus limit the total amount of incentive-based compensation in the form of options that could satisfy the minimum deferral amounts in sections \_\_\_\_\_.7(a)(1)(i) and \_\_\_\_\_.7(a)(1)(ii). Any incentive-based compensation awarded in the form of options would, however, be required to be included in calculating the total amount of incentive-based compensation awarded in a given performance period for purposes of calculating the minimum deferral amounts at Level 1 and Level 2 covered institutions as laid out in sections \_\_\_\_\_.7(a)(1)(i) and \_\_\_\_\_.7(a)(2)(ii).

Options can be a significant and important part of incentive-based compensation arrangements at many covered institutions. The Agencies are concerned, however, that overreliance on options as a form of incentive-based compensation could have negative effects on the financial health of a covered institution due to options’ emphasis on upside gains and possible

lack of responsiveness to downside risks.<sup>184</sup>

The risk dynamic for senior executive officers and significant risk-takers changes when options are awarded because options offer asymmetric payoffs for stock price performance. Options may generate very high payments to covered persons when the market price of a covered institution’s shares rises, representing a leveraged return relative to shareholders. Payment of incentive-based compensation in the form of options may therefore increase the incentives under some market conditions for covered persons to take inappropriate risks in order to increase the covered institution’s short-term share price, possibly without giving appropriate weight to long-term risks.

Moreover, unlike restricted stock, options are limited in how much they decrease in value when the covered institution’s shares decrease in value.<sup>185</sup> Thus, options may not be an effective tool for causing a covered person to adjust his or her behavior to manage downside risk. For senior executive officers and significant risk-takers, whose activities can materially impact the firm’s stock price, incentive-based

<sup>184</sup> In theory, since the payoffs from holding stock options are positively related to volatility of stock returns, options create incentives for executives to increase the volatility of share prices by engaging in riskier activities. See, e.g., Guay, W.R., “The Sensitivity of CEO Weather to Equity Risk: An Analysis of the Magnitude and Determinants,” 53 *Journal of Financial Economics* 43 (1999); Cohen, Hall, and Viceria, “Do Executive Stock Options Encourage Risk Taking?” working paper (2000) available at <http://www.people.hbs.edu/viceria/cohallvic3.pdf>; Rajgopal and Shvelin, “Empirical Evidence on the Relation between Stock Option Compensation and Risk-Taking,” 33 *Journal of Accounting and Economics* 145 (2002); Coles, Daniel, and Naveen, “Managerial Incentives and Risk-Taking,” 79 *Journal of Financial Economics* 431 (2006); Chen, Steiner, and Whyte, “Does Stock Option-Based Executive Compensation Induce Risk-Taking? An Analysis of the Banking Industry,” 30 *Journal of Banking & Finance* 916 (2006); Mehran, Hamid and Rosenberg, “The Effect of Employee Stock Options on Bank Investment Choice, Borrowing and Capital,” Federal Reserve Bank of New York Staff Reports No. 305 (2007) available at [https://www.newyorkfed.org/medialibrary/media/research/staff\\_reports/sr305.pdf](https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr305.pdf).

Beyond the typical measures of risk, the academic literature has found a relation between executive stock option holdings and risky behavior. See, e.g., Denis, Hanouna, and Sarin, “Is There a Dark Side to Incentive Compensation?” 12 *Journal of Corporate Finance* 467 (2006) (finding that there is a significant positive association between the likelihood of securities fraud allegations and the executive stock option incentives); Bergstresser and Philippon, “CEO Incentives and Earnings Management,” 80 *Journal of Financial Economics* 511 (2006) (finding that the use of discretionary accruals to manipulate reported earnings was more pronounced at firms where CEO’s compensation was more closely tied to stock and option holdings).

<sup>185</sup> This would be the case if the current market price for a share is less than or equal to the option’s strike price (i.e., the option is not “in the money”).

compensation based on options may therefore create greater incentive to take inappropriate risk or provide inadequate disincentive to manage risk. For these reasons, the Agencies are proposing to limit to 15 percent the amount permitted to be used in meeting the minimum deferral requirements.

In proposing to limit, but not prohibit, the use of options to fulfill the proposed rule's deferral requirements, the Agencies have sought to conservatively apply better practice while still allowing for some flexibility in the design and operation of incentive-based compensation arrangements. The Agencies note that supervisory experience at large banking organizations and analysis of compensation disclosures, as well as the views of some commenters to the 2011 Proposed Rule, indicate that many institutions have recognized the risks of options as an incentive and have reduced their use of options in recent years.

The proposed rule's 15 percent limit on options is consistent with current industry practice, which is moving away from its historical reliance on options as part of incentive-based compensation. Since the financial crisis that began in 2007, institutions on their own initiative and those working with the Board have decreased the use of options in incentive-based compensation arrangements generally such that for most organizations options constitute no more than 15 percent of an institution's total incentive-based compensation. Restricted stock unit awards have now emerged as the most common form of equity compensation and are more prevalent than stock options at all employee levels.<sup>186</sup> Further, a sample of publicly available disclosures from large covered institutions shows minimal usage of stock options among CEOs and other named executive officers; out of a sample of 14 covered institutions reviewed by the Agencies, only two covered institutions awarded stock options as part of their incentive-based compensation in 2015. Only one of those two covered institutions awarded options in excess of 15 percent of total compensation, and the excess was small. Thus, the proposed rule's limit on options has been set at a level that would, in the Agencies' views, help mitigate concerns about the use of options in incentive-based compensation while still allowing flexibility for covered institutions to use

options in a manner that is consistent with the better practices that have developed following the recent financial crisis.<sup>187</sup>

7.17. The Agencies invite comment on the restrictions on the use of options in incentive-based compensation in the proposed rule. Should the percent limit be higher or lower and if so, why? Should options be permitted to be used to meet the deferral requirements of the rule? Why or why not? Does the use of options by covered institutions create, reduce, or have no effect on the institution's risk of material financial loss?

7.18. Does the proposed 15 percent limit appropriately balance the benefits of using options (such as aligning the recipient's interests with that of shareholders) and drawbacks of using options (such as their emphasis on upside gains)? Why or why not? Is the proposed 15 percent limit the appropriate limit, or should it be higher or lower? If it should be higher or lower, what should the limit be, and why?

7.19. Are there alternative means of addressing the concerns raised by options as a form of incentive-based compensation other than those proposed?

#### *§ \_\_\_\_\_.7(b) Forfeiture and Downward Adjustment*

Section \_\_\_\_\_.7(b) of the proposed rule would require Level 1 and Level 2 covered institutions to place incentive-based compensation of senior executive officers and significant risk-takers at risk of forfeiture and downward adjustment and to subject incentive-based compensation to a forfeiture and downward adjustment review under a defined set of circumstances. As described below, a forfeiture and downward adjustment review would be required to identify senior executive officers or significant risk-takers responsible for the events or circumstances triggering the review. It would also be required to consider certain factors when determining the amount or portion of a senior executive officer's or significant risk-taker's incentive-based compensation that should be forfeited or adjusted downward.

In general, the forfeiture and downward adjustment review requirements in section \_\_\_\_\_.7(b) would require a Level 1 or Level 2 covered

institution to consider reducing some or all of a senior executive officer's or significant risk-taker's incentive-based compensation when the covered institution becomes aware of inappropriate risk-taking or other aspects of behavior that could lead to material financial loss. The amount of incentive-based compensation that would be reduced would depend upon the severity of the event, the impact of the event on the covered institution, and the actions of the senior executive officer or significant risk-taker in the event. The covered institution could accomplish this reduction of incentive-based compensation by reducing the amount of unvested deferred incentive-based compensation (forfeiture), by reducing the amount of incentive-based compensation not yet awarded for a performance period that has begun (downward adjustment), or through a combination of both forfeiture and downward adjustment. The Agencies have found that the possibility of a reduction in incentive-based compensation in the circumstances identified in section \_\_\_\_\_.7(b)(2) of the rule is needed in order to properly align financial reward with risk-taking by senior executive officers and significant risk-takers at Level 1 and Level 2 covered institutions.

The possibility of forfeiture and downward adjustment under the proposed rule would play an important role not only in better aligning incentive-based compensation payouts with long-run risk outcomes at the covered institution but also in reducing incentives for senior executive officers and significant risk-takers to take inappropriate risk that could lead to material financial loss at the covered institution. The proposed rule would also require covered institutions, through policies and procedures,<sup>188</sup> to formalize the governance and review processes surrounding such decision-making, and to document the decisions made.

While forfeiture and downward adjustment reviews would be required components of incentive-based compensation arrangements for senior executive officers and significant risk-takers at Level 1 and Level 2 covered institutions under the proposed rule, and are one way for covered institutions to take into account information about performance that becomes known over time, such reviews would not alone be sufficient to appropriately balance risk and reward, as would be required under section \_\_\_\_\_.4(c)(1). Incentive-based compensation arrangements for those

<sup>186</sup> Bachelder, Joseph E., "What Has Happened To Stock Options," *New York Law Journal* (September 19, 2014).

<sup>187</sup> Rajgopal and Shvelin, "Empirical Evidence on the Relation between Stock Option Compensation and Risk-Taking," 33 *Journal of Accounting and Economics* 145 (2002); Bettis, Bizjak, and Lemmon, "Exercise Behavior, Valuation, and the Incentive Effects of Employee Stock Options," 76 *Journal of Financial Economics* 445; ISS Compensation FAQs.

<sup>188</sup> See sections \_\_\_\_\_.11(b) and \_\_\_\_\_.11(c).

covered persons would also be required to comply with the specific requirements of sections \_\_\_\_\_.4(d), \_\_\_\_\_.7(a), \_\_\_\_\_.7(c) and \_\_\_\_\_.8. As discussed above, to achieve balance between risk and reward, covered institutions should examine incentive-based compensation arrangements as a whole, and consider including provisions for risk adjustments before the award is made, and for adjustments resulting from forfeiture and downward adjustment review during the deferral period.

#### *§ \_\_\_\_\_.7(b)(1) Compensation at Risk*

Under the proposed rule, a Level 1 or Level 2 covered institution would be required to place at risk of forfeiture 100 percent of a senior executive officer's or significant risk-taker's deferred and unvested incentive-based compensation, including unvested deferred amounts awarded under long-term incentive plans. Additionally, a Level 1 or Level 2 covered institution would be required to place at risk of downward adjustment all of a senior executive officer's or significant risk-taker's incentive-based compensation that has not yet been awarded, but that could be awarded for a performance period that is underway and not yet completed.

Forfeiture and downward adjustment give covered institutions an appropriate set of tools through which consequences may be imposed on individual risk-takers when inappropriate risk-taking or misconduct, such as the events identified in section \_\_\_\_\_.7(b)(2), occur or are identified. They also help ensure that a sufficient amount of compensation is at risk. Certain risk management failures and misconduct can take years to manifest, and forfeiture and downward adjustment reviews provide covered institutions an opportunity to adjust the ultimate amount of incentive-based compensation that vests based on information about risk-taking or misconduct that comes to light after the performance period. A senior executive officer or significant risk-taker should not be rewarded for inappropriate risk-taking or misconduct, regardless of when the covered institution learns of it.

Some evidence of inappropriate risk taking, risk management failures and misconduct may not be immediately apparent to the covered institution. To provide a strong disincentive for senior executive officers and significant risk-takers to engage in such conduct, which may lead to material financial loss to the covered institution, the Agencies are proposing to require that all unvested deferred incentive-based compensation

and all incentive-based compensation eligible to be awarded for the performance period in which the covered institution becomes aware of the conduct be available for forfeiture and downward adjustment under the forfeiture and downward adjustment review. A covered institution would be required to consider all incentive-based compensation available, in the form of both unvested deferred incentive-based compensation and yet-to-be awarded incentive-based compensation, when considering forfeiture or downward adjustments, even if the incentive-based compensation does not specifically relate to the performance in the period in which the relevant event occurred.

For example, a significant risk-taker of a Level 1 covered institution might engage in misconduct in June 2025, but the Level 1 covered institution might not become aware of the misconduct until September 2028. The Level 1 covered institution would be required to consider downward adjustment of any amounts available under any of the significant risk-taker's incentive-based compensation plans with performance periods that are still in progress as of September 2028 (for example, an annual plan with a performance period that runs from January 1, 2028, to December 31, 2028, or a long-term incentive plan with a performance period that runs from January 1, 2027, to December 31, 2030). The Level 1 covered institution would also be required to consider forfeiture of any amounts that are deferred, but not yet vested, as of September 2028 (for example, amounts that were awarded for a performance period that ran from January 1, 2026, to December 31, 2026, and that have been deferred and do not vest until December 31, 2030). For an additional example of how these requirements would work in practice, please see Appendix A of this **SUPPLEMENTARY INFORMATION** section.

#### *§ \_\_\_\_\_.7(b)(2) Events Triggering Forfeiture and Downward Adjustment Review*

Section \_\_\_\_\_.7(b) of the proposed rule would require a Level 1 or Level 2 covered institution to conduct a forfeiture and downward adjustment review based on certain identified adverse outcomes.

Under section \_\_\_\_\_.7(b), events <sup>189</sup> that would be required to trigger a

<sup>189</sup> The underlying, or contractual, forfeiture language used by institutions need not be identical to the triggers enumerated in this section, provided the covered institution's triggers capture the full set of outcomes outlined in section 7(b)(2) of the rule. For example, a trigger at a covered institution that read "if an employee improperly or with gross negligence fails to identify, raise, or assess, in a

forfeiture and downward adjustment review include: (1) Poor financial performance attributable to a significant deviation from the risk parameters set forth in the covered institution's policies and procedures; (2) inappropriate risk-taking, regardless of the impact on financial performance; (3) material risk management or control failures; and (4) non-compliance with statutory, regulatory, or supervisory standards that results in: Enforcement or legal action against the covered institution brought by a Federal or state regulator or agency; or a requirement that the covered institution report a restatement of a financial statement to correct a material error. Covered institutions would be permitted to define additional triggers based on conduct or poor performance. Generally, in the Agencies' supervisory experience as earlier described, the triggers are consistent with current practice at the largest financial institutions, although many covered institutions have triggers that are more granular in nature than those proposed and cover a wider set of adverse outcomes. The proposed enumerated adverse outcomes are a set of minimum standards.

As discussed later in this **SUPPLEMENTARY INFORMATION** section, covered institutions would be required to provide for the independent monitoring of all events related to forfeiture and downward adjustment.<sup>190</sup> When such monitoring, or other risk surveillance activity, reveals the occurrence of events triggering forfeiture and downward adjustment reviews, Level 1 and Level 2 covered institutions would be required to conduct those reviews in accordance with section \_\_\_\_\_.7(b). Covered institutions may choose to coordinate the monitoring for triggering events under section \_\_\_\_\_.9(c)(2) and the forfeiture and downward adjustment reviews with broader risk surveillance activities. Such coordinated reviews could take place on a schedule identified by the covered institution. Schedules may vary among covered institutions, but they should occur often enough to appropriately monitor risks and events related to forfeiture and downward adjustment. Larger covered institutions with more complex operations are likely to need to conduct more frequent

timely manner and as reasonably expected, risks and/or concerns with respect to risks material to the institution or its business activities," would be considered consistent with the minimum parameters set forth in the trigger identified in section 7(b)(2)(ii) of the rule.

<sup>190</sup> See section \_\_\_\_\_.9(c)(2).

reviews to ensure effective risk management.

Poor financial performance can indicate that inappropriate risk-taking has occurred at a covered institution. The Agencies recognize that not all inappropriate risk-taking does, in fact, lead to poor financial performance, but given the risks that are posed to the covered institutions by poorly designed incentive-based compensation programs and the statutory mandate of section 956, it is appropriate to prohibit incentive-based compensation arrangements that reward such inappropriate risk-taking. Therefore, if evidence of past inappropriate risk-taking becomes known, the proposed rule would require a Level 1 or Level 2 covered institution to perform a forfeiture and downward adjustment review in order to assess whether the relevant senior executive officer's or significant risk-taker's incentive-based compensation should be affected by the inappropriate risk-taking.

Similarly, material risk management or control failures may allow for inappropriate risk-taking that may lead to material financial loss at a covered institution. Because the role of senior executive officers and significant risk-takers, including those in risk management and other control functions whose role is to identify, measure, monitor, and control risk, the material failure by covered persons to properly perform their responsibilities can be especially likely to put an institution at risk. Thus, if evidence of past material risk management or control failures becomes known, the proposed rule would require a Level 1 or Level 2 covered institution to perform a forfeiture and downward adjustment review, to assess whether a senior executive officer or significant risk-taker's incentive-based compensation should be affected by the risk management or control failure. Examples of risk management or control failures would include failing to properly document or report a transaction or failing to properly identify and control the risks that are associated with a transaction. In each case, the risk management or control failure, if material, could allow for inappropriate risk-taking at a covered institution that could lead to material financial loss.

Finally, a covered institution's non-compliance with statutory, regulatory, or supervisory standards may also reflect inappropriate risk-taking that may lead to material financial loss at a covered institution. The proposed rule would require a forfeiture and downward adjustment review whenever

any such non-compliance (1) results in an enforcement or legal action against the covered institution brought by a Federal or state regulator or agency; or (2) requires the covered institution to restate a financial statement to correct a material error. The Federal Banking Agencies have found that it is appropriate for a covered institution to conduct a forfeiture and downward adjustment review under these circumstances because in many cases a statutory, regulatory, or supervisory standard may have been put in place in order to prevent a covered person from taking an inappropriate risk. In addition, non-compliance with a statute, regulation, or supervisory standard may also give rise to inappropriate compliance risk for a covered institution. A forfeiture and downward adjustment review would allow the institution to assess whether this type of non-compliance should affect a senior executive officer or significant risk-taker's incentive-based compensation.

*§ \_\_\_\_\_.7(b)(3) Senior Executive Officers and Significant Risk-Takers Affected by Forfeiture and Downward Adjustment*

A forfeiture and downward adjustment review would be required to consider forfeiture and downward adjustment of incentive-based compensation for a senior executive officer and significant risk-taker with direct responsibility or responsibility due to the senior executive officer or significant risk-taker's role or position in the covered institution's organizational structure, for the events that would trigger a forfeiture and downward adjustment review as described in section \_\_\_\_\_.7(b)(2). Covered institutions should consider not only senior executive officers or significant risk-takers who are directly responsible for an event that triggers a forfeiture or downward adjustment review, but also those senior executive officers or significant risk-takers whose roles and responsibilities include areas where failures or poor performance contributed to, or failed to prevent, a triggering event. This requirement would discourage senior executive officers and significant risk-takers who can influence outcomes from failing to report or prevent inappropriate risk. A covered institution conducting a forfeiture and downward adjustment review may also consider forfeiture for other covered persons at its discretion.

*§ \_\_\_\_\_.7(b)(4) Determining Forfeiture and Downward Adjustment Amounts*

The proposed rule sets out factors that Level 1 and Level 2 covered institutions must consider, at a minimum, when

making a determination to reduce incentive-based compensation as a result of a forfeiture or downward adjustment review. A Level 1 or Level 2 covered institution would be responsible for determining how much of a reduction in incentive-based compensation is warranted, consistent with the policies and procedures it establishes under § \_\_\_\_\_.11(b), and should be able to support its decisions that such an adjustment was appropriate if requested by its appropriate Federal regulator. In reducing the amount of incentive-based compensation, covered institutions may reduce the dollar amount of deferred cash or cash to be awarded, may lower the amount of equity-like instruments that have been deferred or were eligible to be awarded, or some combination thereof. A reduction in the value of equity-like instruments due to market fluctuations would not be considered a reduction for purposes of this review.

The proposed minimum factors that would be required to be considered when determining the amount of incentive-based compensation to be reduced are: (1) The intent of the senior executive officer or significant risk-taker to operate outside the risk governance framework approved by the covered institution's board of directors or to depart from the covered institution's policies and procedures; (2) the senior executive officer's or significant risk-taker's level of participation in, awareness of, and responsibility for, the events triggering the review; (3) any actions the senior executive officer or significant risk-taker took or could have taken to prevent the events triggering the review; (4) the financial and reputational impact of the events<sup>191</sup> triggering the review as set forth in section \_\_\_\_\_.7(b)(2) on the covered institution, the line or sub-line of business, and individuals involved, as applicable, including the magnitude of any financial loss and the cost of known or potential subsequent fines, settlements, and litigation; (5) the causes of the events triggering the review, including any decision-making

<sup>191</sup> Reputational impact or harm related to the actions of covered individuals refers to a potential weakening of confidence in an institution as evidenced by negative reactions from customers, shareholders, bondholders and other creditors, consumer and community groups, the press, or the general public. Reputational impact is a factor currently considered by some institutions in their existing forfeiture policies. See, e.g., Wells Fargo & Company 2016 Proxy Statement, page 47, available at <https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/annual-reports/2016-proxy-statement.pdf>; and Citigroup 2016 Proxy Statement, page 74, available at <http://www.citigroup.com/citi/investor/quarterly/2016/ar16cp.pdf?ieNocache=611>.

by other individuals; and (6) any other relevant information, including past behavior and risk outcomes linked to past behavior attributable to the senior executive officer or significant risk-taker.

The considerations identified constitute a minimum set of parameters that would be utilized for exercising the discretion permissible under the proposed rule while still holding senior executive officers and significant risk-takers accountable for inappropriate risk-taking and other behavior that could encourage inappropriate risk-taking that could lead to risk of material financial loss at covered institutions. For example, a covered institution might identify a pattern of misconduct stemming from activities begun three years before the review that ultimately leads to an enforcement action and reputational damage to the covered institution. A review of facts and circumstances, including consideration of the minimum review parameters set forth in the proposed rule, could reveal that one individual knowingly removed transaction identifiers in order to facilitate a trade or trades with a counterparty on whom regulators had applied Bank Secrecy Act or Anti-Money Laundering sanctions. Several of the senior executive officer's or significant risk-taker's peers might have been aware of this pattern of behavior but did not report it to their managers. Under the proposed rule, the individual who knowingly removed the identifiers would, in most cases, be subject to a greater reduction in incentive-based compensation than those who were aware of but not participants in the misconduct. However, those peers that were aware of the misconduct, managers supervising the covered person directly involved in the misconduct, and control staff who should have detected but failed to detect the behavior would be considered for a reduction, depending on their role in the organization, and assuming the peers are now senior executive officers or significant risk-takers.

The Agencies do not intend for these proposed factors to be exhaustive and covered institutions should consider additional factors where appropriate. In addition, covered institutions generally should impact incentive-based compensation as a result of forfeiture and downward adjustment reviews to reflect the severity of the event that triggered the review and the level of an individual's involvement. Covered institutions should be able to demonstrate to the appropriate Federal regulator that the impact on incentive-based compensation was appropriate

given the particular set of facts and circumstances.

7.20. The Agencies invite comment on the forfeiture and downward adjustment requirements of the proposed rule.

7.21. Should the rule limit the events that require a Level 1 or Level 2 covered institution to consider forfeiture and downward adjustment to adverse outcomes that occurred within a certain time period? If so, why and what would be an appropriate time period? For example, should the events triggering forfeiture and downward adjustment reviews be limited to those events that occurred within the previous seven years?

7.22. Should the rule limit forfeiture and downward adjustment reviews to reducing only the incentive-based compensation that is related to the performance period in which the triggering event(s) occurred? Why or why not? Is it appropriate to subject unvested or unawarded incentive-based compensation to the risk of forfeiture or downward adjustment, respectively, if the incentive-based compensation does not specifically relate to the performance in the period in which the relevant event occurred or manifested? Why or why not?

7.23. Should the rule place all unvested deferred incentive-based compensation, including amounts voluntarily deferred by Level 1 and Level 2 covered institutions or senior executive officers or significant risk-takers, at risk of forfeiture? Should only that unvested deferred incentive-based compensation that is required to be deferred under section \_\_\_\_\_.7(a) be at risk of forfeiture? Why or why not?

7.24. Are the events triggering a review that are identified in section \_\_\_\_\_.7(b)(2) comprehensive and appropriate? If not, why not? Should the Agencies add "repeated supervisory actions" as a forfeiture or downward adjustment review trigger and why? Should the Agencies add "final enforcement or legal action" instead of the proposed "enforcement or legal action" and why?

7.25. Is the list of factors that a Level 1 or Level 2 covered institution must consider, at a minimum, in determining the amount of incentive-based compensation to be forfeited or downward adjusted by a covered institution appropriate? If not, why not? Are any of the factors proposed unnecessary? Should additional factors be included?

7.26. Are the proposed parameters for forfeiture and downward adjustment review sufficient to provide an appropriate governance framework for making forfeiture decisions while still

permitting adequate discretion for covered institutions to take into account specific facts and circumstances when making determinations related to a wide variety of possible outcomes? Why or why not?

7.27. Should the rule include a presumption of some amount of forfeiture for particularly severe adverse outcomes and why? If so, what should be the amount and what would those outcomes be?

7.28. What protections should covered institutions employ when making forfeiture and downward adjustment determinations?

7.29. In order to determine when forfeiture and downward adjustment should occur, should Level 1 and Level 2 covered institutions be required to establish a formal process that both looks for the occurrence of trigger events and fulfills the requirements of the forfeiture and downward adjustment reviews under the proposed rule? If not, why not? Should covered institutions be required as part of the forfeiture and downward adjustment review process to establish formal review committees including representatives of control functions and a specific timetable for such reviews? Should the answer to this question depend on the size of the institution considered?

#### § \_\_\_\_\_.7(c) Clawback

As used in the proposed rule, the term "clawback" means a mechanism by which a covered institution can recover vested incentive-based compensation from a covered person. The proposed rule would require Level 1 and Level 2 covered institutions to include clawback provisions in incentive-based compensation arrangements for senior executive officers and significant risk-takers that, at a minimum, would allow for the recovery of up to 100 percent of vested incentive-based compensation from a current or former senior executive officer or significant risk-taker for seven years following the date on which such compensation vests. Under section \_\_\_\_\_.7(c) of the proposed rule, all vested incentive-based compensation for senior executive officers and significant risk-takers, whether it had been deferred before vesting or paid out immediately upon award, would be required to be subject to clawback for a period of no less than seven years following the date on which such incentive-based compensation vests. Clawback would be exercised under an identified set of circumstances. These circumstances include situations where a senior executive officer or significant risk-taker engaged in: (1) Misconduct that resulted in significant financial or

reputational harm<sup>192</sup> to the covered institution; (2) fraud; or (3) intentional misrepresentation of information used to determine the senior executive officer's or significant risk-taker's incentive-based compensation.<sup>193</sup> The clawback provisions would apply to all vested incentive-based compensation, whether that incentive-based compensation had been deferred or paid out immediately when awarded. If a Level 1 or Level 2 covered institution discovers that a senior executive officer or significant risk-taker was involved in one of the triggering circumstances during a past performance period, the institution would potentially be able to recover from that senior executive officer or significant risk-taker incentive-based compensation that was awarded for that performance period and has already vested. A covered institution could require clawback irrespective of whether the senior executive officer or significant risk-taker was currently employed by the covered institution.

The proposed set of triggering circumstances would constitute a minimum set of outcomes for which covered institutions would be required to consider recovery of vested incentive-based compensation. Covered institutions would retain flexibility to include other circumstances or outcomes that would trigger additional use of such provisions.

In addition, while the proposed rule would require the inclusion of clawback provisions in incentive-based compensation arrangements, the proposed rule would not require that Level 1 or Level 2 covered institutions exercise the clawback provision, and the proposed rule does not prescribe the process that covered institutions should use to recover vested incentive-based compensation. Facts, circumstances, and all relevant information should determine whether and to what extent it is reasonable for a Level 1 or Level 2 covered institution to seek recovery of any or all vested incentive-based compensation.

The Agencies recognize that clawback provisions may provide another

effective tool for Level 1 and Level 2 covered institutions to deter inappropriate risk-taking because it lengthens the time horizons of incentive-based compensation.<sup>194</sup> The Agencies are proposing that vested incentive-based compensation be subject to clawback for up to seven years. The Agencies are proposing seven years as the length of the review period because it is slightly longer than the length of the average business cycle in the United States and is close to the lower end of the range of average credit cycles.<sup>195</sup> Also, the Agencies observe that seven years is consistent with some international standards.<sup>196</sup>

By proposing seven years as the length of the review period, the Agencies intend to encourage institutions to fairly compensate covered persons and incentivize appropriate risk-taking, while also recognizing that recovering amounts that have already been paid is more difficult than reducing compensation that has not yet been paid. The Agencies are concerned that a clawback period that is too short or one that is too long, or even infinite, could result in the covered person ignoring or discounting the effect of the clawback period and accordingly, could be less effective in balancing risk-taking. Additionally, a very long or even infinite clawback period may be difficult to implement.

While the Agencies did not propose a clawback requirement in the 2011 Proposed Rule, mandatory clawback provisions are not a new concept. Commenters to the 2011 Proposed Rule advocated that the Agencies adopt measures to allow shareholders (and others) to recover incentive-based compensation already paid to covered persons. As discussed above, clawback provisions are now increasingly common at the largest financial institutions. The largest (and mostly

publicly traded) covered institutions are already subject to a number of overlapping clawback regimes as a result of statutory requirements.<sup>197</sup> Over the past several years, many financial institutions have further refined such mechanisms.<sup>198</sup> Most often, clawbacks allow banking institutions to recoup incentive-based compensation in cases of financial restatement, misconduct, or poor financial outcomes. A number of covered institutions have gone beyond these minimum parameters to include situations where poor risk management has led to financial or reputational damage to the firm.<sup>199</sup> The Agencies were cognizant of these developments in proposing the clawback provision in section \_\_\_\_\_.7(c).

The Agencies propose the three triggers referenced above for several reasons. First, a number of the specified triggers reflect better practice at covered institutions today.<sup>200</sup> The factors triggering clawback are based on existing clawback requirements that appear in some covered institutions' incentive-based compensation arrangements. Second, while many of the clawback regulatory regimes currently in place focus only on accounting restatements or material misstatements of financial results, the proposed triggers focus more broadly on risk-related outcomes that are more likely to contribute meaningfully to the balance of incentive-based compensation arrangements. Third, the proposed rule would extend coverage of

<sup>197</sup> See, e.g., section 304 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7243; section 111 of the Emergency Economic Stabilization Act of 2008, 12 U.S.C. 5221; section 210(s) of the Dodd-Frank Act, 12 U.S.C. 5390(s); section 954 of the Dodd-Frank Act, 15 U.S.C. 78j-4(b).

<sup>198</sup> See, e.g., PricewaterhouseCoopers, "Executive Compensation: Clawbacks, 2014 Proxy Disclosure Study" (January 2015), available at <http://www.pwc.com/us/en/hr-management/publications/assets/pwc-executive-compensation-clawbacks-2014.pdf>; Compensation Advisory Partners, "2014 Proxy Season: Changing Practices in Executive Compensation: Clawback, Hedging, and Pledging Policies" (December 17, 2014), available at <http://www.cpartners.com/uploads/news/id204/cpartners.com-capflash-issue62.pdf>.

<sup>199</sup> See, e.g., JPMorgan Chase & Company 2015 Proxy Statement, page 56, available at <http://files.shareholder.com/downloads/ONE/1425504/805x0x820065/4c79f471-36d9-47d4-a0b3-7886b0914c92/JPMC-2015-ProxyStatement1.pdf> (where vested compensation is subject to clawback if, among other things, "the employee engaged in conduct detrimental to the Firm that causes material financial or reputational harm to the Firm").

<sup>200</sup> See, e.g., notes 198 and 199. See also Dawn Kopecki, "JP Morgan's Drew Forfeits 2 Years' Pay as Managers Ousted," *Bloomberg Business* (July 13, 2012); Dolia Estevez, "Pay Slash to Citigroup's Top Mexican Executive Called 'Humiliating,'" *Forbes* (March 13, 2014); Eyk Henning, "Deutsche Bank Cuts Co-CEOs' Compensation," *Wall Street Journal* (March 20, 2015).

<sup>192</sup> As described in the above note 191, reputational impact or harm of an event related to the actions of covered individuals refers to a potential weakening of confidence in an institution as evidenced by negative reactions from customers, shareholders, bondholders and other creditors, consumer and community groups, the press, or the general public.

<sup>193</sup> As with other provisions in this proposed rule, the clawback requirement would not apply to incentive-based compensation plans and arrangements in place at the time the proposed rule is final because those plans and arrangements would be grandfathered.

<sup>194</sup> See, e.g., Faulkender, Kadyrzhanova, Prabhala, and Senbet, "Executive Compensation: An Overview of Research on Corporate Practices and Proposed Reforms," 22 *Journal of Applied Corporate Finance* 107 (2010) (arguing that clawbacks guard against compensating executives for luck rather than long-term performance); Babenko, Bennett, Bizjak and Coles, "Clawback Provisions," working paper (2015) available at <https://wp Carey.asu.edu/sites/default/files/uploads/departments-finance/clawbackprovisions.pdf> (finding that the use of clawback provisions are associated with lower institution risk); Chen, Greene, and Owers, "The Costs and Benefits of Clawback Provisions in CEO Compensation," 4 *Review of Corporate Finance Studies* 108 (2015) (finding that the use of clawback provisions are associated with higher reporting quality).

<sup>195</sup> See *supra* note 154.

<sup>196</sup> See, e.g., PRA, "Policy Statement PS7/14: Clawback" (July 2014), available at <http://www.bankofengland.co.uk/pradocuments/publications/ps/2014/ps714.pdf>.

clawback mechanisms to include additional senior executive officers or significant risk-takers whose inappropriate risk-taking may not result in an accounting restatement, but would inflict harm on the covered institution nonetheless.

This provision would go beyond, but not conflict with, clawback provisions in other areas of law.<sup>201</sup> For example, covered institutions that issue securities also may be subject to clawback requirements pursuant to statutes administered by the SEC:

○ Section 304 of the Sarbanes-Oxley Act of 2002<sup>202</sup> provides that if an issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer, as a result of misconduct, with any financial reporting requirements under the securities laws, the CEO and chief financial officer of the issuer shall reimburse the issuer for (i) any bonus or other incentive-based or equity-based compensation received by that person from the issuer during the 12-month period following the first public issuance or filing with the SEC (whichever first occurs) of the financial document embodying such financial reporting requirement and (ii) any profits realized from the sale of securities of the issuer during that 12-month period.

○ Section 954 of the Dodd-Frank Act added Section 10D to the Securities Exchange Act of 1934.<sup>203</sup> Specifically, Section 10D(a) of the Securities Exchange Act requires the SEC to adopt rules directing the national securities exchanges<sup>204</sup> and the national securities associations<sup>205</sup> to prohibit the listing of any security of an issuer that is not in

compliance with the requirements of Section 10D(b). Section 10D(b) requires the SEC to adopt rules directing the exchanges to establish listing standards to require each issuer to develop and implement a policy providing: (1) For the disclosure of the issuer's policy on incentive-based compensation that is based on financial information required to be reported under the securities laws; and (2) that, in the event that the issuer is required to prepare an accounting restatement due to the issuer's material noncompliance with any financial reporting requirement under the securities laws, the issuer will recover from any of the issuer's current or former executive officers who received incentive-based compensation (including stock options awarded as compensation) during the three-year period preceding the date the issuer is required to prepare the accounting restatement, based on the erroneous data, in excess of what would have been paid to the executive officer under the accounting restatement.

The SEC has proposed rules to implement the requirements of Exchange Act Section 10D.<sup>206</sup>

7.30. The Agencies invite comment on the clawback requirements of the proposed rule.

7.31. Is a clawback requirement appropriate in achieving the goals of section 956? If not, why not?

7.32. Is the seven-year period appropriate? Why or why not?

7.33. Are there state contract or employment law requirements that would conflict with this proposed requirement? Are there challenges that would be posed by overlapping Federal clawback regimes? Why or why not?

7.34. Do the triggers discussed above effectively achieve the goals of section 956? Should the triggers be based on those contained in section 954 of the Dodd-Frank Act?

7.35. Should the Agencies provide additional guidance on the types of behavior that would constitute misconduct for purposes of section \_\_\_\_\_.7(c)(1)?

7.36. Should the rule include a presumption of some amount of clawback for particularly severe adverse outcomes? Why or why not? If so, what should be the amount and what would those outcomes be?

#### § \_\_\_\_\_.8 Additional Prohibitions for Level 1 and Level 2 Covered Institutions

Section \_\_\_\_\_.8 of the proposed rule would establish additional prohibitions

for Level 1 and Level 2 covered institutions to address practices that, in the view of the Agencies, could encourage inappropriate risks that could lead to material financial loss at covered institutions. The Agencies' views are based in part on supervisory experiences in reviewing and supervising incentive-based compensation at some covered institutions, as described earlier in this Supplemental Information section. Under the proposed rule, an incentive-based compensation arrangement at a Level 1 or Level 2 covered institution would be considered to appropriately balance risk and reward, as required by section \_\_\_\_\_.4(c)(1) of the proposed rule, only if the covered institution complies with the prohibitions of section \_\_\_\_\_.8.

#### § \_\_\_\_\_.8(a) Hedging

Section \_\_\_\_\_.8(a) of the proposed rule would prohibit Level 1 and Level 2 covered institutions from purchasing hedging instruments or similar instruments on behalf of covered persons to hedge or offset any decrease in the value of the covered person's incentive-based compensation. This prohibition would apply to all covered persons at a Level 1 or Level 2 covered institution, not just senior executive officers and significant risk-takers. Personal hedging strategies may undermine the effect of risk-balancing mechanisms such as deferral, downward adjustment and forfeiture, or may otherwise negatively affect the goals of these risk-balancing mechanisms and their overall efficacy in inhibiting inappropriate risk-taking.<sup>207</sup> For example, a financial instrument, such as a derivative security that increases in value as the price of a covered institution's equity decreases would offset the intended balancing effect of awarding incentive-based compensation in the form of equity, the value of which is linked to the performance of the covered institution.

Similarly, a hedging arrangement with a third party, under which the third party would make direct or indirect payments to a covered person that are linked to or commensurate with the amounts by which a covered person's incentive-based compensation is reduced by forfeiture, would protect the covered person against declines in the value of incentive-based compensation.

<sup>207</sup> This prohibition would not limit a covered institutions ability to hedge its own exposure in deferred compensation obligations, which the Board, the OCC, and the FDIC continue to view as prudent practice. (see, e.g., Federal Reserve SR Letter 04-19 (Dec. 7, 2004); OCC Bulletin 2004-56 (Dec. 7, 2004); FDIC FIL-127-2004 (Dec. 7, 2004); OCC Interpretive Letter No. 878 (Dec. 22, 1999).

<sup>201</sup> See, e.g., section 304 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7243; section 111 of the Emergency Economic Stabilization Act of 2008, 12 U.S.C. 5221; section 210(s) of the Dodd-Frank Act, 12 U.S.C. 5390(s); section 954 of the Dodd-Frank Act, 15 U.S.C. 78j-4(b).

<sup>202</sup> 15 U.S.C. 7243.

<sup>203</sup> 15 U.S.C. 78a et seq.

<sup>204</sup> A "national securities exchange" is an exchange registered as such under section 6 of the Exchange Act (15 U.S.C. 78f). There are currently 18 exchanges registered under Section 6(a) of the Exchange Act: BATS Exchange, BATS Y-Exchange, BOX Options Exchange, C2 Options Exchange, Chicago Board Options Exchange, Chicago Stock Exchange, EDGA Exchange, EDGX Exchange, International Securities Exchange ("ISE"), ISE Gemini, Miami International Securities Exchange, NASDAQ OMX BX, NASDAQ OMX PHLX, The NASDAQ Stock Market, National Stock Exchange, New York Stock Exchange ("NYSE"), NYSE Arca and NYSE MKT.

<sup>205</sup> A "national securities association" is an association of brokers and dealers registered as such under Section 15A of the Exchange Act (15 U.S.C. 78o-3). The Financial Industry Regulatory Authority ("FINRA") is the only association registered with the SEC under section 15A(a) of the Exchange Act, but FINRA does not list securities.

<sup>206</sup> Listing Standards for Recovery of Erroneously Awarded Compensation, Release No. 33-9861 (July 1, 2015), 80 FR 41144 (July 14, 2015).

In order for incentive-based compensation to provide the appropriate incentive effects, covered persons should not be shielded from exposure to the negative financial impact of taking inappropriate risks or other aspects of their performance at the covered institution.

In the 2011 Proposed Rule, the Agencies stated that they were aware that covered persons who received incentive-based compensation in the form of equity might wish to use personal hedging strategies as a way to assure the value of deferred equity compensation.<sup>208</sup> The Agencies expressed concern that such hedging during deferral periods could diminish the alignment between risk and financial rewards that deferral arrangements might otherwise achieve.<sup>209</sup> After considering supervisory experiences in reviewing incentive-based compensation at some covered institutions and the purposes of section 956 and related provisions of the Dodd-Frank Act, the Agencies are proposing a prohibition on covered institutions purchasing hedging and similar instruments on behalf of a covered person as a practical approach to eliminate the possibility that hedging during deferral periods could diminish the alignment between risk and financial rewards that deferral arrangements might otherwise achieve.

8.1. The Agencies invite comment on whether this restriction on Level 1 and Level 2 covered institutions prohibiting the purchase of a hedging instrument or similar instrument on behalf of covered persons is appropriate to implement section 956 of the Dodd-Frank Act.

8.2. Are there additional requirements that should be imposed on covered institutions with respect to hedging of the exposure of covered persons under incentive-based compensation arrangements?

8.3. Should the proposed rule include a prohibition on the purchase of a hedging instrument or similar instrument on behalf of covered persons at Level 3 institutions?

#### *§ \_\_\_\_ .8(b) Maximum Incentive-Based Compensation Opportunity*

Section \_\_\_\_ .8(b) of the proposed rule would limit the amount by which the actual incentive-based compensation awarded to a senior executive officer or significant risk-taker could exceed the target amounts for performance measure goals established at the beginning of the performance period. It is the

understanding of the Agencies that, under current practice, covered institutions generally establish performance measure goals for their covered persons at the beginning of, or early in, a performance period. At that time, under some incentive-based compensation plans, those covered institutions establish target amounts of incentive-based compensation that the covered persons can expect to be awarded if they meet the established performance measure goals. Some covered institutions also set out the additional amounts of incentive-based compensation, in excess of the target amounts, that covered persons can expect to be awarded if they or the covered institution exceed the performance measure goals. Incentive-based compensation plans commonly set out maximum awards of 150 to 200 percent of the pre-set target amounts.<sup>210</sup>

The proposed rule would prohibit a Level 1 or Level 2 covered institution from awarding incentive-based compensation to a senior executive officer in excess of 125 percent of the target amount for that incentive-based compensation. For a significant risk-taker the limit would be 150 percent of the target amount for that incentive-based compensation. This limitation would apply on a plan-by-plan basis, and, therefore, would apply to long-term incentive plans separately from other incentive-based compensation plans.

For example, a Level 1 covered institution might provide an incentive-based compensation plan for its senior executive officers that links the amount awarded to a senior executive officer to the covered institution's four-year average return on assets (ROA). The plan could establish a target award amount of \$100,000 and a target four-year average ROA of 75 basis points. That is, if the covered institution's four-year average ROA was 75 basis points, a senior executive officer would receive \$100,000. The plan could also provide that senior executive officers would earn nothing (zero percent of target) under the plan if ROA was less than 50 basis points; \$60,000 (60 percent of target) if ROA was 65 basis points; and \$125,000 (125 percent of target) if ROA was 100 basis points. Under the proposed rule, the plan would not be permitted to provide, for example, \$130,000 (130 percent of target) if ROA was 100 basis points or \$150,000 (150

percent of target) if ROA was 110 basis points.

The Agencies are proposing these limits, in part, because they are consistent with the current industry practice at large banking organizations. Moreover, high levels of upside leverage (e.g., 200 percent to 300 percent above the target amount) could lead to senior executive officers and significant risk-takers taking inappropriate risks to maximize the opportunity to double or triple their incentive-based compensation. Recognizing the potential for inappropriate risk-taking with such high levels of leverage, the Federal Banking Agencies have worked with large banking organizations to reduce leverage levels to a range of 125 percent to 150 percent. Such a range continues to provide for flexibility in the design and operation of incentive-based compensation arrangements in covered institutions while it addresses the potential for inappropriate risk-taking where leverage opportunities are large or uncapped. For a full example of how these requirements would work in practice, please see Appendix A of this Supplementary Information section.

The proposed rule would set different maximums for senior executive officers and for significant risk-takers because senior executive officers and significant risk-takers have the potential to expose covered institutions to different types and levels of risk, and may be motivated by different types and amounts of incentive-based compensation. The Agencies intend the different limitations to reflect the differences between the risks posed by senior executive officers and significant risk-takers.

The Agencies emphasize that the proposed limits on a covered employee's maximum incentive-based compensation opportunity would not equate to a ceiling on overall incentive-based compensation. Such limits would represent only a constraint on the percentage by which incentive-based compensation could exceed the target amount, and is aimed at prohibiting the use of particular features of incentive-based compensation arrangements which can contribute to inappropriate risk-taking.

8.4. The Agencies invite comment on whether the proposed rule should establish different limitations for senior executive officers and significant risk-takers, or whether the proposed rule should impose the same percentage limitation on senior executive officers and significant risk-takers.

8.5. The Agencies also seek comment on whether setting a limit on the amount that compensation can grow from the time the target is established

<sup>208</sup> See 76 FR at 21183.

<sup>209</sup> The Agencies note that one commenter to the 2011 Proposed Rule supported limits on hedging.

<sup>210</sup> See, e.g., Arthur Gallagher & Co., "Study of 2013 Short- and Long-Term Incentive Design Criterion Among Top 200 S&P 500 Companies" (December 5, 2014), available at <http://www.ajg.com/media/1420659/study-of-2013-short-and-long-term-incentive-design-criterion-among-top-200.pdf>.

until an award occurs would achieve the goals of section 956.

8.6. The Agencies invite comment on the appropriateness of the limitation, *i.e.*, 125 percent and 150 percent for senior executive officers and significant risk-takers, respectively. Should the limitations be set higher or lower and, if so, why?

8.7. Should the proposed rule apply this limitation on maximum incentive-based compensation opportunity to Level 3 institutions?

#### *§ \_\_\_\_ .8(c) Relative Performance Measures*

Under section \_\_\_\_ .8(c) of the proposed rule, a Level 1 or Level 2 covered institution would be prohibited from using incentive-based compensation performance measures based solely on industry peer performance comparisons. This prohibition would apply to incentive-based compensation arrangements for all covered persons at a Level 1 or Level 2 covered institution, not just senior executive officers and significant risk-takers.

As discussed above, covered institutions generally establish performance measures for covered persons at the beginning of, or early in, a performance period. For these types of plans, the performance measures (sometimes known as performance metrics) are the basis upon which a covered institution determines the related amounts of incentive-based compensation to be awarded to covered persons. These performance measures can be absolute, meaning they are based on the performance of the covered person or the covered institution without reference to the performance of other covered persons or covered institutions. In contrast, a relative performance measure is a performance measure that compares a covered institution's performance to that of so called "peer institutions" or an industry average. The composition of peer groups is generally decided by the individual covered institution. An example of an absolute performance measure is total shareholder return (TSR). An example of a relative performance measure is the rank of the covered institution's TSR among the TSRs of institutions in a pre-established peer group.

The Agencies have observed that incentive-based compensation arrangements based solely on industry peer performance comparisons (a type of relative performance measure) can cause covered persons to take inappropriate risks that could lead to

material financial loss.<sup>211</sup> For example, if a covered institution falls behind its industry peers, it may use performance measures—and set goals for those measures—that lead to inappropriate risk-taking by covered persons in order to perform better than its industry peers. Also, the performance of a covered institution can be strong relative to its peers, but poor on an absolute basis (*e.g.*, every institution in the peer group is performing poorly, but the covered institution is the best of the group). Consequently, if incentive-based compensation arrangements were based only on relative performance measures, they would, in that circumstance, reward covered employees for performance that is poor on an absolute level but still better than that of the covered institution's peer group. Similarly, in cases where only relative performance measures are used and performance is poor, performance-based vesting may still occur when peer performance is also poor. Using a combination of relative and absolute performance measures as part of the performance evaluation process can help maintain balance between financial rewards and potential risks in such situations.

Additionally, covered persons do not know what level of performance is necessary to meet or exceed target peer group rankings, as rankings will become known only at the end of the performance period. As a result, covered employees may be strongly incentivized to achieve exceptional levels of performance by taking inappropriate risks to increase the likelihood that the covered institution will meet or exceed the peer group ranking in order to maximize their incentive-based compensation.

Further, comparing an institution's performance to a peer group can be misleading because the members of the peer group are likely to have different business models, product mixes, operations in different geographical locations, cost structures, or other attributes that make comparisons between institutions inexact.

Relative performance measures, including industry peer performance measures, may be useful when used in combination with absolute performance measures. Thus, under the proposed rule, a covered institution would be permitted to use relative performance measures in combination with absolute performance measures, but not in

isolation. For instance, a covered institution would not be in compliance with the proposed rule if the performance of the CEO were assessed solely on the basis of total shareholder return relative to a peer group. However, if the performance of the CEO were assessed on the basis of institution-specific performance measures, such as earnings per share and return on tangible common equity, along with the same relative TSR the covered institution would comply with section \_\_\_\_ .8(c) of the proposed rule (assuming the CEO's incentive-based compensation arrangement met the other requirements of the rule, such as an appropriate balance of risk and reward).

8.8. The Agencies invite comment on whether the restricting on the use of relative performance measures for covered persons at Level 1 and Level 2 covered institutions in section \_\_\_\_ .8(d) of the proposed rule is appropriate in deterring behavior that could put the covered institution at risk of material financial loss. Should this restriction be limited to a specific group of covered persons and why? What are the relative performance measures being used in industry?

8.9. Should the proposed rule apply this restriction on the use of relative performance measures to Level 3 institutions?

#### *§ \_\_\_\_ .8(d) Volume-Driven Incentive-Based Compensation*

Section \_\_\_\_ .8(d) of the proposed rule would prohibit Level 1 and Level 2 covered institutions from providing incentive-based compensation to a covered person that is based solely on transaction or revenue volume without regard to transaction quality or the compliance of the covered person with sound risk management. Under the proposed rule, transaction or revenue volume could be used as a factor in incentive-based compensation arrangements, but only in combination with other factors designed to cause covered persons to account for the risks of their activities. This prohibition would apply to incentive-based compensation arrangements for all covered persons at a Level 1 or Level 2 covered institution, not just senior executive officers and significant risk-takers.

Incentive-based compensation arrangements that do not account for the risks covered persons can take to achieve performance measures do not appropriately balance risk and reward, as section \_\_\_\_ .4(c)(1) of the proposed rule would require. An arrangement that provides incentive-based compensation

<sup>211</sup> Gong, Li, and Shin, "Relative Performance Evaluation and Related Peer Groups in Executive Compensation Contracts," 86 *The Accounting Review* 1007 (May 2011).

to a covered person based solely on transaction or revenue volume, without regard to other factors, would not adequately account for the risks to which the transaction in question could expose the covered institution. For instance, an incentive-based compensation arrangement that rewarded mortgage originators based solely on the volume of loans approved, without any subsequent adjustment for the quality of the loans originated (such as adjustments for early payment default or problems with representations and warranties) would not adequately balance risk and financial rewards.

An incentive-based compensation arrangement with performance measures based solely on transaction or revenue volume could incentivize covered persons to generate as many transactions or as much revenue as possible without appropriate attention to resulting risks. Such arrangements were noted in MLRs and similar reports where compensation had been cited as a contributing factor to a financial institution's failure during the recent financial crisis.<sup>212</sup> In addition, many studies about the causes of the recent financial crisis discuss how volume-driven incentive-based compensation lead to inappropriate risk-taking and caused material financial loss to financial institutions.<sup>213</sup>

8.10. The Agencies invite comment on whether there are circumstances under which consideration of transaction or revenue volume as a sole performance measure goal, without consideration of risk, can be appropriate in incentive-based compensation arrangements for Level 1 or Level 2 covered institutions.

8.11. Should the proposed rule apply this restriction on the use of volume-driven incentive-based compensation arrangements to Level 3 institutions?

#### *§ \_\_\_\_\_.9 Risk Management and Controls Requirements for Level 1 and Level 2 Covered Institutions*

Prior to the financial crisis that began in 2007, institutions rarely involved risk management in either the design or monitoring of incentive-based compensation arrangements. Federal Banking Agency reviews of compensation practices have shown that one important development in the intervening years has been the increasing integration of control functions in compensation design and decision-making. For instance, control functions are increasingly relied on to ensure that risk is properly considered in incentive-based compensation programs. At the largest covered institutions, the role of the board of directors in oversight of compensation programs (including the oversight of supporting risk management processes) has also expanded.

Section \_\_\_\_\_.9 of the proposed rule would establish additional risk management and controls requirements at Level 1 and Level 2 covered institutions. Without effective risk management and controls, larger covered institutions could establish incentive-based compensation arrangements that, in the view of the Agencies,<sup>214</sup> could encourage inappropriate risks that could lead to material financial loss at covered institutions. Under the proposed rule, an incentive-based compensation arrangement at a Level 1 or Level 2 covered institution would be considered to be compatible with effective risk management and controls, as required by section \_\_\_\_\_.4(c)(2) of the proposed rule, only if the covered institution also complies with the requirements of section \_\_\_\_\_.9. In proposing section \_\_\_\_\_.9, the Agencies are also cognizant of comments received on the 2011 Proposed Rule.<sup>215</sup> In order to facilitate

consistent adoption of the practices that contribute to incentive-based compensation arrangements that appropriately balance risk and reward, the Agencies are proposing that the practices set forth in section \_\_\_\_\_.9 be required for all Level 1 and Level 2 covered institutions.

Section \_\_\_\_\_.9(a) of the proposed rule would establish minimum requirements for a risk management framework at a Level 1 or Level 2 covered institution by requiring that such framework: (1) Be independent of any lines of business; (2) include an independent compliance program that provides for internal controls, testing, monitoring, and training with written policies and procedures consistent with section \_\_\_\_\_.11 of the proposed rule; and (3) be commensurate with the size and complexity of the covered institution's operations.

Generally, section \_\_\_\_\_.9(a) would require that Level 1 and Level 2 covered institutions have a systematic approach to designing and implementing their incentive-based compensation arrangements and incentive-based compensation programs supported by independent risk management frameworks with written policies and procedures, and developed systems. These frameworks would include processes and systems for identifying and reporting deficiencies; establishing managerial and employee responsibility; and ensuring the independence of control functions. To be effective, an independent risk management framework should have sufficient stature, authority, resources and access to the board of directors.

Level 1 and Level 2 covered institutions would be required to develop, as part of their broader risk management framework, an independent compliance program for incentive-based compensation. The Federal Banking Agencies have found that an independent compliance program leads to more robust oversight of incentive-based compensation programs, helps to avoid undue influence by lines of business, and facilitates supervision. Agencies would expect such a compliance program to have formal policies and procedures to support compliance with the proposed rule and to help to ensure that risk is effectively taken into account in both design and decision-making processes related to incentive-based

2 covered institutions to retain flexibility to determine the specific role that risk management and control functions should play in incentive-based compensation processes, while still allowing for appropriate oversight of incentive-based compensation arrangements.

<sup>212</sup> In accordance with section 38(k) of the FDIA, 12 U.S.C. 1831o(k), MLRs are conducted by the Inspectors General of the appropriate Federal banking agency following the failure of insured depository institutions.

See, e.g., Office of Inspector General for the Department of Treasury, "Material Loss Review of Indymac Bank, FSB," OIG-09-032 (February 26, 2009), available at <http://www.treasury.gov/about/organizational-structure/ig/Documents/oig09032.pdf>; Offices of Inspector General for the Federal Deposit Insurance Corporation and the Department of Treasury, "Evaluation of Federal Regulatory Oversight of Washington Mutual Bank," EVAL-10-002 (April 9, 2010), available at <https://www.fdicig.gov/reports/10/10-002EV.pdf>.

<sup>213</sup> See, e.g., Financial Crisis Inquiry Commission, "The Financial Crisis Inquiry Report" (January 2011), available at [http://fcic-static.law.stanford.edu/cdn\\_media/fcic-reports/fcic\\_final\\_report\\_full.pdf](http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf).

<sup>214</sup> This view is based in part on supervisory experiences in reviewing and supervising incentive-based compensation at some covered institutions.

<sup>215</sup> The 2011 Proposed Rule would have required incentive-based compensation arrangements to be compatible with effective risk management and controls. A number of commenters offered views on the proposed requirements, and some raised concerns. Some commenters emphasized the importance of sound risk management practices in the area of incentive-based compensation. However, a number of commenters also questioned whether the determination of an "appropriate" role for risk management personnel should be left to the discretion of individual institutions. In light of these comments, the proposed rule is designed to strike a reasonable balance between requiring an appropriate role for risk management and allowing institutions the ability to tailor their risk management practices to their business model. The proposed rule does not include prescriptive standards. Instead, it would allow Level 1 and Level

compensation. The requirements for such policies and procedures are set forth in section \_\_\_\_\_.11 of the proposed rule.

The requirements of the proposed rule would encourage Level 1 and Level 2 covered institutions to develop well-targeted internal controls that work within the covered institution's broader risk management framework to support balanced risk-taking. Independent control functions should regularly monitor and test the covered institution's incentive-based compensation program and its arrangements to validate their effectiveness. Training would generally include communication to employees of the covered institution's compliance risk management standards and policies and procedures, and communication to managers on expectations regarding risk adjustment and documentation.

The Agencies note that independent compliance programs consistent with these proposed requirements are already in place at a significant number of larger covered institutions, in part due to supervisory efforts such as the Board's ongoing horizontal review of incentive-based compensation,<sup>216</sup> Enhanced Prudential Standards from section 165 of the Dodd-Frank Act,<sup>217</sup> and the OCC's Heightened Standards.<sup>218</sup> For example, control function employees monitor compliance with policies and procedures and help to ensure robust documentation of compensation decisions, including those relating to forfeiture and risk-adjustment processes. Institutions have also improved communication to managers and employees about how risk adjustment should work and have developed processes to review the application of related guidance in order to ensure better consideration of risk in compensation decisions. The Agencies are proposing to require similar compliance programs at covered institutions not subject to the supervisory efforts described above, as well as to reinforce the practices of covered institutions that already have such compliance programs in place.

Section \_\_\_\_\_.9(b) of the proposed rule would require Level 1 and Level 2 covered institutions to provide individuals engaged in control functions with the authority to influence the risk-taking of the business areas they monitor and to ensure covered persons engaged in control functions are compensated in accordance with the achievement of performance objectives

linked to their control functions and independent of the performance of the business areas they oversee. These protections are intended to mitigate potential conflicts of interest that might undermine the role covered persons engaged in control functions play in supporting incentive-based compensation arrangements that appropriately balance risk and reward.

Under section \_\_\_\_\_.9(c) of the proposed rule, Level 1 and Level 2 covered institutions would be required to provide for independent monitoring of: (1) Incentive-based compensation plans to identify whether those plans appropriately balance risk and reward; (2) events relating to forfeiture and downward adjustment reviews and decisions related thereto; and (3) compliance of the incentive-based compensation program with the covered institution's policies and procedures.

To be considered independent under the proposed rule, the group or person at the covered institution responsible for monitoring the areas described above generally should have a reporting line to senior management or the board that is separate from the covered persons whom the group or person is responsible for monitoring. Some covered institutions may use internal audit to perform the independent monitoring that would be required under this section.<sup>219</sup> The type of independent monitoring conducted to fulfill the requirements of section \_\_\_\_\_.9(c) generally should be appropriate to the size and complexity of the covered institution and its use of incentive-based compensation. For example, a Level 1 covered institution might be expected to use a different scope and type of data and analysis to monitor its incentive-based compensation program than a Level 2 covered institution. Likewise, a covered institution that offers incentive-based compensation to only a few employees may require a less formal monitoring process than a covered institution that offers many types of incentive-based compensation to many of its employees.

Section \_\_\_\_\_.9(c)(1) of the proposed rule would require covered institutions to periodically review all incentive-based compensation plans to assess whether those plans provide incentives that appropriately balance risk and reward. Monitoring the incentives embedded in plans, rather than the individual arrangements that rely on those plans, provides an opportunity to identify incentives for imprudent risk-

taking. It also reduces burden on covered institutions in a reasonable way in light of the proposed rule's additional protections against excessive risk-taking which operate at the level of incentive-based compensation arrangements. Supervisory experience indicates that many covered institutions already periodically perform such a review, and the Agencies consider it a better practice. Level 1 and Level 2 covered institutions should have procedures for collecting information about the effects of their incentive-based compensation arrangements on employee risk-taking, and have systems and processes for using this information to adjust incentive-based compensation arrangements in order to eliminate or reduce unintended incentives for inappropriate risk-taking.

Under Section \_\_\_\_\_.9(c)(2), covered institutions would be required to provide for the independent monitoring of all events related to forfeiture and downward adjustment. With regard to forfeiture and downward adjustment decisions, covered institutions would be expected to regularly monitor the events that could trigger a forfeiture and downward adjustment review. Many covered institutions also regularly conduct independent monitoring and testing activities, or broad-based risk reviews, that could reveal instances of inappropriate risk-taking. The policies and procedures established under section \_\_\_\_\_.11(b) would be expected to specify that covered institutions would evaluate whether inappropriate risk-taking identified in the course of any independent monitoring and testing activities triggered a forfeiture and downward adjustment review. The frequency of reviews may vary depending on the size and complexity of, and the level of risks at, the covered institution, but they should occur often enough to reasonably monitor risks and events related to the forfeiture and downward adjustment triggers.<sup>220</sup> When these reviews uncover events that trigger forfeiture and downward adjustment reviews, Level 1 and Level 2 covered institutions would be required to complete such a review, consistent with the requirements of section \_\_\_\_\_.7(b). They would also be required to monitor adherence to policies and procedures that support effective balancing of risk and rewards. Many covered institutions currently perform forfeiture reviews in the context of broader and more regular risk reviews to ensure that the forfeiture review process appropriately captures all risk-taking activity. The Agencies view this

<sup>216</sup> See 2011 FRB White Paper.

<sup>217</sup> See 12 CFR part 252.

<sup>218</sup> See 12 CFR part 30, appendix D.

<sup>219</sup> At OCC-supervised institutions, the independent monitoring required under section \_\_\_\_\_.9(c) would be carried out by internal audit.

<sup>220</sup> See section \_\_\_\_\_.7(b)(2).

approach as better practice, as decisions about appropriate adjustment of compensation in such circumstances are only one desired outcome. For instance, identification of risk events generally should lead not only to consideration of compensation adjustments, but also to analysis of whether there are weaknesses in broader controls or risk management oversight that need to be addressed. In their supervisory experience, the Federal Banking Agencies have found that tying forfeiture reviews to broader risk reviews is a better practice.

Section \_\_\_\_\_.9(c)(3) of the proposed rule would require covered institutions to provide for independent compliance monitoring of the institution's incentive-based compensation program with policies and procedures. To be considered independent under the proposed rule, the group or person at the covered institution monitoring compliance should have a separate reporting line to senior management or to the board of directors from the business line or group being monitored, but may be conducted by groups within the covered institution. For example, internal audit could review whether award disbursement and vesting policies were adhered to and whether documentation of such decisions was sufficient to support independent review. Such independence will help ensure that the monitoring is unbiased and identifies appropriate issues.

The Agencies have taken the position that Level 1 and Level 2 covered institutions should regularly review whether the design and implementation of their incentive-based compensation arrangements deliver appropriate risk-taking incentives. Independent monitoring should enable covered institutions to correct deficiencies and make necessary improvements in a timely fashion based on the results of those reviews.<sup>221</sup>

9.1 Some Level 1 and Level 2 covered institutions are subject to separate risk management and controls requirements under other statutory or regulatory regimes. For example, OCC-supervised Level 1 and Level 2 covered institution are subject to the OCC's Heightened

Standards. Is it clear to commenters how the risk management and controls requirements under the proposed rule would interact, if at all, with requirements under other statutory or regulatory regimes?

#### *§ \_\_\_\_\_.10 Governance Requirements for Level 1 and Level 2 Covered Institutions*

Section \_\_\_\_\_.10 of the proposed rule contains specific governance requirements that would apply to Level 1 and Level 2 covered institutions. Under the proposed rule, an incentive-based compensation arrangement at a Level 1 or Level 2 covered institution would be considered to be supported by effective governance, as required by section \_\_\_\_\_.4(c)(3) of the proposed rule, only if the covered institution also complies with the requirements of section \_\_\_\_\_.10.

As discussed earlier in this Supplementary Information section, the supervisory experience of the Federal Banking Agencies at large consolidated financial institutions is that effective oversight by a covered institution's board of directors, including review and approval by the board of the overall goals and purposes of the covered institution's incentive-based compensation program, is essential to the attainment of incentive-based compensation arrangements that do not encourage inappropriate risks that could lead to material financial loss to the covered institution.

Accordingly, section \_\_\_\_\_.10(a) of the proposed rule would require that a Level 1 or Level 2 covered institution establish a compensation committee, composed solely of directors who are not senior executive officers, to assist the board in carrying out its responsibilities related to incentive-based compensation.<sup>222</sup> Having an independent compensation committee is consistent with the emphasis the Agencies place on the need for incentive-based compensation

arrangements to be compatible with effective risk management and controls and supported by effective governance. In response to the 2011 Proposed Rule, some commenters expressed a view that an independent compensation committee composed solely of non-management directors would have helped to avoid potential conflicts of interest and more appropriate consideration of management proposals, particularly proposed awards and payouts for senior executive officers.

Section \_\_\_\_\_.10(b) of the proposed rule would require that compensation committees at Level 1 and Level 2 covered institutions obtain input and assessments from various parties. For example, the compensation committees would be required to obtain input on the effectiveness of risk measures and adjustments used to balance risk and reward in incentive-based compensation arrangements from the risk and audit committees of the covered institution's board of directors, or groups performing similar functions, and from the covered institution's risk management function. The proposed requirements would help protect covered institutions against inappropriate risk-taking that could lead to material financial loss by leveraging the expertise and experience of these parties.

In their review of the incentive-based compensation practices of many of the largest covered institutions, the Federal Banking Agencies have noted that the compensation, risk, and audit committees of the boards of directors collaborate and seek advice from risk management and other control functions before making decisions. Many of these covered institutions have members of the compensation committee that are also members of the risk and audit committees. Some covered institutions rely on regular meetings between the compensation and risk committees, while others rely on more ad hoc communications. Human resources, risk management, finance, and audit committees work with compensation committees to ensure that compensation systems attain multiple objectives, including appropriate risk-taking.<sup>223</sup>

Section \_\_\_\_\_.10(b)(2) of the proposed rule would require the compensation committees to obtain from management, on an annual or more frequent basis, a written assessment of the covered institution's incentive-based compensation program and related compliance and control processes. The

<sup>221</sup> The 2010 Federal Banking Agency Guidance mentions several practices that can contribute to the effectiveness of such activity, including internal reviews and audits of compliance with policies and procedures, and monitoring of results relative to expectations. For instance, internal audit should assess the effectiveness of the compliance risk management program by performing regular independent reviews and evaluating whether internal controls, policies, and processes that limit incentive-based compensation risk are effective and appropriate for the covered institution's activities and associated risks.

<sup>222</sup> As described above, under the Board's and FDIC's proposed rules, for a foreign banking organization, "board of directors" would mean the relevant oversight body for the institution's U.S. branch, agency, or operations, consistent with the foreign banking organization's overall corporate and management structure. The Board and FDIC will work with foreign banking organizations to determine the appropriate persons to carry out the required functions of a compensation committee under the proposed rule. Likewise, under the OCC's proposed rule, for a Federal branch or agency of a foreign bank, "board of directors" would mean the relevant oversight body for the Federal branch or agency, consistent with its overall corporate and management structure. The OCC would work closely with Federal branches and agencies to determine the person or committee to undertake the responsibilities assigned to the oversight body.

<sup>223</sup> See generally 2011 FRB White Paper; FSB, "FSB 2015 Workshop on Compensation Practices" (April 14, 2015), available at <http://www.fsb.org/wp-content/uploads/Summary-of-the-April-2015-FSB-workshop-on-compensation-practices.pdf>.

report should assess the extent to which the program and processes provide risk-taking incentives that are consistent with the covered institution's risk profile. Management would be required to develop the assessment with input from the covered institutions' risk and audit committees, or groups performing similar functions, and from individuals in risk management and audit functions. In addition to the written assessment submitted by management, section \_\_\_\_\_.10(b)(3) of the proposed rule would require the compensation committee to obtain another written assessment on the same matter, submitted on an annual or more frequent basis, by the internal audit or risk management function of the covered institution. This written assessment would be developed independently of the covered institution's management.

The Agencies are proposing that the independent compensation committee of the board of directors to be the recipient of such input and written assessments.

Developing incentive-based compensation arrangements that provide balanced risk-taking incentives and monitoring arrangements to ensure they achieve balance requires an understanding of the full spectrum of risks (including compliance risks) and potential risk outcomes associated with the activities of covered persons. For this reason, risk-management and other control functions generally should each have an appropriate role in the covered institution's processes, not only for designing incentive-based compensation arrangements, but also for assessing their effectiveness in providing risk-taking incentives that are consistent with the risk profile of the institution. The proposed rule sets forth two separate effectiveness assessments: (1) An assessment under the auspices of management, but reliant on risk management and audit functions, as well as the audit and risk committees of the board, and (2) an assessment conducted by the internal audit or risk management function of the covered institution, independent of management.

In support of the first requirement, a covered institution's management has a full understanding of both the entirety of the covered institution's activities and a detailed understanding of its incentive-based compensation program, including both the performance that the covered institution intends to reward and the risks to which covered persons can expose the covered institution. An understanding of the full compensation program (including the effectiveness of risk measures across various lines of

business, the measurement of actual risk outcomes, and the analysis of risk-taking and risk outcomes relative to incentive-based compensation payments) requires a large degree of technical expertise. It also requires an understanding of the wider strategic and risk management frameworks in place at the covered institution (including the various objectives that compensation programs seek to balance, such as recruiting and retention goals and prudent risk management). While the board of directors at a covered institution is ultimately responsible for the balance of incentive-based compensation arrangements, and for an incentive-based compensation program that incentivizes behaviors consistent with the long-term health of the organization, the board should generally hold senior management accountable for effectively executing the covered institution's incentive-based compensation program, and for modifying it when weaknesses are identified.

In addition, some Level 1 and Level 2 covered institutions use automated systems to monitor the effectiveness of incentive-based compensation arrangements in balancing risk-taking incentives, especially systems that support capture of relevant data in databases that support monitoring and analysis. Management plays a role in all of these activities and is well-positioned to oversee an analysis that considers such a wide variety of inputs. In order to ensure that considerations of risk-taking are included in such an exercise, an active role for independent control functions is critical in such a review as well as input from the risk and audit committees of the board of directors, or groups performing similar functions. Periodic presentations by the chief risk officer or other risk management staff to the board of directors can help complement the annual effectiveness review.

In addition, the proposed rule includes a requirement that internal audit or risk management submit a written assessment of the effectiveness of a Level 1 or Level 2 covered institution's incentive-based compensation program and related control processes in providing risk-taking incentives that are consistent with the risk profile of the covered institution. Regular internal reviews and audits of compliance with policies and procedures are important to helping implement the incentive-based compensation system as intended by those employees involved in incentive-based compensation decision-making. Internal audit and risk management are

well-positioned to provide an independent perspective on a covered institution's incentive-based compensation program and related control processes. The Federal Banking Agencies have observed that compensation committees benefit from an independent analysis of the effectiveness of their covered institutions' incentive-based compensation programs.<sup>224</sup>

The proposed requirement takes into consideration comments received on the policies and procedures standards embodied in the 2011 Proposed Rule that would have required the covered financial institution's board of directors, or a committee thereof, to receive data and analysis from management and other sources sufficient to allow the board, or committee thereof, to assess whether the overall design and performance of the institution's incentive-based compensation arrangements were consistent with section 956. Many commenters on the 2011 Proposed Rule expressed concern that the proposed requirements in the 2011 Proposed Rule would have inappropriately expanded the traditional "oversight" role of the board and would have required the board to exercise judgment in areas that traditionally have been—and, in the view of some commenters, are best left to—the expertise and prerogative of management. Commenters suggested that the proposed requirement instead place responsibility on management to conduct a formal assessment of the effectiveness of the covered institution's incentive-based compensation program and related compliance and control processes. The Agencies agree that management should be responsible for conducting such an assessment and section \_\_\_\_\_.10(b)(2) of the proposed rule would thus place this responsibility on management, while requiring input from risk and audit committees, or groups performing similar functions, and from the covered institutions' risk management and audit functions. Under the proposed rule, the board's primary focus would be oversight of incentive-based compensation program and arrangements, while management would be expected to implement a program consistent with the vision of the board.

10.1. The Agencies invite comment on this provision generally and whether the written assessments required under sections \_\_\_\_\_.10(b)(2) and \_\_\_\_\_.10(b)(3)

<sup>224</sup> For example, the 2010 Federal Banking Agency Guidance notes that a banking organization's risk-management processes and internal controls should reinforce and support the development and maintenance of balanced incentive compensation arrangements.

of the proposed rule should be provided to the compensation committee on an annual basis or at more or less frequent intervals?

10.2. Are both reports required under § \_\_\_\_\_.10(b)(2) and (3) necessary to aid the compensation committee in carrying out its responsibilities under the proposed rule? Would one or the other be more helpful? Why or why not?

*§ \_\_\_\_\_.11 Policies and Procedures Requirements for Level 1 and Level 2 Covered Institutions*

Section \_\_\_\_\_.11 of the proposed rule would require Level 1 and Level 2 covered institutions to develop and implement certain minimum policies and procedures relating to their incentive-based compensation programs. Requiring covered institutions to develop and follow policies and procedures related to incentive-based compensation would help both covered institutions and regulators identify the incentive-based compensation risks to which covered institutions are exposed, and how these risks are managed so as not to incentivize inappropriate risk-taking by covered persons that could lead to material financial loss to the covered institution. The Agencies are not proposing to require specific policies and procedures of Level 3 covered institutions because these institutions are generally less complex and the impact to the financial system by risks taken at these covered institutions is not as significant as risks taken by covered persons at the larger, more complex covered institutions. In addition, by not requiring additional policies and procedures, Agencies intend to reduce burden on smaller covered institutions. In contrast, the larger Level 1 and Level 2 covered institutions generally will have more complex organizations that tend to conduct a wide range of business activities and therefore will need robust policies and procedures as part of their compliance programs.<sup>225</sup> Therefore, under section \_\_\_\_\_.11 of the proposed rule, Level 3 covered institutions would not be subject to any specific requirements in this area, while Level 1 and Level 2 covered institutions would be required to develop and implement specific policies and procedures for their incentive-based compensation programs.

Section \_\_\_\_\_.11 of the proposed rule would identify certain areas that the policies and procedures of Level 1 and

Level 2 covered institutions would, at a minimum, have to address. The list is not exhaustive. Instead, it is meant to indicate the policies and procedures that would, at a minimum, be necessary to carry out the requirements in other sections of the proposed rule.

The development and implementation of the policies and procedures under section \_\_\_\_\_.11 of the proposed rule would help to ensure and monitor compliance with the requirements set forth in section 956 and the other requirements in the proposed rule because the policies and procedures would set clear expectations for covered persons and allow the Agencies to better understand how a covered institution's incentive-based compensation program operates. Section \_\_\_\_\_.11(a) of the proposed rule would contain the general requirement that the policies and procedures be consistent with the prohibitions and requirements under the proposed rule. Other parts of section \_\_\_\_\_.11 of the proposed rule would help to ensure and monitor compliance with specific portions of the proposed rule.

Under section \_\_\_\_\_.11(b) of the proposed rule, a Level 1 or Level 2 covered institution would have to develop and implement policies and procedures that specify the substantive and procedural criteria for the application of forfeiture and clawback, including the process for determining the amount of incentive-based compensation to be clawed back. These policies and procedures would provide covered persons with notice of the circumstances that would lead to forfeiture and clawback at their covered institutions, including any circumstances identified by the covered institution in addition to those required under the proposed rule. They would also help ensure consistent application of forfeiture and clawback by establishing a common set of expectations.

Policies and procedures should make clear the triggers that will result in consideration of forfeiture, downward adjustment, and clawback; should indicate what individuals or committees are responsible for identifying, escalating and resolving these issues in such cases; should ensure that control functions contribute relevant information and participate in any decisions; and should set out a clear process for determining responsibility for the events triggering the forfeiture and downward adjustment review including provisions requiring appropriate input from covered employees under consideration for forfeiture or clawback.

The proposed rule also would require that Level 1 and Level 2 covered institutions' policies and procedures require the maintenance of documentation of final forfeiture, downward adjustment, and clawback decisions under section \_\_\_\_\_.11(c) of the proposed rule. Documentation would allow control functions and the Agencies to evaluate compliance with the requirements of section \_\_\_\_\_.7 of the proposed rule. The Agencies are proposing this requirement because they have found that it is critical that forfeiture and downward adjustment reviews at covered institutions be supported by effective governance to ensure consistency, fairness and robustness of all related decision-making.

Section \_\_\_\_\_.11(d) of the proposed rule would include a requirement for policies and procedures of Level 1 and Level 2 covered institutions that would specify the substantive and procedural criteria for acceleration of payments of deferred incentive-based compensation to a covered person consistent with sections \_\_\_\_\_.7(a)(1)(iii)(B) and \_\_\_\_\_.7(a)(2)(iii)(B) of the proposed rule. Under section \_\_\_\_\_.7 of the proposed rule, acceleration of vesting of incentive-based compensation that is required to be deferred under such section would only be permitted in the case of death or disability. A Level 1 or Level 2 covered institution would have to have policies and procedures that describe how disability would be evaluated for purposes of determining whether to accelerate payments of deferred incentive-based compensation.

Section \_\_\_\_\_.11(e) would require Level 1 and Level 2 covered institutions to have policies and procedures that identify and describe the role of any employees, committees, or groups authorized to make incentive-based compensation decisions, including when discretion is authorized. A Level 1 or Level 2 covered institution's policies and procedures would also have to describe how discretion is expected to be exercised in order to appropriately balance risk and reward and how the incentive-based compensation arrangements will be monitored under sections \_\_\_\_\_.11(f) and (h) of the proposed rule, respectively.

Related to the requirements regarding disclosure under sections \_\_\_\_\_.4(f) and \_\_\_\_\_.5 of the proposed rule, under section \_\_\_\_\_.11(g), a Level 1 or Level 2 covered institution would need to have policies and procedures that require the covered institution to maintain documentation of the establishment, implementation, modification, and monitoring of incentive-based

<sup>225</sup> See Federal Reserve SR Letter 08-08, "Compliance Risk Management Programs and Oversight at Large Banking Organizations with Complex Compliance Profiles" (October 16, 2008).

compensation arrangements sufficient to support the covered institution's decisions. Section \_\_\_\_\_.11(i) would require the policies and procedures to specify the substantive and procedural requirements of the independent compliance program, consistent with section \_\_\_\_\_.9(a)(2). And section \_\_\_\_\_.11(j) would require policies and procedures that address the appropriate roles for risk management, risk oversight, and other control function personnel in the covered institution's processes for (1) designing incentive-based compensation arrangements and determining awards, deferral amounts, deferral periods, forfeiture, downward adjustment, clawback, and vesting, and (2) assessing the effectiveness of incentive-based compensation arrangements in restraining inappropriate risk-taking.

The Agencies anticipate that some Level 1 and Level 2 covered institutions that have international operations might choose to adopt enterprise-wide incentive-based compensation policies and procedures. The Agencies recognize that such policies and procedures, when utilized by various subsidiary institutions, may need to be further modified to reflect local regulation and the requirements of home country regulators in the case of international institutions and tailored to a certain extent by line of business, legal entity, or business model.

11.1. The Agencies invite general comment on the proposed policies and procedures requirements for Level 1 and Level 2 covered institutions under section \_\_\_\_\_.11 of the proposed rule.

#### § \_\_\_\_\_.12 Indirect Actions

Section \_\_\_\_\_.12 of the proposed rule would prohibit a covered institution from doing indirectly what it cannot do directly under the proposed rule. Section \_\_\_\_\_.12 would apply all of the proposed rule's requirements and prohibitions to actions taken by covered institutions indirectly or through or by any other person. Section \_\_\_\_\_.12 is substantially the same as section \_\_\_\_\_.7 of the 2011 Proposed Rule. The Agencies did not receive any comments on section \_\_\_\_\_.7 of the 2011 Proposed Rule.

By subjecting such indirect actions by covered institutions to all of the proposed rule's requirements and prohibitions, section \_\_\_\_\_.12 would implement the directive in section 956(b) to adopt rules that prohibit any type of incentive-based payment arrangement, or any feature of any such arrangement, that the Agencies determine encourages inappropriate risks by covered institutions (1) by

providing excessive compensation, fees, or benefits or (2) that could lead to material financial loss. The Agencies are concerned that a covered institution may take indirect actions in order to avoid application of the proposed rule's requirements and prohibitions. For example, a covered institution could attempt to make substantial numbers of its covered persons independent contractors for the purpose of avoiding application of the proposed rule's requirements and prohibitions. A covered institution could also attempt to make substantial numbers of its covered persons employees of another entity for the purpose of avoiding application of the proposed rule's requirements and prohibitions. If left unchecked, such indirect actions could encourage inappropriate risk-taking by providing covered persons with excessive compensation or could lead to material financial loss at a covered institution.

The Agencies, however, do not intend to disrupt indirect actions, including independent contractor or employment relationships, not undertaken for the purpose of avoiding application of the proposed rule's requirements and prohibitions. Thus, the Agencies would apply the proposed rule regardless of how covered institutions classify their actions, while also recognizing that covered institutions may legitimately engage in activities that are outside the scope of section 956 and the proposed rule.<sup>226</sup>

NCUA's proposed rule also would clarify that covered credit unions may not use CUSOs to avoid the requirements of the proposed rule, such as by using CUSOs to maintain non-compliant incentive-based compensation arrangements on behalf of senior executive officers or significant risk-takers of Federally insured credit unions.

12.1. Commenters are invited to address all aspects of section \_\_\_\_\_.12, including any examples of other indirect actions that the Agencies should consider.

#### § \_\_\_\_\_.13 Enforcement

By its terms, section 956 applies to any depository institution and any depository institution holding company (as those terms are defined in section 3 of the FDIA), any broker-dealer registered under section 15 of the Securities Exchange Act, any credit union, any investment adviser (as that term is defined in the Investment

Advisers Act of 1940), the Federal National Mortgage Association, and the Federal Home Loan Mortgage Corporation. Section 956 also applies to any other financial institution that the appropriate Federal regulators jointly by rule determine should be treated as a covered financial institution for purposes of section 956.

Section 956(d) also specifically sets forth the enforcement mechanism for rules adopted under that section. The statute provides that section 956 and the implementing rules shall be enforced under section 505 of the Gramm-Leach-Bliley Act and that a violation of section 956 or the regulations under section 956 will be treated as a violation of subtitle A of Title V of the Gramm-Leach-Bliley Act.

Section 505 of the Gramm-Leach-Bliley Act provides for enforcement under section 1818 of title 12, by the appropriate Federal banking agency, as defined in section 1813(q) of title 12,<sup>227</sup> in the case of national banks, Federal branches and Federal agencies of foreign banks, and any subsidiaries of such entities (except brokers, dealers, persons providing insurance, investment companies, and investment advisers); member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, organizations operating under section 25 or 25A of the Federal Reserve Act [12 U.S.C. 601 *et seq.*, 611 *et seq.*], and bank holding companies and their nonbank subsidiaries or affiliates (except brokers, dealers, persons providing insurance, investment companies, and investment advisers); as well as banks insured by the FDIC (other than members of the Federal Reserve System), insured State branches of foreign banks, and any subsidiaries of such entities (except brokers, dealers, persons providing insurance, investment companies, and investment advisers); and savings associations the deposits of which are insured by the FDIC, and any subsidiaries of such savings associations (except brokers, dealers, persons providing insurance, investment companies, and investment advisers).

The Gramm-Leach-Bliley Act also provides for enforcement under the following: (1) Federal Credit Union Act

<sup>226</sup> The Agencies note, however, that section 956 of the Dodd-Frank Act does not, and the proposed rule would not, limit the authority of the Agencies under other provisions of applicable law and regulations.

<sup>227</sup> For purposes of section 1813(q), the appropriate Federal banking agency for institutions listed in paragraphs (A) and (D) is the OCC; for institutions listed in paragraphs (B), the Board; and for institutions listed in paragraph (C), the FDIC. 12 U.S.C. 1813(q).

[12 U.S.C. 1751 *et seq.*], by the Board of the NCUA with respect to any federally insured credit union, and any subsidiaries of such an entity; (2) the Securities Exchange Act of 1934 [15 U.S.C. 78a *et seq.*], by the SEC with respect to any broker or dealer; (3) the Investment Company Act of 1940 [15 U.S.C. 80a–1 *et seq.*], by the SEC with respect to investment companies; (4) the Investment Advisers Act of 1940 [15 U.S.C. 80b–1 *et seq.*], by the SEC with respect to investment advisers registered with the Commission under such Act; (5) State insurance law, in the case of any person engaged in providing insurance, by the applicable State insurance authority of the State in which the person is domiciled, subject to section 6701 of the Gramm-Leach-Bliley Act; (6) the Federal Trade Commission Act [15 U.S.C. 41 *et seq.*], by the Federal Trade Commission for any other financial institution or other person that is not subject to the jurisdiction of any agency or authority listed above; and (7) subtitle E of the Consumer Financial Protection Act of 2010 [12 U.S.C. 5561 *et seq.*], by the Bureau of Consumer Financial Protection, in the case of any financial institution and other covered person or service provider that is subject to the jurisdiction of the Bureau.

The proposed rule includes these enforcement provisions as provided in section 956.

FHFA's enforcement authority for the proposed rule derives from its authorizing statute, the Safety and Soundness Act. FHFA is not one of the "Federal functional regulators" listed in section 505 of the Gramm-Leach-Bliley Act. Additionally, the applicability of Title V of the Gramm-Leach-Bliley Act to Fannie Mae and Freddie Mac is limited by their conditional exclusion from that Title's definition of "financial institution." But there is no evidence that Congress intended to exclude FHFA, or Fannie Mae and Freddie Mac, from enforcement of the proposed rule. To the contrary, Congress specifically included Fannie Mae and Freddie Mac as covered financial institutions and FHFA as an "appropriate federal regulator" in section 956, and FHFA requires no additional enforcement authority. The Safety and Soundness Act provides FHFA with enforcement authority for all laws and regulations that apply to its regulated entities.

13.1. The Agencies invite comment on all aspects of section \_\_\_\_\_.13.

#### *§ \_\_\_\_\_.14 NCUA and FHFA Covered Institutions in Conservatorship, Receivership, or Liquidation*

The NCUA's and FHFA's proposed rules each include a section \_\_\_\_\_.14 that would address those instances when a covered institution is placed in conservatorship, receivership, or liquidation, including limited-life regulated entities, under their respective authorizing statutes, the Federal Credit Union Act or the Safety and Soundness Act.<sup>228</sup> If a covered institution is placed in conservatorship, receivership, or liquidation, the conservator, receiver, or liquidating agent, respectively, and not the covered institution's board or management, has ultimate authority over all compensation arrangements, including any incentive-based compensation for covered persons. When determining or approving any incentive-based compensation plans for covered persons at such a covered institution, the conservator, receiver, or liquidating agent will implement the purposes of the Dodd-Frank Act by prohibiting excessive incentive-based compensation and incentive-based compensation that encourages inappropriate risk-taking.

Institutions placed in conservatorship, receivership, or liquidation may be subject to different needs and circumstances with respect to attracting and retaining talent than other types of covered institutions. In order to attract and retain qualified individuals at a covered institution in conservatorship, for example, the conservator may determine that while a significant portion of a covered person's incentive-based compensation should be deferred, due to the uncertain future of the covered institution in conservatorship, the deferral period would be shorter than that set forth in the deferral provisions of the proposed rule. In another example, where a conservator assumes the roles and responsibilities of the covered institution's board and its committees, the conservator may determine that it is not necessary for the board of the covered institution, if any remains in conservatorship, to approve a material adjustment to a senior executive officer's incentive-based compensation arrangement as described by the governance section of the proposed rule.

Certain provisions of the proposed rule, such as the deferral and governance provisions, may not be

appropriate for institutions in conservatorship, receivership, or liquidation, and the incentive-based compensation structure that best meets their needs while implementing the purposes of the Dodd-Frank Act is appropriately left to the conservator, receiver, or liquidating agent, respectively. Under the applicable section \_\_\_\_\_.14 of the proposed rule, if a covered institution is placed in conservatorship, receivership, or liquidation under the Safety and Soundness Act, for FHFA's proposed rule, or the Federal Credit Union Act, for the NCUA's proposed rule, the respective conservator, receiver, or liquidating agent would have the responsibility to fulfill the requirements and purposes of 12 U.S.C. 5641. The conservator, receiver, or liquidating agent also has the discretion to determine transition terms should the covered institution cease to be in conservatorship, receivership, or liquidation.

14.1. Commenters are invited to address all aspects of section \_\_\_\_\_.14 of the proposed rule.

#### *SEC Amendment to Exchange Act Rule 17a–4*

The SEC is proposing an amendment to Exchange Act Rule 17a–4(e) (17 CFR 240.17a–4(e)) to require that broker-dealers maintain the records required by § \_\_\_\_\_.4(f), and for Level 1 and Level 2 broker-dealers, §§ \_\_\_\_\_.5 and \_\_\_\_\_.11, in accordance with the recordkeeping requirements of Exchange Act Rule 17a–4. Exchange Rule 17a–4 establishes the general formatting and storage requirements for records that broker-dealers are required to keep. For the sake of consistency with other broker-dealer records, the SEC believes that broker-dealers should also keep the records required by § \_\_\_\_\_.4(f), and for Level 1 and Level 2 broker-dealers, §§ \_\_\_\_\_.5 and \_\_\_\_\_.11, in accordance with these requirements.

New paragraph (e)(10) of Exchange Act Rule 17a–4 would require Level 1, Level 2, and Level 3 broker-dealers to maintain and preserve in an easily accessible place the records required by § \_\_\_\_\_.4(f), and for Level 1 and Level 2 broker-dealers, the records required by §§ \_\_\_\_\_.5 and \_\_\_\_\_.11. Paragraph (f) of Exchange Act Rule 17a–4 provides that the records a broker-dealer is required to maintain and preserve under Exchange Act Rule 17a–3 (17 CFR 240.17a–3) and Exchange Act Rule 17a–4 may be immediately produced or reproduced on micrographic media or by means of electronic storage media. Paragraph (j) of Exchange Act Rule 17a–4 requires a broker-dealer, which would include a

<sup>228</sup> The FDIC's proposed rule would not apply to institutions for which the FDIC is appointed receiver under the FDIA or Title II of the Dodd-Frank Act, as appropriate, as those statutes govern such cases.

broker-dealer that is a Level 1, Level 2, or Level 3 covered institution pursuant to the proposed rules, to furnish promptly to a representative of the SEC legible, true, complete, and current copies of those records of the broker-dealer that are required to be preserved under Exchange Act Rule 17a-4, or any other records of the broker-dealer subject to examination under section 17(b) of the Securities Exchange Act of 1934 that are requested by the representative.<sup>229</sup>

*SEC Amendment to Investment Advisers Act Rule 204-2*

The SEC is proposing an amendment to rule 204-2 under the Investment Advisers Act (17 CFR 275.204-2) to require that investment advisers registered or required to be registered under section 203 of the Investment Advisers Act (15 U.S.C. 80b-3) maintain the records required by § \_\_\_\_\_.4(f) and, for those investment advisers that are Level 1 or Level 2 covered institutions, §§ \_\_\_\_\_.5 and \_\_\_\_\_.11, in accordance with the recordkeeping requirements of rule 204-2. New paragraph (a)(19) of rule 204-2 would require investment advisers subject to rule 204-2 that are Level 1, Level 2, or Level 3 covered institutions to make and keep true, accurate, and current the records required by, and for the period specified in, § \_\_\_\_\_.4(f) and, for those investment advisers that are Level 1 or Level 2 covered institutions, the records required by, and for the periods specified in, §§ \_\_\_\_\_.5 and \_\_\_\_\_.11.

Rule 204-2 establishes the general recordkeeping requirements for investment advisers registered or required to be registered under section 203 of the Investment Advisers Act. For the sake of consistency with other investment adviser records, the SEC is proposing that this rule require such investment advisers that are covered institutions to keep the records required by § \_\_\_\_\_.4(f) and those that are Level 1 or Level 2 covered institutions to keep the records required by §§ \_\_\_\_\_.5 and \_\_\_\_\_.11 in accordance with the requirements of rule 204-2.

**III. Appendix to the Supplementary Information: Example Incentive-Based Compensation Arrangement and Forfeiture and Downward Adjustment Review**

For an incentive-based compensation arrangement to meet the requirements of the proposed rule, particularly the requirement that such an arrangement appropriately balance risk and reward, covered institutions would need to look holistically at the entire incentive-based arrangement. Below, for purposes of illustration only, the Agencies outline an example of a hypothetical incentive-based compensation arrangement that would meet the requirements of the proposed rule and an example of how a forfeiture and downward adjustment review might be conducted. These illustrations do not cover every aspect of the proposed rule. They are provided as an aid to understanding the proposed rule and would not carry the force and effect of law or regulation, if issued as a companion to a final rule. Reviewing these illustrations does not substitute for a review of the proposed rule.

This example assumes that the final rule was published as proposed and all incentive-based compensation programs and arrangements were required to comply on or before January 1, 2020.

*Ms. Ledger: Senior Executive Officer at Level 2 Covered Institution*

Ms. Ledger is the chief financial officer at a bank holding company, henceforth “ABC,” which has \$200 billion in average total consolidated assets. Under the definitions of the proposed rule Ms. Ledger would be a senior executive officer and ABC would be a Level 2 covered institution.<sup>230</sup>

Ms. Ledger is provided incentive-based compensation under three separate incentive-based compensation plans. The first plan, the “Annual Executive Plan,” is applicable to all senior executive officers at ABC, and requires assessment over the course of one calendar year. The second plan, the “Annual Firm-Wide Plan,” is applicable to all employees at ABC, and is also based on a one-year performance period that coincides with the calendar year. The third plan, “Ms. Ledger’s LTIP,” is applicable only to Ms. Ledger, and requires assessment of performance over a three-year performance period that begins on January 1 of year 1 and ends on December 31 of year 3. These three plans together comprise Ms. Ledger’s incentive-based compensation arrangement.

<sup>230</sup> See the definitions of “senior executive officer” and “Level 2 covered institution” in section \_\_\_\_\_.2 of the proposed rule.

The proposed rule would impose certain requirements on Ms. Ledger’s incentive-based compensation arrangement. Section \_\_\_\_\_.4(a)(1) of the proposed rule would require that Ms. Ledger’s entire incentive-based compensation arrangement, and each feature of that arrangement, not provide excessive compensation. ABC would be required to consider the six factors listed in section \_\_\_\_\_.4(b) of the proposed rule, as well as any other factors that ABC finds relevant, in evaluating whether Ms. Ledger’s incentive-based compensation arrangement provides excessive compensation before approving Ms. Ledger’s incentive-based compensation arrangement.

*Balance*

Under section \_\_\_\_\_.4(c)(1) of the proposed rule, the entire arrangement would be required to appropriately balance risk and reward. ABC would be expected to consider the risks that Ms. Ledger’s activities pose to the institution, and the performance that Ms. Ledger’s incentive-based compensation arrangement rewards. ABC might consider both the type and target level of any associated performance measures; how all performance measures would work together under the three plans; the form of incentive-based compensation; the recourse ABC has to reduce incentive-based compensation once awarded (through forfeiture)<sup>231</sup> including under the conditions outlined in section \_\_\_\_\_.7 of the proposed rule; the ability ABC has to use clawback of incentive-based compensation once vested, including under the conditions outlined in section \_\_\_\_\_.7 of the proposed rule; and any overlapping performance periods of the various incentive-based compensation plans, which apply to Ms. Ledger.

Under section \_\_\_\_\_.4(d) of the proposed rule, Ms. Ledger’s incentive-based compensation arrangement would be required to include both financial and non-financial measures of performance. These measures would need to include considerations of risk-taking that are relevant to Ms. Ledger’s role within ABC and to the type of business in which Ms. Ledger is engaged. They also would need to be appropriately weighted to reflect risk-taking. The arrangement would be required to allow non-financial

<sup>231</sup> This requirement for balance under section \_\_\_\_\_.4(c)(1) would not, however require forfeiture, or any specific forfeiture measure, for any particular covered person. As discussed below, sections \_\_\_\_\_.7 and \_\_\_\_\_.8 contain specific requirements applicable to senior executive officers at Level 1 and Level 2 covered institutions.

<sup>229</sup> For a discussion generally of Exchange Act Rule 17a-4, see Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers; Capital Rule for Certain Security-Based Swap Dealers, Release No. 34-71958 (Apr. 17, 2014), 79 FR 25194 (May 2, 2014).

measures of performance to override financial measures of performance when appropriate in determining Ms. Ledger's incentive-based compensation. Any amounts to be awarded under Ms. Ledger's arrangement would be subject to adjustment to reflect ABC's actual losses, inappropriate risks Ms. Ledger took or was accountable for others taking, compliance deficiencies Ms. Ledger was accountable for, or other measures or aspects of Ms. Ledger's and ABC's financial and non-financial performance. For example, the Annual Firm-Wide Plan might use a forward-looking internal profit measure that takes into account stressed conditions as a proxy for liquidity risk that Ms. Ledger's activities pose to ABC and thus mitigates against incentives to take imprudent liquidity risk. It might also include limits on liquidity risk, the repeated breach of which would result in non-compliance with a key non-financial performance objective.

In practice, each incentive-based compensation plan will include various measures of performance, and under the proposed rule, each plan would be required to include both financial and non-financial measures. The Annual Firm-Wide Plan may be largely based on the change in value of ABC's equity over the performance year, but that cannot be the only basis for incentive-based compensation awarded under that plan. Non-financial measures of Ms. Ledger's risk-taking activity would have to be taken into account in determining the incentive-based compensation awarded under that plan, and those non-financial measures would need to be appropriately weighted so that they could override financial measures. Even if ABC's equity performed very well over the performance year, if Ms. Ledger was found to have violated risk performance measures, Ms. Ledger should not be awarded the full target of incentive-based compensation from the plan.

Because Ms. Ledger is a senior executive officer at a Level 2 covered institution, Ms. Ledger's incentive-based compensation arrangement would not

be considered to appropriately balance risk and reward unless it was structured to be consistent with the requirements set forth in sections \_\_\_\_\_.7 and \_\_\_\_\_.8 of the proposed rule. The incentive-based compensation awarded to Ms. Ledger would not be permitted to be based solely on relative performance measures<sup>232</sup> or be based solely on transaction revenue or volume.<sup>233</sup> The Annual Executive Plan may include a measure of ABC's TSR relative to its peer group, but that plan would comply with the proposed rule only if other absolute measures of ABC's or Ms. Ledger's performance were also included (e.g., achievement of a three-year average return on risk adjusted capital). Similarly, a plan that applied to significant risk-takers who were engaged in trading might include transaction volume as one of the financial performance measures, but that plan would comply with the proposed rule only if it also included other factors, such as measurement of transaction quality or the significant risk-taker's compliance with the institution's risk-management policies.

*Award of Incentive-Based Compensation for Performance Periods Ending December 31, 2024*

Ms. Ledger's incentive-based compensation is awarded on January 31, 2025. The Annual Executive Plan and the Annual Firm-Wide Plan are awarded on this date for the performance period starting on January 1, 2024 and ending on December 31, 2024. Ms. Ledger's LTIP will be awarded on this date for the performance period starting on January 1, 2022 and ending on December 31, 2024. This example assumes ABC's share price on December 31, 2024 (the end of the performance period) is \$50.

Ms. Ledger's target incentive-based compensation award amount under the Annual Executive plan is \$60,000 and 1,000 shares of ABC.<sup>234</sup> Under the Annual Firm-Wide Plan, Ms. Ledger's target incentive-based compensation award amount is \$30,000. Finally, under Ms. Ledger's LTIP, her target incentive-

based compensation award amount is \$40,000 and 2,000 shares of ABC.

To be consistent with the proposed rule, the maximum incentive-based compensation amounts that ABC would be allowed to award to Ms. Ledger are 125 percent of the target amount, which would amount to: \$75,000 and 1,250 shares under the Annual Executive Plan; \$37,500 under the Annual Firm-Wide Plan; and \$50,000 and 2,500 shares under Ms. Ledger's LTIP.

If Ms. Ledger were implicated in a forfeiture and downward adjustment review during the performance period, ABC would be expected to consider whether and by what amount to reduce the amounts awarded to Ms. Ledger. As part of that review, ABC would be expected to consider all of the amounts that could be awarded to Ms. Ledger under the Annual Executive Plan, Annual Firm-Wide Plan, and Ms. Ledger's LTIP for downward adjustment before any incentive-based compensation were awarded to Ms. Ledger.<sup>235</sup>

Regardless of whether a downward forfeiture and downward adjustment review occurred, ABC would be expected to evaluate Ms. Ledger's performance, including Ms. Ledger's risk-taking activities, at or near the end of the performance period (December 31, 2024). ABC would be required to use non-financial measures of performance, and particularly measures of risk-taking, to determine Ms. Ledger's incentive-based compensation award, possibly decreasing the amount Ms. Ledger would be awarded if only financial measures were taken into account.<sup>236</sup>

Based on performance and taking into account Ms. Ledger's risk-taking behavior, ABC decides to award Ms. Ledger: \$30,000 and 1,000 shares under the Annual Executive Plan; \$35,000 under the Annual Firm-Wide Plan; and \$40,000 and 2,000 shares under Ms. Ledger's LTIP. Valuing the ABC equity at the time of award, the total value of Ms. Ledger's award under the Annual Executive Plan is \$80,000, under the Annual Firm-Wide Plan is \$35,000, and under Ms. Ledger's LTIP is \$140,000.

Incentive-based compensation	Target award				Maximum award				Actual award			
	Cash (\$)	Equity (#)	Value of equity (\$)	Total value (\$)	Cash (\$)	Equity (#)	Value of equity (\$)	Total value (\$)	Cash <sup>1</sup> (\$)	Equity <sup>2</sup> (#)	Value of equity (\$)	Total value (\$)
Annual Executive Plan .....	60,000	1,000	50,000	110,000	75,000	1,250	62,500	137,500	30,000	1,000	50,000	80,000
Annual Firm-Wide Plan .....	30,000	.....	.....	30,000	37,500	.....	.....	37,500	35,000	.....	.....	35,000
Ms. Ledger's LTIP .....	40,000	2,000	100,000	140,000	50,000	2,500	125,000	175,000	40,000	2,000	100,000	140,000

<sup>232</sup> See section \_\_\_\_\_.8(c) of the proposed rule.

<sup>233</sup> See section \_\_\_\_\_.8(d) of the proposed rule.

<sup>234</sup> That is, if Ms. Ledger meets all of the performance measure targets set out under that plan, she will be awarded both \$60,000 in cash and 1,000 shares of ABC stock.

<sup>235</sup> See section \_\_\_\_\_.7(b) of the proposed rule.

<sup>236</sup> See section \_\_\_\_\_.4(d)(2) of the proposed rule.

Incentive-based compensation	Target award				Maximum award				Actual award			
	Cash (\$)	Equity (#)	Value of equity (\$)	Total value (\$)	Cash (\$)	Equity (#)	Value of equity (\$)	Total value (\$)	Cash <sup>1</sup> (\$)	Equity <sup>2</sup> (#)	Value of equity (\$)	Total value (\$)
Total Incentive-Based Compensation ....	130,000	3,000	150,000	280,000	162,500	3,750	87,500	350,000	105,000	3,000	150,000	255,000

<sup>1</sup> The amount of actual cash award ABC chose to award.

<sup>2</sup> The amount of actual equity award ABC chose to award.

To calculate the minimum required deferred amounts, ABC would have to aggregate the amounts awarded under both the Annual Executive Plan (\$80,000) and the Annual Firm-Wide Plan (\$35,000), because each has the same performance period, which is less than three years, to determine the total amount of qualifying incentive-based compensation awarded (\$115,000).<sup>237</sup> At least 50 percent of that qualifying incentive-based compensation would be

required to be deferred for at least three years.<sup>238</sup> Thus, ABC would be required to defer cash and equity with an aggregate value of at least \$57,500 from qualifying incentive-based compensation. ABC would have the flexibility to defer the amounts awarded in cash or in equity, as long as the total deferred incentive-based compensation was composed of both substantial amounts of deferred cash and substantial amounts of deferred

equity.<sup>239</sup> ABC would also have the flexibility to defer amounts awarded from either the Annual Executive Plan or the Annual Firm-Wide Plan.

In this example, ABC chooses to defer \$27,500 of cash and 650 shares from Ms. Ledger's award from the Annual Executive Plan, which has a total value of \$60,000 at the time of the award, for three years and none of the award under the Annual Firm-Wide Plan.<sup>240</sup>

Incentive-based compensation	Total award				Minimum required deferred			Actual deferred			
	Cash (\$)	Equity (#)	Value of equity (\$)	Total value (\$)	Total value (\$)	Deferral rate (%)	Total value (\$)	Cash <sup>2</sup> (\$)	Equity <sup>3</sup> (#)	Value of equity (\$)	Total value (\$)
Annual Executive Plan .....	30,000	1,000	50,000	80,000	.....	.....	.....	27,500	650	32,500	60,000
Annual Firm-Wide Plan .....	35,000	.....	.....	35,000	.....	.....	.....	.....	.....	.....	.....
Qualified Incentive-Based Compensation .....	65,000	1,000	50,000	115,000	115,000	50	57,500	27,500	650	32,500	60,000
Ms. Ledger's LTIP .....	40,000	2,000	100,000	140,000	140,000	50	70,000	35,000	700	35,000	70,000
Total Incentive-Based Compensation .....	105,000	3,000	150,000	255,000	255,000	50	127,500	62,500	1,350	67,500	130,000

<sup>1</sup> The aggregate amount from both the Annual Executive Plan and Annual Firm-Wide Plan.

<sup>2</sup> The amount of actual cash award ABC chose to defer.

<sup>3</sup> The amount of actual equity award ABC chose to defer.

### Vesting Schedule

ABC would have the flexibility to determine the schedule by which this deferred incentive-based compensation would be eligible for vesting, as long as the cumulative total of the deferred incentive-based compensation that has been made eligible for vesting by any given year is not greater than the cumulative total that would have been eligible for vesting had the covered institution made equal amounts eligible for vesting each year.<sup>241</sup> With deferred qualifying incentive-based compensation valued at \$60,000 and three-year vesting, no more than \$20,000 would be allowed to be eligible to vest on December 31, 2025, and no more than \$40,000 would be eligible to vest on or before December 31, 2026. At least \$20,000 would need to be eligible to vest on December 31, 2027, to be consistent with the proposed rule. In this example, ABC decides to make none of the deferred award from the Annual Executive Plan eligible for

vesting on December 31, 2025; to make \$13,750 and 325 shares (total value of cash and equity \$30,000) eligible for vesting on December 31, 2026; and to make \$13,750 and 325 shares (total value of cash and equity \$30,000) eligible for vesting on December 31, 2027.

Ms. Ledger's LTIP has a performance period of three years, so Ms. Ledger's LTIP would meet the definition of a "long-term incentive-plan" under the proposed rule.<sup>242</sup> At least 50 percent of Ms. Ledger's LTIP amount (\$140,000) would be required to be deferred for at least one year.<sup>243</sup> Thus, ABC would be required to defer cash and equity with an aggregate value of at least \$70,000 from Ms. Ledger's LTIP, which would be eligible for vesting on December 31, 2025. ABC would have flexibility to defer the amounts awarded in cash or in equity, as long as the total deferred incentive-based compensation were composed of both substantial amounts of deferred cash and substantial amounts of deferred equity.<sup>244</sup> If ABC

chooses to defer amounts awarded from Ms. Ledger's LTIP for longer than one year, ABC would have flexibility to determine the schedule on which it would be eligible for vesting, as long as the cumulative total of the deferred incentive-based compensation that has been made eligible for vesting by any given year is not greater than the cumulative total that would have been eligible for vesting had the covered institution made equal amounts eligible for vesting in one year.<sup>245</sup>

In this example, ABC chooses to defer \$35,000 of cash and 700 shares of the award from Ms. Ledger's LTIP, which has a total value of \$70,000 at the time of the award, for one year.<sup>246</sup> The non-deferred amount (\$35,000 and 700 shares) could vest at the time of the award on January 31, 2025.

In summary, Ms. Ledger would receive \$42,500 and 1,650 shares (a total value of \$125,000) immediately after December 31, 2024.<sup>247</sup> A total of \$35,000 and 700 shares (total value \$70,000) would be eligible to vest on

<sup>237</sup> See section \_\_\_\_\_.7(a)(1) of the proposed rule.

<sup>238</sup> See sections \_\_\_\_\_.7(a)(1)(i)(C) and \_\_\_\_\_.7(a)(1)(ii)(B) of the proposed rule.

<sup>239</sup> See section \_\_\_\_\_.7(a)(4)(i) of the proposed rule.

<sup>240</sup> Ms. Ledger's entire award under the Annual Firm-Wide Plan, \$35,000, and remaining award under the Annual Executive Plan, \$2,500 and 350 shares, could vest immediately.

<sup>241</sup> See section \_\_\_\_\_.7(a)(1)(iii) of the proposed rule.

<sup>242</sup> See the definition of "long-term incentive plan" in section \_\_\_\_\_.2 of the proposed rule.

<sup>243</sup> See sections \_\_\_\_\_.7(a)(2)(i)(C) and \_\_\_\_\_.7(a)(2)(ii)(B) of the proposed rule.

<sup>244</sup> See section \_\_\_\_\_.7(a)(4)(i) of the proposed rule.

<sup>245</sup> See section \_\_\_\_\_.7(a)(2)(iii) of the proposed rule.

<sup>246</sup> Ms. Ledger's remaining award under Ms. Ledger's LTIP would vest immediately.

<sup>247</sup> This amount would represent \$2,500 and 350 shares awarded under the Annual Executive Plan, \$35,000 awarded under the Annual Firm-Wide Plan and \$5,000 and 1,300 shares awarded under Ms. Ledger's LTIP.

December 31, 2025. A total of \$13,750 and 325 shares (total value \$30,000) would be eligible to vest on December

31, 2026. Finally, a total of \$13,750 and 325 shares (total value \$30,000) would

again be eligible to vest on December 31, 2027.

Incentive-based compensation	Immediate amounts payable				Total amounts deferred			
	Cash (\$)	Equity (#)	Value of equity (\$)	Total value (\$)	Cash (\$)	Equity (#)	Value of equity (\$)	Total value (\$)
Annual Executive Plan .....	\$2,500	350	\$17,500	\$20,000	\$27,500	650	\$32,500	\$60,000
Annual Firm-Wide Plan ....	35,000	.....	.....	35,000	.....	.....	.....	.....
Ms. Ledger's LTIP .....	5,000	1,300	65,000	70,000	35,000	700	35,000	70,000
<b>Total Incentive-Based Compensation .....</b>	<b>42,500</b>	<b>1,650</b>	<b>82,500</b>	<b>125,000</b>	<b>62,500</b>	<b>1,350</b>	<b>67,500</b>	<b>130,000</b>

#### VESTING SCHEDULE

Incentive-based compensation	12/31/2025				12/31/2026				12/31/2027			
	Cash (\$)	Equity (#)	Value of equity (\$)	Total value (\$)	Cash (\$)	Equity (#)	Value of equity (\$)	Total value (\$)	Cash (\$)	Equity (#)	Value of equity (\$)	Total value (\$)
Annual Executive Plan .....	.....	.....	.....	.....	\$13,750	325	\$16,250	\$30,000	\$13,750	325	\$16,250	\$30,000
Ms. Ledger's LTIP .....	\$35,000	700	\$35,000	\$70,000	.....	.....	.....	.....	.....	.....	.....	.....
Amount Eligible for Vesting .....	.....	.....	.....	70,000	.....	.....	.....	30,000	.....	.....	.....	30,000
Remaining Unvested Amount .....	.....	.....	.....	60,000	.....	.....	.....	30,000	.....	.....	.....	0

#### Use of Options in Deferred Incentive-Based Compensation

If, under the total award amount outlined above, ABC chooses to award Ms. Ledger incentive-based compensation partially in the form of options, and chooses to defer the vesting of those options, no more than \$38,250 worth of those options (the equivalent of 15 percent of the aggregate incentive-based compensation awarded to Ms. Ledger) would be eligible to be treated as deferred incentive-based compensation.<sup>248</sup> As an example, ABC may award Ms. Ledger options that have a value at the end of the performance period of \$10 and deferred vesting. ABC may choose to award Ms. Ledger incentive-based compensation with a total value of \$255,000 in the following forms: \$30,000 in cash, 640 shares of

equity (valued at \$32,000), and 1,800 options (valued at \$18,000) under the Annual Executive Plan; \$35,000 cash under the Annual Firm-Wide Plan; and \$40,000 cash, 1,600 shares of equity (valued at \$80,000), and 2,000 options (valued at \$20,000) under Ms. Ledger's LTIP. Of that award, ABC may defer: \$27,500 in cash, 290 shares (valued at \$14,500), and 1,800 options (valued at \$18,000) under the Annual Executive Plan (total value of deferred \$60,000); none of the award from the Annual Firm-Wide Plan; and \$35,000 in cash, 300 shares (valued at \$15,000) and 2,000 options (valued at \$20,000) under Ms. Ledger's LTIP (total value of deferred \$70,000). The total value of options being counted as deferred incentive-based compensation would be \$38,000, which would be 14.9 percent of the total

incentive-based compensation awarded (\$255,000). Assuming the vesting schedule is consistent with the proposed rule, Ms. Ledger's incentive-based compensation arrangement would be consistent with the proposed rule, because: (1) The value of Ms. Ledger's deferred incentive-based compensation under the Annual Executive Plan (which comprises all of Ms. Ledger's deferred qualifying incentive-based compensation) is more than 50 percent of the value of Ms. Ledger's total qualifying incentive-based compensation award (\$115,000) and (2) the value of Ms. Ledger's deferred incentive-based compensation under Ms. Ledger's LTIP is 50 percent the value of Ms. Ledger's incentive-based compensation awarded under a long-term incentive plan (\$140,000).

#### ALTERNATIVE SCENARIO 1: DEFERRED OPTIONS CONSISTENT WITH THE PROPOSED RULE

Incentive-based compensation	Total award amounts					
	Cash (\$)	Equity (#)	Value of equity (\$)	Options (#)	Value of options (\$)	Total value (\$)
Annual Executive Plan .....	\$30,000	640	\$32,000	1,800	\$18,000	\$80,000
Annual Firm-Wide Plan .....	35,000	.....	.....	.....	.....	35,000
Ms. Ledger's LTIP .....	40,000	1,600	80,000	2,000	20,000	140,000
<b>Total .....</b>	<b>105,000</b>	<b>2,240</b>	<b>112,000</b>	<b>3,800</b>	<b>38,000</b>	<b>255,000</b>
Incentive-based compensation	Amounts immediately payable					
	Cash (\$)	Equity (#)	Value of equity (\$)	Options (#)	Value of options (\$)	Total value (\$)
Annual Executive Plan .....	\$2,500	350	\$17,500	.....	.....	20,000
Annual Firm-Wide Plan .....	35,000	.....	.....	.....	.....	35,000
Ms. Ledger's LTIP .....	5,000	1,300	65,000	.....	.....	70,000

<sup>248</sup> See section \_\_\_\_\_.7(a)(4)(ii).

## ALTERNATIVE SCENARIO 1: DEFERRED OPTIONS CONSISTENT WITH THE PROPOSED RULE—Continued

Incentive-based compensation	Total award amounts					
	Cash (\$)	Equity (#)	Value of equity (\$)	Options (#)	Value of options (\$)	Total value (\$)
Total .....	42,500	1,650	82,500	.....	.....	125,000
Total deferred amounts						
Annual Executive Plan .....	\$27,500	290	\$14,500	1,800	\$18,000	\$60,000
Annual Firm-Wide Plan .....	.....	.....	.....	.....	.....	.....
Ms. Ledger's LTIP .....	35,000	300	15,000	2,000	20,000	70,000
Total .....	62,500	590	29,500	3,800	38,000	130,000

Aggregate Incentive-Based Compensation Awarded .....	\$255,000
Option Value at 15% Threshold Maximum .....	38,250
Minimum Qualifying Incentive-Based Compensation—Deferral at 50% .....	57,500
Minimum Incentive-Based Compensation Required under a Long-Term Incentive Plan—Deferral at 50% .....	70,000

In contrast, if ABC chooses to award Ms. Ledger more options than in the example above, Ms. Ledger's incentive-based compensation arrangement may no longer be consistent with the proposed rule. As a second alternative scenario, ABC may choose to award Ms. Ledger incentive-based compensation with a total value of \$255,000 in the

following forms: \$30,000 in cash, 500 shares of equity (valued at \$25,000), and 2,500 options (valued at \$25,000) under the Annual Executive Plan; \$35,000 cash under the Annual Firm-Wide Plan; and \$40,000 cash, 1,600 shares of equity (valued at \$80,000), and 2,000 options (valued at \$20,000) under Ms. Ledger's LTIP. Of that award, if ABC defers the following amounts, the arrangement would not be consistent with the proposed rule: \$27,500 in cash, 150 shares (valued at \$7,500), and 2,500 options (valued at \$25,000) under the Annual Executive Plan (total value of deferred \$60,000); none of the award from the Annual Firm-Wide Plan; and \$35,000 in cash, 300 shares (valued at \$15,000) and 2,000 options (valued at \$20,000) under Ms. Ledger's LTIP (total value of deferred \$70,000). The total

value of options would be \$45,000, which would be 17.6 percent of the total incentive-based compensation awarded (\$255,000). Thus, 675 of those options, or \$6,750 worth, would not qualify to meet the minimum deferral requirements of the proposed rule. Combining qualifying incentive-based compensation and incentive-based compensation awarded under a long-term incentive plan, Ms. Ledger's total minimum required deferral amount would be \$127,500, and yet incentive-based compensation worth only \$123,250 would be eligible to meet the minimum deferral requirements. ABC could alter the proportions of incentive-based compensation awarded and deferred in order to comply with the proposed rule.

## ALTERNATIVE SCENARIO 2: DEFERRED OPTIONS INCONSISTENT WITH THE PROPOSED RULE

Incentive-based compensation	Total award amounts					
	Cash (\$)	Equity (#)	Value of equity (\$)	Options (#)	Value of options (\$)	Total value (\$)
Annual Executive Plan .....	\$30,000	500	\$25,000	2,500	\$25,000	\$80,000
Annual Firm-Wide Plan .....	35,000	.....	.....	.....	.....	35,000
Ms. Ledger's LTIP .....	40,000	1,600	80,000	2,000	20,000	140,000
Total .....	105,000	2,100	105,000	4,500	45,000	255,000
Amounts immediately payable						
Annual Executive Plan .....	\$2,500	350	\$17,500	.....	.....	\$20,000
Annual Firm-Wide Plan .....	35,000	.....	.....	.....	.....	35,000
Ms. Ledger's LTIP .....	5,000	1,300	65,000	.....	.....	70,000
Total .....	42,500	1,650	82,500	.....	.....	125,000
Total deferred amounts						
Annual Executive Plan .....	\$27,500	150	\$7,500	2,500	\$25,000	\$60,000
Annual Firm-Wide Plan .....	.....	.....	.....	.....	.....	.....
Ms. Ledger's LTIP .....	35,000	300	15,000	2,000	20,000	70,000
Total .....	62,500	450	22,500	4,500	45,000	130,000

Aggregate Incentive-Based Compensation Awarded .....	\$255,000
Option Value at 15% Threshold Maximum .....	38,250
Non-Qualifying Options .....	6,750 or 675 options
Incentive-Based Compensation Eligible to Meet the Minimum Deferral Requirements .....	123,250

Other Requirements Specific to Ms. Ledger's Incentive-Based Compensation Arrangement

Under the proposed rule, ABC would not be allowed to accelerate the vesting of Ms. Ledger's deferred incentive-based compensation, except in the case of Ms. Ledger's death or disability, as determined by ABC pursuant to sections \_\_\_\_\_.7(a)(1)(iii)(B) and \_\_\_\_\_.7(a)(2)(iii)(B).

Before vesting, ABC may determine to reduce the amount of deferred incentive-based compensation that Ms. Ledger receives pursuant to a forfeiture and downward adjustment review.<sup>249</sup> If Ms. Ledger, or an employee Ms. Ledger managed, had been responsible for an event triggering the proposed rule's requirements for forfeiture and downward adjustment review, ABC would be expected to consider all of the unvested deferred amounts from the Annual Executive Plan and Ms. Ledger's LTIP for forfeiture before any incentive-based compensation vested even if the event occurred outside of the relevant performance period for the awards discussed in the example (*i.e.*, January 1, 2022 to December 31, 2024).<sup>250</sup> ABC may also rely on other performance adjustments during the deferral period to appropriately balance Ms. Ledger's incentive-based compensation arrangement. In this case ABC would take into account information about Ms. Ledger's and ABC's performance that becomes better known during the deferral period to potentially reduce the amount of deferred incentive-based compensation that vests. ABC would not be allowed to increase the amount of deferred incentive-based compensation that vests. In the case of the deferred equity awarded to Ms. Ledger, the number of shares or options awarded to Ms. Ledger and eligible for vesting on each anniversary of the end of the performance period is the maximum number of shares or options that may vest on that date. An increase in the total value of those shares or options would not be considered an

<sup>249</sup> See "Mr. Ticker: Forfeiture and downward adjustment review" discussion below for more details about the requirements for a forfeiture and downward adjustment review.  
<sup>250</sup> See section \_\_\_\_\_.7(b) of the proposed rule.

increase in the amount of deferred incentive-based compensation for the purposes of the proposed rule.<sup>251</sup> ABC would be required to include clawback provisions in Ms. Ledger's incentive-based compensation arrangement that, at a minimum, allowed for clawback for seven years following the date on which Ms. Ledger's incentive-based compensation vested.<sup>252</sup> These provisions would permit ABC to recover up to 100 percent of any vested incentive-based compensation if ABC determined that Ms. Ledger engaged in certain misconduct, fraud or intentional misrepresentation of information, as described in section \_\_\_\_\_.7(c) of the proposed rule. Thus, if in the year 2030, ABC determined that Ms. Ledger engaged in fraud in the year 2024, the entirety of the \$42,500 and 1,650 shares of equity that vested immediately after 2024, and as well as any part of her deferred incentive-based compensation (\$62,500 and 1,350 shares of equity) that actually had vested by 2030, could be subject to clawback by ABC. Facts and circumstances would determine whether the ABC would actually seek to claw back amounts, as well as the specific amount ABC would seek to recover from Ms. Ledger's already-vested incentive-based compensation. Finally, in order for Ms. Ledger's incentive-based compensation arrangement to appropriately balance risk and reward, ABC would not be permitted to purchase a hedging instrument or similar instrument on Ms. Ledger's behalf that would offset any decrease in the value of Ms. Ledger's deferred incentive-based compensation.<sup>253</sup>

Risk Management and Controls and Governance

Sections \_\_\_\_\_.4(c)(2) and \_\_\_\_\_.4(c)(3) of the proposed rule would require that Ms. Ledger's incentive-based compensation arrangement be compatible with effective risk management and controls and be supported by effective governance. For Ms. Ledger's arrangement to be compatible with effective risk management and controls, ABC's risk management framework and controls would be required to comply with the specific provisions of section \_\_\_\_\_.9 of the proposed rule. ABC would have to maintain a risk management framework for its incentive-based compensation program that is independent of any lines of business, includes an independent

<sup>251</sup> See section \_\_\_\_\_.7(a)(3) of the proposed rule.  
<sup>252</sup> See section \_\_\_\_\_.7(c) of the proposed rule.  
<sup>253</sup> See section \_\_\_\_\_.8(a) of the proposed rule.

compliance program, and is commensurate with the size and complexity of ABC's operations.<sup>254</sup> ABC would have to provide individuals engaged in control functions with the authority to influence the risk-taking of the business areas they monitor and ensure that covered persons engaged in control functions are compensated in accordance with the achievement of performance objectives linked to their job functions, independent of the performance of those business areas.<sup>255</sup> In addition, ABC would have to provide for independent monitoring of events related to forfeiture and downward adjustment reviews and decisions of forfeiture and downward adjustment reviews.<sup>256</sup>

For Ms. Ledger's arrangement to be consistent with the effective governance requirement in the proposed rule, the board of directors of ABC would be required to establish a compensation committee composed solely of directors who are not senior executive officers. The board of directors, or a committee thereof, would be required to approve Ms. Ledger's incentive-based compensation arrangements, including the amounts of all awards and payouts under those arrangements.<sup>257</sup> In this example, the board of directors or a committee thereof (such as the compensation committee) would be required to approve the total award of \$105,000 and 3,000 shares in 2024. Each time deferred amounts are scheduled to vest (in this example, in December 31, 2025, December 31, 2026, and December 31, 2027), the board of directors or a committee thereof would also be required to approve the amounts that vest.<sup>258</sup> Additionally, the compensation committee would be required to receive input from the risk and audit committees of the ABC's board of directors on the effectiveness of risk measures and adjustments used to balance risk and reward in incentive-based compensation arrangements.<sup>259</sup> Finally, the compensation committee would be required to obtain at least annually two written assessments, one prepared by ABC's management with input from the risk and audit committees of the board of directors and a separate assessment written from ABC's risk management or internal audit function developed independently of ABC's senior management. Both

<sup>254</sup> See section \_\_\_\_\_.9(a) of the proposed rule.  
<sup>255</sup> See section \_\_\_\_\_.9(b) of the proposed rule.  
<sup>256</sup> See section \_\_\_\_\_.9(c) of the proposed rule.  
<sup>257</sup> See section \_\_\_\_\_.4(e) of the proposed rule.  
<sup>258</sup> See sections \_\_\_\_\_.4(e)(2) and \_\_\_\_\_.4(e)(3) of the proposed rule.  
<sup>259</sup> See section \_\_\_\_\_.10(b)(1) of the proposed rule.

assessments would focus on the effectiveness of ABC's incentive-based compensation program and related compliance and control processes in providing appropriate risk-taking incentives.<sup>260</sup>

#### *Recordkeeping*

In order to comply with the recordkeeping requirements in the proposed rule, ABC would be required to document Ms. Ledger's incentive-based compensation arrangement.<sup>261</sup> ABC would be required to maintain copies of the Annual Executive Plan, the Annual Firm-Wide Plan, and Ms. Ledger's LTIP, along with all plans that are part of ABC's incentive-based compensation program. ABC also would be required to include Ms. Ledger on the list of senior executive officers and significant risk-takers, including the legal entity for which she works, her job function, her line of business, and her position in the organizational hierarchy.<sup>262</sup> Finally, ABC would be required to document Ms. Ledger's entire incentive-based compensation arrangement, including information on percentage deferred and form of payment and any forfeiture and downward adjustment or clawback reviews and decisions that pertain to her.<sup>263</sup>

#### *Mr. Ticker: Forfeiture and Downward Adjustment Review*

Under section \_\_\_\_\_.7(b) of the proposed rule, ABC would be required to put certain portions of a senior executive officer's or significant risk-taker's incentive-based compensation at risk of forfeiture and downward adjustment upon certain triggering events.<sup>264</sup> In this example, Mr. Ticker is a significant risk-taker who is the senior manager of a trader and a trading desk that engaged in inappropriate risk-taking in calendar year 2021, which was discovered on March 1, 2024.<sup>265</sup> The activity of the trader, and several other members of the same trading desk, resulted in an enforcement proceeding against ABC and the imposition of a significant fine.

Mr. Ticker is provided incentive-based compensation under two separate incentive-based compensation plans.

The first plan, the "Annual Firm-Wide Plan," is applicable to all employees at ABC, and is based on a one-year performance period that coincides with the calendar year. The second plan, "Mr. Ticker's LTIP," is applicable to all traders at Mr. Ticker's level, and requires assessment of performance over a three-year performance period that begins on January 1, 2022 (year 1) and ends on December 31, 2024 (year 3). These two plans together comprise Mr. Ticker's incentive-based compensation arrangement.

The proposed rule would require ABC to conduct a forfeiture and downward adjustment review both because the trades resulted from inappropriate risk-taking and because they failed to comply with a statutory, regulatory, or supervisory standard in a manner that resulted in an enforcement or legal action against ABC.<sup>266</sup> In addition, the possibility exists that a material risk management and control failure as described in section \_\_\_\_\_.7(b)(2)(iii) of the proposed rule has occurred, which would widen the group of covered employees whose incentive-based compensation would be considered for possible forfeiture and downward adjustment. Under the proposed rule, covered institutions would be required to consider forfeiture and downward adjustment for a covered person with direct responsibility for the adverse outcome (in this case, the trader, if designated as a significant risk-taker), as well as responsibility due to the covered person's role or position in the covered institution's organizational structure (in this case, Mr. Ticker for his possible lack of oversight of the trader when such activities were conducted).<sup>267</sup>

In this example, ABC determines that as the senior manager of the trader, Mr. Ticker is responsible for inappropriate oversight of the trader and that Mr. Ticker facilitated the inappropriate risk-taking the trader engaged in. Under the proposed rule, ABC would have to consider all of Mr. Ticker's unvested deferred incentive-based compensation, including unvested deferred amounts awarded under Mr. Ticker's LTIP, when determining the appropriate impact on Mr. Ticker's incentive-based compensation.<sup>268</sup> In addition, all of Mr. Ticker's incentive-based compensation amounts not yet awarded for the current performance period, including amounts to be awarded under Mr. Ticker's LTIP, would have to be considered for

possible downward adjustment.<sup>269</sup> The amount by which Mr. Ticker's incentive-based compensation would be reduced could be part or all of the relevant tranches which have not yet vested or have not yet been awarded. For example, if Mr. Ticker's lack of oversight were determined to be only a contributing factor that led to the adverse outcome (e.g., Mr. Ticker identified and elevated the breach of related risk limits but made no effort to follow up in order to ensure that such activity immediately ceased), ABC might be comfortable reducing only a portion of the incentive-based compensation to be awarded under Mr. Ticker's LTIP in 2024.

To determine the amount or portion of Mr. Ticker's incentive-based compensation that should be forfeited or adjusted downward under the proposed rule, ABC would be required to consider, at a minimum, the six factors listed in section \_\_\_\_\_.7(b)(4) of the proposed rule.<sup>270</sup> The cumulative impact of these factors, when appropriately weighed in the final decision-making process, might lead to lesser or greater impact on Mr. Ticker's incentive-based compensation. For instance, if it were found that Mr. Ticker had repeatedly failed to manage traders or others who report to him, ABC might decide that a reduction of 100 percent of Mr. Ticker's incentive-based compensation at risk would be appropriate.<sup>271</sup> On the other hand, if it were determined that Mr. Ticker took immediate and meaningful actions to prevent the adverse outcome from occurring and immediately escalated and addressed the inappropriate behavior, the impact on Mr. Ticker's incentive-based compensation could be less than 100 percent, or nothing.

It is possible that some or all of Mr. Ticker's incentive-based compensation may be forfeited before it vests, which could result in amounts vesting faster than pro rata. In this case, ABC decides to defer \$30,000 of Mr. Ticker's incentive-based compensation for three years so that \$10,000 is eligible for vesting in 2022, \$10,000 is eligible for vesting in 2023, and \$10,000 is eligible for vesting in 2024. This schedule would meet the proposed rule's pro rata vesting requirement. No adverse information about Mr. Ticker's performance comes to light in 2022 or 2023 and so \$10,000 vests in each of those years. However, Mr. Ticker's

<sup>260</sup> See sections \_\_\_\_\_.10(b)(2) and \_\_\_\_\_.10(b)(3) of the proposed rule.

<sup>261</sup> See sections \_\_\_\_\_.4(f) and \_\_\_\_\_.5(a) of the proposed rule.

<sup>262</sup> See section \_\_\_\_\_.5(a) of the proposed rule.

<sup>263</sup> See section \_\_\_\_\_.5(a) of the proposed rule.

<sup>264</sup> See section \_\_\_\_\_.7(b) of the proposed rule.

<sup>265</sup> If Mr. Ticker's inappropriate risk-taking during 2021 were instead discovered in another year, ABC could subject all deferred amounts not yet vested in that year to forfeiture.

<sup>266</sup> See sections \_\_\_\_\_.7(b)(2)(ii) and \_\_\_\_\_.7(b)(2)(iv)(A) of the proposed rule.

<sup>267</sup> See section \_\_\_\_\_.7(b)(3) of the proposed rule.

<sup>268</sup> See section \_\_\_\_\_.7(b)(1)(i) of the proposed rule.

<sup>269</sup> See section \_\_\_\_\_.7(b)(1)(ii) of the proposed rule.

<sup>270</sup> See section \_\_\_\_\_.7(b)(4) of the proposed rule.

<sup>271</sup> See sections \_\_\_\_\_.7(b)(4)(ii) and (iii) of the proposed rule.

inappropriate risk-taking during 2021 is discovered in 2024, causing ABC to forfeit the remaining \$10,000. Therefore, the amounts that vest in this case are \$10,000 in 2022, \$10,000 in 2023, and \$0 in 2024. While the vesting is faster than pro rata due to the forfeiture, the incentive-based compensation arrangement would still be consistent with the proposed rule since the original vesting schedule would have been in compliance.

ABC would be required to document the rationale for its decision and to keep timely and accurate records that detail the individuals considered for compensation adjustments, the factors weighed in reaching a final decision and how those factors were considered during the decision-making process.<sup>272</sup>

#### IV. Request for Comments

The Agencies are interested in receiving comments on all aspects of the proposed rule.

#### V. Regulatory Analysis

##### A. Regulatory Flexibility Act

*OCC:* Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b) ("RFA"), the initial regulatory flexibility analysis otherwise required under section 603 of the RFA is not required if the agency certifies that the proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities (defined for purposes of the RFA to include banks and Federal branches and agencies with assets less than or equal to \$550 million) and publishes its certification and a short, explanatory statement in the **Federal Register** along with its proposed rule.

As discussed in the **SUPPLEMENTARY INFORMATION** section above, section 956 of the Dodd-Frank Act does not apply to institutions with assets of less than \$1 billion. As a result, the proposed rule will not, if promulgated, apply to any OCC-supervised small entities. For this reason, the proposed rule will not, if promulgated, have a significant economic impact on a substantial number of OCC-supervised small entities. Therefore, the OCC certifies that the proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.

*Board:* The Board has considered the potential impact of the proposed rule on small banking organizations in accordance with the RFA (5 U.S.C. 603(b)). As discussed in the **SUPPLEMENTARY INFORMATION** above,

section 956 of the Dodd-Frank Act (codified at 12 U.S.C. 5641) requires that the Agencies prohibit any incentive-based payment arrangement, or any feature of any such arrangement, at a covered financial institution that the Agencies determine encourages inappropriate risks by a financial institution by providing excessive compensation or that could lead to material financial loss. In addition, under the Dodd-Frank Act a covered financial institution also must disclose to its appropriate Federal regulator the structure of its incentive-based compensation arrangements. The Board and the other Agencies have issued the proposed rule in response to these requirements of the Dodd-Frank Act.

The proposed rule would apply to "covered institutions" as defined in the proposed rule. Covered institutions as so defined include specifically listed types of institutions, as well as other institutions added by the Agencies acting jointly by rule. In every case, however, covered institutions must have at least \$1 billion in total consolidated assets pursuant to section 956(f). Thus the proposed rule is not expected to apply to any small banking organizations (defined as banking organizations with \$550 million or less in total assets). See 13 CFR 121.201.

The proposed rule would implement section 956(a) of the Dodd-Frank act by requiring a covered institution to create annually and maintain for a period of at least seven years records that document the structure of all its incentive-based compensation arrangements and demonstrate compliance with the proposed rule. A covered institution must disclose the records to the Board upon request. At a minimum, the records must include copies of all incentive-based compensation plans, a record of who is subject to each plan, and a description of how the incentive-based compensation program is compatible with effective risk management and controls.

Covered institutions with at least \$50 billion in consolidated assets, and their subsidiaries with at least \$1 billion in total consolidated assets, would be subject to additional, more specific requirements, including that such covered institutions create annually and maintain for a period of at least seven years records that document: (1) The covered institution's senior executive officers and significant risk-takers, listed by legal entity, job function, organizational hierarchy, and line of business; (2) the incentive-based compensation arrangements for senior executive officers and significant risk-takers, including information on

percentage of incentive-based compensation deferred and form of award; (3) any forfeiture and downward adjustment or clawback reviews and decisions for senior executive officers and significant risk-takers; and (4) any material changes to the covered institution's incentive-based compensation arrangements and policies. These larger covered institutions must provide these records in such form and with such frequency as requested by the Board, and they must be maintained in a manner that allows for an independent audit of incentive-based compensation arrangements, policies, and procedures.

As described above, the volume and detail of information required to be created and maintained by a covered institution is tiered; covered institutions with less than \$50 billion in total consolidated assets are subject to less rigorous and detailed informational requirements than larger covered institutions. As such, the Board expects that the volume and detail of information created and maintained by a covered institution with greater than \$50 billion in consolidated assets, that may use incentive-based arrangements to a significant degree, would be substantially greater than that created and maintained by a smaller institution.

The proposed rule would implement section 956(b) of the Dodd-Frank Act by prohibiting a covered institution from having incentive-based compensation arrangements that may encourage inappropriate risks (i) by providing excessive compensation or (ii) that could lead to material financial loss. The proposed rule would establish standards for determining whether an incentive-based compensation arrangement violates these prohibitions. These standards would include deferral, forfeiture, downward adjustment, clawback, and other requirements for certain covered persons at covered institutions with total consolidated assets of more than \$50 billion, and their subsidiaries with at least \$1 billion in assets, as well as specific prohibitions on incentive-based compensation arrangements at these institutions. Consistent with section 956(c), the standards adopted under section 956 are comparable to the compensation-related safety and soundness standards applicable to insured depository institutions under section 39 of the FDIA. The proposed rule also would supplement existing guidance adopted by the Board and the other Federal Banking Agencies regarding incentive-based compensation (*i.e.*, the 2010 Federal Banking Agency Guidance, as

<sup>272</sup> See section \_\_\_\_\_.5(a)(3) of the proposed rule.

defined in the **SUPPLEMENTARY INFORMATION** above).

The proposed rule also would require all covered institutions to have incentive-based compensation arrangements that are compatible with effective risk management and controls and supported by effective governance. In addition, the board of directors, or a committee thereof, of a covered institution to conduct oversight of the covered institution's incentive-based compensation program and to approve incentive-based compensation arrangements and material exceptions or adjustments to incentive-based compensation policies or arrangements for senior executive officers. For covered institutions with greater than \$50 billion in total consolidated assets, and their subsidiaries with at least \$1 billion in total consolidated assets, the proposed rule includes additional specific requirements for risk management and controls, governance and policies and procedures. Thus, like the deferral, forfeiture, downward adjustment, clawback and other requirements referred to above, risk management, governance, and policies and procedures requirements are tiered based on the size of the covered institution, with smaller institutions only subject to general risk management, controls, and governance requirements and larger institutions subject to more detailed requirements, including policies and procedures requirements. Therefore, the requirements of the proposed rule in these areas would be expected to be less extensive for covered institutions with less than \$50 billion in total consolidated assets than for larger covered institutions.

As noted above, because the proposed rule applies to institutions that have at least \$1 billion in total consolidated assets, if adopted in final form it is not expected to apply to any small banking organizations for purposes of the RFA. In light of the foregoing, the Board does not believe that the proposed rule, if adopted in final form, would have a significant economic impact on a substantial number of small entities supervised by the Board. The Board specifically seeks comment on whether the proposed rule would impose undue burdens on, or have unintended consequences for, small institutions and whether there are ways such potential burdens or consequences could be addressed in a manner consistent with section 956 of the Dodd-Frank Act.

**FDIC:** In accordance with the RFA, 5 U.S.C. 601–612 (“RFA”), an agency must provide an initial regulatory flexibility analysis with a proposed rule

or to certify that the rule will not have a significant economic impact on a substantial number of small entities (defined for purposes of the RFA to include banking entities with total assets of \$550 million or less).

As described in the Scope and Initial Applicability section of the **SUPPLEMENTARY INFORMATION** above, the proposed rule would establish general requirements applicable to the incentive-based compensation arrangements of all institutions defined as covered institutions under the proposed rule (*i.e.*, covered institutions with average total consolidated assets of \$1 billion or more that offers incentive-based compensation to covered persons). As of December 31, 2015, a total of 353 FDIC-supervised institutions had total assets of \$1 billion or more and would be subject to the proposed rule.

As of December 31, 2015, there were 3,947 FDIC-supervised depository institutions. Of those depository institutions, 3,262 had total assets of \$550 million or less. All FDIC-supervised depository institutions that fall under the \$550 million asset threshold, by definition, would not be subject to the proposed rule, regardless of their incentive-based compensation practices.

Therefore, the FDIC certifies that the notice of proposed rulemaking would not have a significant economic impact on a substantial number of small FDIC-supervised institutions.

**FHFA:** FHFA believes that the proposed rule will not have a significant economic impact on a substantial number of small entities, since none of FHFA's regulated entities come within the meaning of small entities as defined in the RFA (*see* 5 U.S.C. 601(6)), and the proposed rule will not substantially affect any business that its regulated entities might conduct with such small entities.

**NCUA:** The RFA requires NCUA to prepare an analysis to describe any significant economic impact a regulation may have on a substantial number of small entities.<sup>273</sup> For purposes of this analysis, NCUA considers small credit unions to be those having under \$100 million in assets.<sup>274</sup> Section 956 of the Dodd Frank Act and the NCUA's proposed rule apply only to credit unions with \$1 billion or more in assets. Accordingly, NCUA certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities since the credit unions subject

to NCUA's proposed rule are not small entities for RFA purposes.

**SEC:** Pursuant to 5 U.S.C. 605(b), the SEC hereby certifies that the proposed rules would not, if adopted, have a significant economic impact on a substantial number of small entities. The SEC notes that the proposed rules would not apply to broker-dealers or investment advisers with less than \$1 billion in total consolidated assets. Therefore, the SEC believes that all broker-dealers and investment advisers that are likely to be covered institutions under the proposed rules would not be small entities.

The SEC encourages written comments regarding this certification. The SEC solicits comment as to whether the proposed rules could have an effect on small entities that has not been considered. The SEC requests that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of such impact.

#### *B. Paperwork Reduction Act*

Certain provisions of the proposed rule contain “collection of information” requirements within the meaning of the Paperwork Reduction Act (PRA) of 1995.<sup>275</sup> In accordance with the requirements of the PRA, the Agencies may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The information collection requirements contained in this joint notice of proposed rulemaking have been submitted by the OCC, FDIC, NCUA, and SEC to OMB for review and approval under section 3506 of the PRA and section 1320.11 of OMB's implementing regulations (5 CFR part 1320). The Board reviewed the proposed rule under the authority delegated to the Board by OMB. FHFA has found that, with respect to any regulated entity as defined in section 1303(20) of the Safety and Soundness Act (12 U.S.C. 4502(20)), the proposed rule does not contain any collection of information that requires the approval of the OMB under the PRA. The recordkeeping requirements are found in sections \_\_.4(f), \_\_.5, and \_\_.11.

Comments are invited on:

(a) Whether the collections of information are necessary for the proper performance of the Agencies' functions, including whether the information has practical utility;

(b) The accuracy of the estimates of the burden of the information

<sup>273</sup> 5 U.S.C. 603(a).

<sup>274</sup> 80 FR 57512 (September 24, 2015).

<sup>275</sup> 44 U.S.C. 3501–3521.

collections, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the information collections 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.

All comments will become a matter of public record. Comments on aspects of this notice that may affect reporting, recordkeeping, or disclosure requirements and burden estimates should be sent to the addresses listed in the **ADDRESSES** section. A copy of the comments may also be submitted to the OMB desk officer for the Agencies by mail to U.S. Office of Management and Budget, 725 17th Street NW., #10235, Washington, DC 20503, by facsimile to (202) 395-5806, or by email to [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov), Attention, Commission and Federal Banking Agency Desk Officer.

#### Proposed Information Collection

*Title of Information Collection:*  
Recordkeeping Requirements  
Associated with Incentive-Based  
Compensation Arrangements.

*Frequency of Response:* Annual.

*Affected Public:* Businesses or other for-profit.

*Respondents:*

*OCC:* National banks, Federal savings associations, and Federal branches or agencies of a foreign bank with average total consolidated assets greater than or equal to \$1 billion and their subsidiaries.

*Board:* State member banks, bank holding companies, savings and loan holding companies, Edge and Agreement corporations, state-licensed uninsured branches or agencies of a foreign bank, and foreign banking organization with average total consolidated assets greater than or equal to \$1 billion and their subsidiaries.

*FDIC:* State nonmember banks, state savings associations, and state insured branches of a foreign bank, and certain subsidiaries thereof, with average total consolidated assets greater than or equal to \$1 billion.

*NCUA:* Credit unions with average total consolidated assets greater than or equal to \$1 billion.

*SEC:* Brokers or dealers registered under section 15 of the Securities Exchange Act of 1934 and investment advisers as such term is defined in

section 202(a)(11) of the Investment Advisers Act of 1940, in each case, with average total consolidated assets greater than or equal to \$1 billion.

*Abstract:* Section 956(e) of the Dodd-Frank Act requires that the Agencies prohibit incentive-based payment arrangements at a covered financial institution that encourage inappropriate risks by a financial institution by providing excessive compensation or that could lead to material financial loss. Under the Dodd-Frank Act, a covered financial institution also must disclose to its appropriate Federal regulator the structure of its incentive-based compensation arrangements sufficient to determine whether the structure provides “excessive compensation, fees, or benefits” or “could lead to material financial loss” to the institution. The Dodd-Frank Act does not require a covered financial institution to disclose compensation of individuals as part of this requirement.

Section \_\_\_\_ .4(f) would require all covered institutions to create annually and maintain for a period of at least seven years records that document the structure of all its incentive-based compensation arrangements and demonstrate compliance with this part. A covered institution must disclose the records to the Agency upon request. At a minimum, the records must include copies of all incentive-based compensation plans, a record of who is subject to each plan, and a description of how the incentive-based compensation program is compatible with effective risk management and controls.

Section \_\_\_\_ .5 would require a Level 1 or Level 2 covered institution to create annually and maintain for a period of at least seven years records that document: (1) The covered institution’s senior executive officers and significant risk-takers, listed by legal entity, job function, organizational hierarchy, and line of business; (2) the incentive-based compensation arrangements for senior executive officers and significant risk-takers, including information on percentage of incentive-based compensation deferred and form of award; (3) any forfeiture and downward adjustment or clawback reviews and decisions for senior executive officers and significant risk-takers; and (4) any material changes to the covered institution’s incentive-based compensation arrangements and policies. A Level 1 or Level 2 covered institution must create and maintain records in a manner that allows for an independent audit of incentive-based compensation arrangements, policies, and procedures, including, those

required under § \_\_\_\_ .11. A Level 1 or Level 2 covered institution must provide the records described above to the Agency in such form and with such frequency as requested by Agency.

Section \_\_\_\_ .11 would require a Level 1 or Level 2 covered institution to develop and implement policies and procedures for its incentive-based compensation program that, at a minimum (1) are consistent with the prohibitions and requirements of this part; (2) specify the substantive and procedural criteria for the application of forfeiture and clawback, including the process for determining the amount of incentive-based compensation to be clawed back; (3) require that the covered institution maintain documentation of final forfeiture, downward adjustment, and clawback decisions; (4) specify the substantive and procedural criteria for the acceleration of payments of deferred incentive-based compensation to a covered person, consistent with section \_\_\_\_ .7(a)(1)(iii)(B) and section \_\_\_\_ .7(a)(2)(iii)(B)); (5) identify and describe the role of any employees, committees, or groups authorized to make incentive-based compensation decisions, including when discretion is authorized; (6) describe how discretion is expected to be exercised to appropriately balance risk and reward; (7) require that the covered institution maintain documentation of the establishment, implementation, modification, and monitoring of incentive-based compensation arrangements, sufficient to support the covered institution’s decisions; (8) describe how incentive-based compensation arrangements will be monitored; (9) specify the substantive and procedural requirements of the independent compliance program consistent with section 9(a)(2); and (10) ensure appropriate roles for risk management, risk oversight, and other control function personnel in the covered institution’s processes for designing incentive-based compensation arrangements and determining awards, deferral amounts, deferral periods, forfeiture, downward adjustment, clawback, and vesting; and assessing the effectiveness of incentive-based compensation arrangements in restraining inappropriate risk-taking.

#### Collection of Information Is Mandatory

The collection of information will be mandatory for any covered institution subject to the proposed rules.

#### Confidentiality

The information collected pursuant to the collection of information will be

kept confidential, subject to the provisions of applicable law.

#### Estimated Paperwork Burden

In determining the method for estimating the paperwork burden the Board, OCC and FDIC made the assumption that covered institution subsidiaries of a covered institution subject to the Board's, OCC's or FDIC's proposed rule, respectively, would act in concert with one another to take advantage of efficiencies that may exist. The Board, OCC and FDIC invite comment on whether it is reasonable to assume that covered institutions that are affiliated entities would act jointly or whether they would act independently to implement programs tailored to each entity.

#### Estimated Average Hours per Response

**Recordkeeping Burden**  
 \$ \_\_\_\_\_.4(f)—20 hours (Initial setup 40 hours).  
 §§ \_\_\_\_\_.5 and \_\_\_\_\_.11 (Level 1 and Level 2)—20 hours (Initial setup 40 hours).

#### OCC

Number of respondents: 229 (Level 1—18, Level 2—17, and Level 3—194).  
 Total estimated annual burden: 15,840 hours (10,560 hours for initial setup and 5,280 hours for ongoing compliance).

#### Board

Number of respondents: 829 (Level 1—15, Level 2—51, and Level 3—763).  
 Total estimated annual burden: 53,700 hours (35,800 hours for initial setup and 17,900 hours for ongoing compliance).

#### FDIC

Number of respondents: 353 (Level 1—0, Level 2—13, and Level 3—340).  
 Total estimated annual burden: 21,960 hours (14,640 hours for initial setup and 7,320 hours for ongoing compliance).

#### NCUA

Number of respondents: 258 (Level 1—0, Level 2—1, and Level 3—257).  
 Total estimated annual burden: 15,540 hours (10,360 hours for initial setup and 5,180 hours for ongoing compliance).

#### SEC

Number of respondents: 806 (Level 1—58, Level 2—36, and Level 3—712).  
 Total estimated annual burden: 54,000 hours (36,000 hours for initial setup and 18,000 hours for ongoing compliance)

*Amendments to Exchange Act Rule 17a-4 and Investment Advisers Act Rule*

204-2: The proposed amendments to Exchange Act Rule 17a-4 and Investment Advisers Act Rule 204-2 contain "collection of information requirements" within the meaning of the PRA. The SEC has submitted the collections of information to OMB for review in accordance with 44 U.S.C. 3507 and 5 CFR 1320.11. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has assigned control number 3235-0279 to Exchange Act Rule 17a-4 and control number 3235-0278 to Investment Advisers Act Rule 204-2. The titles of these collections of information are "Rule 17a-4; Records to be Preserved by Certain Exchange Members, Brokers and Dealers" and "Rule 204-2 under the Investment Advisers Act of 1940." The collections of information required by the proposed amendments to Exchange Act Rule 17a-4 and Investment Advisers Act Rule 204-2 will be necessary for any broker-dealer or investment adviser (registered or required to be registered under section 203 of the Investment Advisers Act (15 U.S.C. 80b-3)) ("covered investment advisers"), as applicable, that is a covered institution subject to the proposed rules.

#### A. Summary of Collection of Information

The SEC is proposing amendments to Exchange Act Rule 17a-4(e) (17 CFR 240.17a-4(e)) and Investment Advisers Act Rule 204-2 (17 CFR 275.204-2) to require that broker-dealers and covered investment advisers that are covered institutions maintain the records required by \$ \_\_\_\_\_.4(f), and for broker-dealers or covered investment advisers that are Level 1 or Level 2 covered institutions, §§ \_\_\_\_\_.5 and \_\_\_\_\_.11, in accordance with the recordkeeping requirements of Exchange Act Rule 17a-4 or Investment Advisers Act Rule 204-2, as applicable.

#### B. Proposed Use of Information

The collections of information are necessary for, and will be used by, the SEC to determine compliance with the proposed rules and section 956 of the Dodd-Frank Act. Exchange Act Rule 17a-4 requires a broker-dealer to preserve records if the broker-dealer makes or receives the type of record and establishes the general formatting and storage requirements for records that broker-dealers are required to keep. Investment Advisers Act Rule 204-2 establishes general recordkeeping requirements for covered investment advisers. For the sake of consistency

with other broker-dealer or covered investment adviser records, the SEC believes that broker-dealers and covered investment advisers that are covered institutions should also keep the records required by \$ \_\_\_\_\_.4(f), and for broker-dealers or covered investment advisers that are Level 1 or Level 2 covered institutions, §§ \_\_\_\_\_.5 and \_\_\_\_\_.11, in accordance with these requirements.

#### C. Respondents

The collections of information will apply to any broker-dealer or covered investment adviser that is a covered institution under the proposed rules. The SEC estimates that 131 broker-dealers and approximately 669 investment advisers will be covered institutions under the proposed rules. The SEC further estimates that of those 131 broker-dealers, 49 will be Level 1 or Level 2 covered institutions, and 82 will be Level 3 covered institutions and that of those 669 investment advisers, approximately 18 will be Level 1 covered institutions, approximately 21 will be Level 2 covered institutions, and approximately 630 will be Level 3 covered institutions.<sup>276</sup>

#### D. Total Annual Reporting and Recordkeeping Burden

The collection of information would add three types of records to be maintained and preserved by broker-dealers and covered investment advisers: The records required by \$ \_\_\_\_\_.4(f), and for broker-dealers or covered investment advisers that are Level 1 or Level 2 covered institutions, the records required by \$ \_\_\_\_\_.5 and the policies and procedures required by \$ \_\_\_\_\_.11.

##### 1. Exchange Act Rule 17a-4

In recent proposed amendments to Exchange Act Rule 17a-4, the SEC estimated that proposed amendments adding three types of records to be preserved by broker-dealers pursuant to Exchange Act Rule 17a-4(b) would impose an initial burden of 39 hours per broker-dealer and an ongoing annual burden of 18 hours and \$360 per broker-dealer.<sup>277</sup> The SEC believes that those

<sup>276</sup> For a discussion of how the SEC arrived at these estimates, see the SEC Economic Analysis at Section V.I.

<sup>277</sup> Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers; Capital Rule for Certain Security-Based Swap Dealers, Release No. 34-71958 (Apr. 17, 2014), 79 FR 25194, 25267 (May 2, 2014). The burden hours estimated by the SEC for amending Exchange Act Rule 17a-4(b) include burdens attributable to ensuring adequate physical space and computer hardware and software storage for the records and promptly producing them when requested. These burdens may include, as necessary, acquiring

estimates provide a reasonable estimate for the burden imposed by the collection of information because the collection of information would add three types of records to be preserved by broker-dealers pursuant to Exchange Act Rule 17a-4(e). The records required to be preserved under Exchange Act Rule 17a-4(e) are subject to the similar formatting and storage requirements as the records required to be preserved under Exchange Act Rule 17a-4(b). For example, paragraph (f) of Exchange Act Rule 17a-4 provides that the records a broker-dealer is required to maintain and preserve under Exchange Act Rule 17a-4, including those under paragraph (b) and (e), may be immediately produced or reproduced on micrographic media or by means of electronic storage media. Similarly, paragraph (j) of Exchange Act Rule 17a-4 requires a broker-dealer to furnish promptly to a representative of the SEC legible, true, complete, and current copies of those records of the broker-dealer that are required to be preserved under Exchange Act Rule 17a-4, including those under paragraph (b) and (e).

The SEC notes, however, that paragraph (b) of Exchange Act Rule 17a-4 includes a three-year minimum retention period while paragraph (e) does not include any retention period. Thus, to the extent that a portion of the SEC's previously estimated burdens with respect to the amendments to Exchange Act Rule 17a-4(b) represent the burden of complying with the minimum retention period, using those same burden estimates with respect to the collection of information may represent a slight overestimate because the collection of information does not include a minimum retention period. The SEC believes, however, that the previously estimated burdens with respect to the amendments to Exchange Act Rule 17a-4(b) represent a reasonable estimate of the burdens of the collection of information given the other similarities between Exchange Act Rule 17a-4(b) and Exchange Act Rule 17a-4(e) discussed above. Moreover, the burden to create, and the retention period for, the records required by § \_\_\_.4(f), and for Level 1 and Level 2 broker-dealers, the records required by § \_\_\_.5 and the policies and procedures required by § \_\_\_.11, is accounted for in the PRA estimates for the proposed rules. Consequently, the burdens imposed by the collection of

information are to ensure adequate physical space and computer hardware and software storage for the records and promptly produce them when requested.<sup>278</sup>

Therefore, the SEC estimates that each of the three types of records required to be preserved pursuant to the collection of information will each impose an initial burden of 13 hours<sup>279</sup> per respondent and an ongoing annual burden of 6 hours<sup>280</sup> and \$120<sup>281</sup> per respondent. This is the result of dividing the SEC's previously estimated burdens with respect to the amendments to Exchange Act Rule 17a-4(b) by three to produce a per-record burden estimate.

The SEC estimates that requiring broker-dealers to maintain the records required by § \_\_\_.4(f) in accordance with Exchange Act Rule 17a-4 will impose an initial burden of 13 hours per respondent and a total ongoing annual burden of 6 hours and \$120 per respondent. The total burden for all respondents will be 1,703 hours initially (13 hours × 131 Level 1, Level 2, and Level 3 broker-dealers) and 786 hours annually (6 hours × 131 Level 1, Level 2, and Level 3 broker-dealers) with an annual cost of \$15,720 (\$120 × 131 Level 1, Level 2, and Level 3 broker-dealers).

The SEC estimates that requiring Level 1 and Level 2 broker-dealers to maintain the records required by § \_\_\_.5 in accordance with Exchange Act Rule 17a-4 will impose an initial burden of 13 hours per respondent and a total ongoing annual burden of 6 hours and \$120 per respondent. The total burden for all Level 1 and Level 2 broker-dealers will be 637 hours initially (13 hours × 49 Level 1 and

Level 2 broker-dealers) and 294 hours annually (6 hours × 49 Level 1 and Level 2 broker-dealers) with an annual cost of \$5,880 (\$120 × 49 Level 1 and Level 2 broker-dealers).

The SEC estimates that requiring Level 1 and Level 2 broker-dealers to maintain the policies and procedures required by § \_\_\_.11 in accordance with Exchange Act Rule 17a-4 will impose an initial burden of 13 hours per respondent and a total ongoing annual burden of 6 hours and \$120 per respondent. The total burden for all Level 1 and Level 2 broker-dealers will be 637 hours initially (13 hours × 49 Level 1 and Level 2 broker-dealers) and 294 hours annually (6 hours × 49 Level 1 and Level 2 broker-dealers) with an annual cost of \$5,880 (\$120 × 49 Level 1 and Level 2 broker-dealers).

In the Supporting Statement accompanying the most recent extension of Exchange Act Rule 17a-4's collection of information, the SEC estimated that each registered broker-dealer spends 254 hours annually to ensure it is in compliance with Rule 17a-4 and produce records promptly when required, and \$5,000 each year on physical space and computer hardware and software to store the requisite documents and information.<sup>282</sup> Thus, for Level 3 broker-dealers, as a result of the collection of information, the total annual burden to ensure compliance with Rule 17a-4 and produce records promptly when required will be 260 hours<sup>283</sup> and \$5,120<sup>284</sup> per Level 3 broker-dealer, or 21,320 hours and \$419,840 per all 82 Level 3 broker-dealers. For Level 1 and Level 2 broker-dealers, as a result of the collection of information, the total annual burden to ensure compliance with Rule 17a-4 and produce records promptly when required will be 272 hours<sup>285</sup> and \$5,360<sup>286</sup> per Level 1 and Level 2

<sup>278</sup> As discussed above, paragraph (j) of Exchange Act Rule 17a-4 requires a broker-dealer to furnish promptly to a representative of the SEC legible, true, complete, and current copies of those records of the broker-dealer that are required to be preserved under Exchange Act Rule 17a-4. Thus, the SEC estimates that this promptness requirement will be part of the incremental burden of the collection of information.

<sup>279</sup> 13 hours is the result of dividing the SEC's previously estimated burdens with respect to the amendments to Exchange Act Rule 17a-4(b) (39 hours) by three to produce a per-record burden estimate. 39 hours/3 types of records = 13 hours per record. These internal hours likely will be performed by a senior database administrator.

<sup>280</sup> 6 hours is the result of dividing the SEC's previously estimated burdens with respect to the amendments to Exchange Act Rule 17a-4(b) (18 hours) by three to produce a per-record burden estimate. 18 hours/3 types of records = 6 hours per record. These internal hours likely will be performed by a compliance clerk.

<sup>281</sup> \$120 is the result of dividing the SEC's previously estimated cost with respect to the amendments to Exchange Act Rule 17a-4(b) (\$360) by three to produce a per-record cost estimate. \$360 hours/3 types of records = \$120 per record.

<sup>282</sup> See Supporting Statement for the Paperwork Reduction Act Information Collection Submission for Rule 17a-4, Collection of Information for Exchange Act Rule 17a-4 (OMB Control No. 3235-0279), Office of Information and Regulatory Affairs, Office of Management and Budget, *available at* <http://www.reginfo.gov/public/do/PRAMain>.

<sup>283</sup> 254 hours + 6 hour annual burden of maintaining the records required by § \_\_\_.4(f) in accordance with Exchange Act Rule 17a-4.

<sup>284</sup> \$5,000 + \$120 annual cost of maintaining the records required by § \_\_\_.4(f) in accordance with Exchange Act Rule 17a-4.

<sup>285</sup> 254 hours + 6 hour annual burden of maintaining the records required by § \_\_\_.4(f) in accordance with Exchange Act Rule 17a-4 + 6 hour annual burden of maintaining the records required by § \_\_\_.5 in accordance with Exchange Act Rule 17a-4 + 6 hour annual burden of maintaining the policies and procedures required by § \_\_\_.11 in accordance with Exchange Act Rule 17a-4.

<sup>286</sup> \$5,000 + \$120 annual cost of maintaining the records required by § \_\_\_.4(f) in accordance with Exchange Act Rule 17a-4 + \$120 annual cost of

additional physical space, computer hardware, and software storage and establishing and maintaining additional systems for computer software and hardware storage.

broker-dealer, or 13,328 hours and \$262,640 per all 49 Level 1 and Level 2 broker-dealers.

## SUMMARY OF COLLECTION OF INFORMATION BURDENS PER RECORD TYPE

Nature of information collection burden	Initial hourly burden estimate per respondent (all respondents)	Annual hourly burden estimate per respondent (all respondents)	Annual cost estimate per respondent (all respondents)
§ ____ .4(f) Recordkeeping for Level 1, Level 2, and Level 3 Broker-Dealers .....	13 (1,703)	6 (786)	\$120 (\$15,720)
§ ____ .5 Recordkeeping for Level 1 and Level 2 Broker-Dealers .....	13 (637)	6 (294)	120 (5,880)
§ ____ .11 Policies and Procedures for Level 1 and Level 2 Broker-Dealers .....	13 (637)	6 (294)	120 (5,880)
Totals .....	39 (2,977)	18 (1,374)	360 (27,480)

## SUMMARY OF COLLECTION OF INFORMATION BURDENS PER RESPONDENT TYPE

Nature of information collection burden	Initial hourly burden estimate per respondent (all respondents)	Annual hourly burden estimate per respondent (all respondents)	Annual cost estimate per respondent (all respondents)
Level 1 and Level 2 Broker-Dealers (49 total) .....	39 (1,911)	18 (882)	\$360 (\$17,640)
Level 3 Broker-Dealers (82 total) .....	13 (1,066)	6 (492)	120 (9,840)

## SUMMARY OF COLLECTION OF INFORMATION BURDENS PER RESPONDENT TYPE INCLUDING ESTIMATE OF ANNUAL COMPLIANCE WITH RULE 17a-4

Nature of information collection burden	Annual hourly burden estimate per respondent (all respondents)	Annual cost estimate per respondent (all respondents)
Level 1 and Level 2 Broker-Dealers (49 total) .....	272 (13,328)	\$5,360 (\$262,640)
Level 3 Broker-Dealers (82 total) .....	260 (21,320)	5,120 (419,840)

As discussed above, the SEC estimates an increase of \$120 for Level 3 broker-dealers and \$360 for Level 1 and Level 2 broker-dealers to the \$5,000 spent each year by a broker-dealer on physical space and computer hardware and software to store the requisite documents and information as a result of the collection of information. The SEC estimates that respondents will not otherwise seek outside assistance in completing the collection of information or experience any other external costs in connection with the collection of information.

## 2. Investment Advisers Act Rule 204-2

The currently-approved total annual burden estimate for rule 204-2 is 1,986,152 hours. This burden estimate was based on estimates that 10,946 advisers were subject to the rule, and each of these advisers spends an average of 181.45 hours preparing and preserving records in accordance with the rule. Based on updated data as of January 4, 2016, there are 11,956 registered investment advisers.<sup>287</sup> This increase in the number of registered investment advisers increases the total burden hours of current rule 204-2 from

1,986,152 to 2,169,417, an increase of 183,265 hours.<sup>288</sup>

The proposed amendment to rule 204-2 would require covered investment advisers that are Level 1, Level 2, or Level 3 covered institutions to make and keep true, accurate, and current the records required by, and for the period specified in, § \_\_\_\_ .4(f) and, for those covered investment advisers that are Level 1 or Level 2 covered institutions, the records required by, and for the periods specified in, §§ \_\_\_\_ .5 and \_\_\_\_ .11.

maintaining the records required by § \_\_\_\_ .5 in accordance with Exchange Act Rule 17a-4 + \$120 annual cost of maintaining the policies and procedures required by § \_\_\_\_ .11 in accordance with Exchange Act Rule 17a-4.

<sup>287</sup> Based on data from the Commission's Investment Adviser Registration Depository ("IARD") as of January 4, 2016.

<sup>288</sup> This estimate is based on the following calculations:  $(11,956 - 10,946) \times 181.45 = 183,265$ ;  $183,265 + 1,986,152 = 2,169,417$ .

Based on SEC staff experience, the SEC estimates that the proposed amendment to rule 204–2 would increase each registered investment adviser's average annual collection burden under rule 204–2 by 2 hours<sup>289</sup> for each of the three types of records required to be preserved pursuant to the collection of information.<sup>290</sup> Therefore, for a covered investment adviser that is a Level 1 covered institution, the increase in its average annual collection burden would be from 181.45 hours to 187.45 hours,<sup>291</sup> and would thus increase the annual aggregate burden for rule 204–2 by 108 hours,<sup>292</sup> from 2,169,417 hours to 2,169,525 hours.<sup>293</sup> As monetized, the estimated burden for each such investment adviser's average annual burden under rule 204–2 would increase by approximately \$450,<sup>294</sup> which would increase the estimated monetized aggregate annual burden for rule 204–2 by \$8,100, from \$162,706,275 to \$162,714,375.<sup>295</sup> For a covered investment adviser that is a Level 2 covered institution, the increase in its average annual collection burden would be from 181.45 hours to 185.45 hours,<sup>296</sup> and would thus increase the annual aggregate burden for rule 204–2

by 84 hours,<sup>297</sup> from 2,169,525 hours<sup>298</sup> to 2,169,609 hours.<sup>299</sup> As monetized, the estimated burden for each such investment adviser's average annual burden under rule 204–2 would increase by approximately \$300,<sup>300</sup> which would increase the estimated monetized aggregate annual burden for rule 204–2 by \$6,300, from \$162,714,375<sup>301</sup> to \$162,720,675.<sup>302</sup> For a covered investment adviser that is a Level 3 covered institution, the increase in its average annual collection burden would be from 181.45 hours to 183.45 hours,<sup>303</sup> and would thus increase the annual aggregate burden for rule 204–2 by 1,260 hours,<sup>304</sup> from 2,169,609 hours<sup>305</sup> to 2,170,869 hours.<sup>306</sup> As monetized, the estimated burden for each such investment adviser's average annual burden under rule 204–2 would increase by approximately \$150,<sup>307</sup> which would increase the estimated monetized aggregate annual burden for rule 204–2 by \$94,500, from

<sup>297</sup> This estimate is based on the following calculation: 21 (Level 2 covered institution) advisers × 4 hours = 84 hours.

<sup>298</sup> This estimate includes the increase in the annual aggregate burden for covered investment advisers that are Level 1 covered institutions.

<sup>299</sup> This estimate is based on the following calculation: 2,169,525 hours + 84 hours = 2,169,609 hours.

<sup>300</sup> This estimate is based on the following calculation: 4 hours × \$75 (hourly rate for an administrative assistant) = \$300. The hourly wage used is from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified to account for an 1800-hour work-year and inflation and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

<sup>301</sup> This estimate includes the monetized increase in the annual aggregate burden for covered investment advisers that are Level 1 covered institutions.

<sup>302</sup> This estimate is based on the following calculations: 2,169,525 hours × \$75 = \$162,714,375. 2,169,609 hours × \$75 = \$162,720,675. \$162,720,675 – \$162,714,375 = \$6,300.

<sup>303</sup> This estimate is based on the following calculation: 181.45 existing hours + 2 new hours = 183.45 hours.

<sup>304</sup> This estimate is based on the following calculation: 630 (Level 3 covered institution) advisers × 2 hours = 1,260 hours.

<sup>305</sup> This estimate includes the increase in the annual aggregate burden for covered investment advisers that are Level 1 or Level 2 covered institutions.

<sup>306</sup> This estimate is based on the following calculation: 2,169,609 hours + 1,260 hours = 2,170,869 hours.

<sup>307</sup> This estimate is based on the following calculation: 2 hours × \$75 (hourly rate for an administrative assistant) = \$150. The hourly wage used is from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified to account for an 1800-hour work-year and inflation and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

\$162,720,675<sup>308</sup> to \$162,815,175.<sup>309</sup> The SEC estimates that the proposed amendment does not result in any additional external costs associated with this collection of information for rule 204–2.

#### E. Collection of Information Is Mandatory

The collections of information will be mandatory for any broker-dealer or covered investment adviser that is a covered institution subject to the proposed rules.

#### F. Confidentiality

The information collected pursuant to the collections of information will be kept confidential, subject to the provisions of applicable law.

#### G. Retention Period of Recordkeeping Requirements

The collections of information will not impose any retention period with respect to recordkeeping requirements. The retention period for the records required by § \_\_\_\_\_.4(f) and the records required by § \_\_\_\_\_.5 is accounted for in the PRA estimates for the proposed rules.

#### H. Request for Comment

Pursuant to 44 U.S.C. 3505(c)(2)(B), the SEC solicits comment to:

1. Evaluate whether the proposed collections are necessary for the proper performance of its functions, including whether the information shall have practical utility;

2. Evaluate the accuracy of its estimate of the burden of the proposed collections of information;

3. Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and

4. Evaluate whether there are ways to minimize the burden of collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also

<sup>308</sup> This estimate includes the monetized increase in the annual aggregate burden for covered investment advisers that are Level 1 or Level 2 covered institutions.

<sup>309</sup> This estimate is based on the following calculations: 2,169,609 hours × \$75 = \$162,720,675. 2,170,869 hours × \$75 = \$162,815,175. \$162,815,175 – \$162,706,275 = \$94,500.

<sup>289</sup> The burden hours estimated by the SEC for amending Investment Advisers Act Rule 204–2 assumes that the covered investment adviser already has systems in place to comply with the general requirements of Investment Advisers Rule 204–2. Accordingly, the 2 burden hours estimated by the SEC for each type of record required to be preserved pursuant to these proposed rules is attributable solely to the burden associated with maintaining such record.

<sup>290</sup> The records required by § \_\_\_\_\_.4(f), and for covered investment advisers that are Level 1 or Level 2 covered institutions, the records required by § \_\_\_\_\_.5 and the policies and procedures required by § \_\_\_\_\_.11.

<sup>291</sup> This estimate is based on the following calculation: 181.45 existing hours + 6 new hours = 187.45 hours.

<sup>292</sup> This estimate is based on the following calculation: 18 (Level 1 covered institution) advisers × 6 hours = 108 hours.

<sup>293</sup> This estimate is based on the following calculation: 2,169,417 hours + 108 hours = 2,169,525 hours.

<sup>294</sup> This estimate is based on the following calculation: 6 hours × \$75 (hourly rate for an administrative assistant) = \$450. The hourly wage used is from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified to account for an 1800-hour work-year and inflation and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

<sup>295</sup> This estimate is based on the following calculations: 2,169,417 hours × \$75 = \$162,706,275. 2,169,525 hours × \$75 = \$162,714,375. \$162,714,375 – \$162,706,275 = \$8,100.

<sup>296</sup> This estimate is based on the following calculation: 181.45 existing hours + 4 new hours = 185.45 hours.

send a copy of their comments to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090, with reference to File No. S7–07–16. Requests for materials submitted to OMB by the SEC with regard to this collection of information should be in writing, with reference to File No. S7–07–16, and be submitted to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE., Washington, DC 20549. As OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this proposal, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

*C. The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families*

NCUA and the FDIC have determined that this proposed rulemaking would not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act of 1999.<sup>310</sup>

*D. Riegle Community Development and Regulatory Improvement Act of 1994*

The Riegle Community Development and Regulatory Improvement Act of 1994 (“RCDRIA”) requires that each Federal Banking Agency, in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, new regulations that impose additional reporting, disclosures, or other new requirements on insured depository institutions generally must take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.

The Federal Banking Agencies note that comment on these matters has been solicited in the discussions of section \_\_\_\_\_.1 and \_\_\_\_\_.3 in Part II of the Supplementary Information, as well as other sections of the preamble, and that the requirements of RCDRIA will be

considered as part of the overall rulemaking process. In addition, the Federal Banking Agencies also invite any other comments that further will inform the Federal Banking Agencies’ consideration of RCDRIA.

*E. Solicitation of Comments on Use of Plain Language*

Section 722 of the Gramm-Leach-Bliley Act<sup>311</sup> requires the Federal Banking Agencies to use plain language in all proposed and final rules published after January 1, 2000. The Federal Banking Agencies invite comments on how to make these proposed rules easier to understand. For example:

- Have the agencies organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the proposed rules clearly stated? If not, how could the proposed rules be more clearly stated?
- Do the proposed rules contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the proposed rules easier to understand? If so, what changes to the format would make the proposed rules easier to understand?
- What else could the Agencies do to make the regulation easier to understand?

*F. OCC Unfunded Mandates Reform Act of 1995 Determination*

The OCC has analyzed the proposed rule under the factors set forth in section 202 of the Unfunded Mandates Reform Act of 1995 (“UMRA”) (2 U.S.C. 1532). Under this analysis, the OCC considered whether the proposed rule includes Federal mandates that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year (adjusted annually for inflation). For the following reasons, the OCC finds that the proposed rule does not trigger the \$100 million UMRA threshold. First, the mandates in the proposed rule do not apply to State, local, and tribal governments. Second, the overall estimate of the maximum one-year cost of the proposed rule to the private sector is approximately \$50 million. For this reason, and for the other reasons cited above, the OCC has determined that this proposed rule will not result in expenditures by State, local, and tribal

governments, or the private sector, of \$100 million or more in any one year. Accordingly, this proposed rule is not subject to section 202 of the UMRA.

*G. Differences Between the Federal Home Loan Banks and the Enterprises*

Section 1313(f) of the Safety and Soundness Act requires the Director of FHFA, when promulgating regulations relating to the Federal Home Loan Banks, to consider the differences between the Federal Home Loan Banks and the Enterprises (Fannie Mae and Freddie Mac) as they relate to: The Federal Home Loan Banks’ cooperative ownership structure; the mission of providing liquidity to members; the affordable housing and community development mission; their capital structure; and their joint and several liability on consolidated obligations (12 U.S.C. 4513(f)). The Director also may consider any other differences that are deemed appropriate. In preparing this proposed rule, the Director considered the differences between the Federal Home Loan Banks and the Enterprises as they relate to the above factors, and determined that the rule is appropriate. FHFA requests comments regarding whether differences related to those factors should result in any revisions to the proposed rule.

*H. NCUA Executive Order 13132 Determination*

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency,<sup>312</sup> voluntarily complies with the Executive Order. As required by statute, the proposed rule, if adopted, will apply to federally insured, state-chartered credit unions. These institutions are already subject to numerous provisions of NCUA’s rules, based on the agency’s role as the insurer of member share accounts and the significant interest NCUA has in the safety and soundness of their operations. Because the statute specifies that this rule must apply to state-chartered credit unions, NCUA has determined that the proposed rule does not constitute a policy that has federalism implications for purposes of the Executive Order.

*I. SEC Economic Analysis*

*A. Introduction*

As discussed above, section 956 of the Dodd-Frank Act requires the SEC, jointly with other appropriate Federal regulators, to prescribe regulations or

<sup>311</sup> Public Law 106–102, section 722, 113 Stat. 1338 1471 (1999).

<sup>310</sup> Public Law 105–277, 112 Stat. 2681 (1998).

<sup>312</sup> 44 U.S.C. 3502(5).

guidelines to require covered institutions to disclose information about their incentive-based compensation arrangements sufficient for the Agencies to determine whether their compensation structure provides an executive officer, employee, director or principal shareholder with excessive compensation, fees or benefits or could lead to material financial loss to the firm. Section 956 also requires the Agencies to jointly prescribe regulations or guidelines that prohibit any type of incentive-based compensation arrangements, or any feature of these arrangements, that the Agencies determine encourages inappropriate risks by covered institutions by providing excessive compensation to officers, employees, directors, or principal shareholders (“covered persons”) or that could lead to material financial loss to the covered institution. While section 956 requires rulemaking to address a number of types of financial institutions, the rule being proposed by the SEC would apply to broker-dealers registered with the SEC under section 15 of the Securities Exchange Act (“broker-dealers” or “BDs”) and investment advisers, as defined in section 202(a)(11) of the Investment Advisers Act of 1940 (“investment advisers” or “IAs”).

In connection with its rulemakings, the SEC considers the likely economic effects of the rules. This section provides the SEC’s economic analysis of the main likely effects of the proposed rule on broker-dealers and investment advisers that would be covered under the proposed rule. For purposes of this analysis, the SEC addresses the potential economic effects for covered BDs and IAs resulting from the statutory mandate and from the SEC’s exercise of discretion together, recognizing that it is often difficult to separate the economic effects arising from these two sources. The SEC also has considered the potential costs and benefits of reasonable alternative means of implementing the mandate. Where practicable, the SEC has attempted to quantify the effects of the proposed rule; however, in certain cases noted below, the SEC is unable to provide a reasonable estimate because the SEC lacks the necessary data.

In particular, because the SEC’s regulation of individuals’ compensation has historically been centered on disclosures by reporting companies, the SEC lacks information and data regarding the present incentive-based compensation practices of broker-dealers and investment advisers if those entities are not themselves reporting companies under the Exchange Act. In

addition, in proposing these rules jointly for public comment, the Agencies have relied in part on the supervisory experience of the Federal Banking Agencies.<sup>313</sup> Accordingly, for the purposes of evaluating the economic impact of the proposed rule, the SEC has considered outside analyses and other studies regarding the effects of incentive-based compensation that are not directly related to broker-dealers or investment advisers. In addition, the SEC is requesting that commenters provide data that will permit the SEC to perform a more direct analysis of the economic impact on broker-dealers and investment advisers that the proposed rules would have if adopted.

The SEC requests comment on all aspects of the economic effects, including the costs and benefits of the proposed rule and possible alternatives to the proposed rule. The SEC appreciates comments that include data or qualitative information that would enable it to quantify the costs and benefits associated with the proposed rule and alternatives to the proposed rule.

#### B. Broad Economic Considerations

Economic theory suggests that even compensation practices that are optimal from the perspective of one set of stakeholders may not be optimal from the perspective of others. As discussed below, pay packages that are optimal from the point of view of certain shareholders may not be optimal from the point of view of taxpayers and other stakeholders.

In particular, as discussed above, under certain facts and circumstances, even pay packages that are optimal from the point of view of shareholders may induce an excessive amount of risk-taking that could create potentially negative externalities for taxpayers. For example, also as discussed above, some have argued that during financial crises the losses of certain financial institutions have resulted in taxpayer assistance.<sup>314</sup> To the extent that the

<sup>313</sup> See, e.g., OCC, Board, FDIC, and Office of Thrift Supervision, “Guidance on Sound Incentive Compensation Policies” (“2010 Federal Banking Agency Guidance”), 75 FR 36395 (June 25, 2010), available at: <http://www.federalreserve.gov/newsevents/press/bcreg/20100621a.htm>. As discussed above, the Federal Banking Agencies have found that any incentive-based compensation arrangement at a covered institution will encourage inappropriate risks if it does not sufficiently expose the risk-takers to the consequences of their risk decisions over time, and that in order to do this, it is necessary that meaningful portions of incentive-based compensation be deferred and placed at risk of reduction or recovery. This economic analysis relies in part on these Agencies’ supervisory experience described above.

<sup>314</sup> See Gorton, G., 2012. Misunderstanding Financial Crises: Why We Don’t See Them Coming,

proposed rule would curtail pay convexity<sup>315</sup> by imposing restrictions of certain amounts, components, and features of incentive-based compensation, the proposed rule may have potential benefits by lowering the likelihood of an outcome that may induce negative externalities. The extent of these potential benefits would depend on specific facts and circumstances at the firm level and individual level, including whether the size, centrality, and business complexity of the firm and the position of the individual materially affect the level of risk, including risks that could lead to negative externalities. While academic literature does not provide clear evidence that broker-dealers and investment advisers have produced negative externalities for taxpayers,<sup>316</sup> the proposed rule may address scenarios where such externalities could nonetheless arise because the incentive-based compensation arrangements at a broker-dealer or investment adviser generate differences in risk preferences between managers<sup>317</sup> and taxpayers.

From an economic standpoint, when the risk preferences of managers (agents) differ from the risk preferences of stakeholders (principals) of a firm, risk-taking may be considered inappropriate from the point of view of a particular stakeholder.<sup>318</sup> While the economic

Oxford University Press; French et al., 2010. Excerpts from The Squam Lake Report: Fixing the Financial System. *Journal of Applied Corporate Finance* 22, 8–21.

<sup>315</sup> Pay convexity describes the shape of the payoff curve as a result of compensation arrangements. More convex payoff curves provide higher rewards for taking on risk.

<sup>316</sup> In the academic literature, some studies relate to a broad spectrum of firms in different industries, while other studies related to firms, primarily banks, in the financial services sector. The SEC is not aware of studies that focus on broker-dealers and investment advisers. While certain findings in the financial services sector may apply also to broker-dealers and investment advisers, any generalization is subject to a number of limitations. For example, BDs and IAs differ from other financial services firms with respect to business models, nature of the risks posed by the institutions, and the nature and identity of the persons affected by those risks.

<sup>317</sup> The SEC’s economic analysis uses the term “managers” in an economic (rather than organizational) connotation as the persons or entities that are able to make decisions on behalf of, or that impact, another person or entity. Thus, managers in this context would include covered persons such as senior executive officers and significant risk-takers.

<sup>318</sup> The literature in economics and finance typically refers to a principal-agent model to describe the employment relationship between shareholders and managers of a firm. The principal (shareholder) hires an agent (manager) to operate the firm. More generally, the principal-agent model is also used to describe the relationship between managers and stakeholders. For example, see Jensen, M., Meckling, W. 1976. Theory of the Firm: Managerial Behavior, Agency Costs and Ownership

theory mainly focuses on the principal-agent relationship between managers and shareholders, an agency problem may also exist between managers and taxpayers and between managers and debtholders. For example, certain levels of risk-taking (e.g., those associated with investments in R&D-intensive activities) may be optimal<sup>319</sup> for shareholders but considered to be excessive for debtholders. In general, debtholders are likely to require a rate of return on their investment that is proportionate to the riskiness of the firm and to put in place covenants in the contracts governing the debt that restrict those managerial actions that, in their view, may constitute inappropriate risk-taking but that shareholders may find appropriate.<sup>320</sup>

Tying managerial compensation to firm performance aims at aligning the incentives of management with the interests of shareholders.<sup>321</sup> Managers are likely to be motivated by drivers other than their explicit compensation, including for example career advancements, personal pride, and job retention concerns. Beyond that, making their compensation in part depend on firm performance could incentivize managers to exert effort and make decisions that maximize shareholder value. In a principal-agent relationship between shareholders and managers, there may be an incentive misalignment that may give rise to agency problems between the parties: For example, managers may take on projects that benefit their personal wealth but do not necessarily increase the value of the firm. Absent a variable component in the compensation arrangements that encourages risk-taking, risk averse and

undiversified managers<sup>322</sup> may take less risk than is optimal from the point of view of shareholders.<sup>323</sup>

With an aim to incentivize managers to take on risk that is optimal for shareholders and to attract and retain managerial talent, managerial compensation arrangements most often include incentive-based compensation, which is the variable component of compensation that serves as an incentive or a reward for performance.<sup>324</sup> Incentive-based compensation arrangements typically include<sup>325</sup> performance-based compensation whose award is conditional on achieving specified performance measures that are evaluated over a certain time period (i.e., short-term and long-term incentive plans), in absolute terms or in relation to a peer group. It encompasses a wide range of forms of compensation instruments. Among these forms, equity-based compensation (e.g., performance share units, restricted stock units, and stock option awards) ties managerial wealth to stock performance to motivate managers to take actions—exert effort and take risks—that are more directly aligned with the interests of shareholders. Equity awards are typically subject to multi-year vesting schedules and vesting conditions restricting managers from unwinding their equity positions during vesting periods. Relatedly, some managers are often prohibited from hedging their

equity positions in their firm's stock against any downside in the stock value.

Incentivizing managers through compensation to take on shareholders' preferred amount of risk requires a delicate balancing act, because different combinations of amounts, components and features of incentive-based compensation may make managerial pay more or less sensitive to firm risk than the level that is desired by shareholders to maximize their return. In particular, different combinations may make pay a nonlinear (in particular, convex) function of performance; in other words, a greater increment in payoffs is realized in the case of high performance, compared to when performance is moderate or poor. While there has been ample debate about how certain characteristics of incentive-based compensation may affect pay convexity and induce risk-taking, the economic literature has not conclusively identified a specific amount, component, or feature of incentive-based compensation that uniformly leads to inappropriate risk-taking, due to differential facts and circumstances at both the firm level and individual level.

For example, stock options and risk grants are often seen as a form of incentive-based compensation that, under certain conditions, may lead to incentives for taking inappropriate risk from shareholders' point of view.<sup>326</sup> Compared to cash incentives or restricted stock units, stock options have an asymmetric payoff structure since they provide the option holder with unlimited upside potential and limited downside. In particular, given that a positive outcome from risk-taking is a positive payoff, whereas a negative outcome does not symmetrically penalize the option holder, the design of stock options is likely to encourage managers to undertake risks. The empirical research on the effect of stock options on risk-taking does in general support a positive relation between option-based compensation and risk-taking;<sup>327</sup> however, as a whole, the academic evidence is mixed on whether stock options induce inappropriate risk-

Structure. *Journal of Financial Economics* 3, 305–360.

<sup>319</sup> The economic literature uses the term of “optimal” (“suboptimal”) level of risk-taking in a technical manner to describe the alignment (misalignment) in risk preferences between managers and a particular stakeholder. Here “optimal” means from the point of view of a particular stakeholder (e.g., shareholders). Hereafter, consistently with the economic literature, the SEC's economic analysis uses these terms without any normative connotation or implication.

<sup>320</sup> Both managers and shareholders have an incentive to engage in activities that promise high payoffs if successful even if they have a low probability of success. If such activities turn out well, managers and shareholders capture most of the gains, whereas if they turn out badly debtholders bear most of the costs. In the principal-agent relationship between managers and debtholders, inappropriate risk taking would amount to managers' actions that transfer risks from shareholders to debtholders and that benefit shareholders at the expense of debtholders. See Jensen, M., Meckling, W. 1976. Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure. *Journal of Financial Economics* 3, 305–360.

<sup>321</sup> See *Ibid.*

<sup>322</sup> The differential degree of diversification between managers' and shareholders' portfolios may lead to a misalignment of managerial incentives from optimal risk-taking from the point of view of shareholders. In general, executives are relatively undiversified compared to the average investor, because a significant fraction of executives' wealth is invested into the companies they operate, through the value of their firm-specific human capital and their portfolio holdings, including their compensation-related claims. The concentration of managerial wealth in their employer company may lead to managerial aversion towards value-enhancing but risky projects since such projects can place undiversified managerial wealth at heightened levels of risk. See Hall, B., and Murphy, K. 2002. Stock Options for Undiversified Executives. *Journal of Accounting and Economics* 33, 3–42.

<sup>323</sup> Most managers would operate in a multi-period framework. In this environment, managers would still have incentives to exert effort and make decisions that maximize shareholder value due to career concerns and expectations about future wages.

<sup>324</sup> Incentive-based compensation addresses the fact that shareholders cannot observe how much effort managers exert or should exert. Because shareholders do not know and cannot specify every action managers should take in every scenario, shareholders delegate many of the decisions to managers by compensating them based on the results from those decisions.

<sup>325</sup> See, for example, Frydman, C., and R. Saks, 2010. Executive Compensation: A New View from a Long-Term Perspective, 1936–2005. *Review of Financial Studies* 23, 2099–2138.

<sup>326</sup> See Frydman and Jenter. CEO Compensation. *Annual Review of Financial Economics* (2010).

<sup>327</sup> See Guay, W. 1999. The sensitivity of CEO wealth to equity risk: An analysis of the magnitude and determinants. *Journal of Financial Economics* 53, 43–71. Stock options, as opposed to common stockholdings, increase the sensitivity of CEOs' wealth to equity risk. The study documents a positive relation between the convexity in compensation arrangements and stock return volatility suggesting that such compensation arrangements are related to riskier investing and financing decisions. Stock options are mostly used in companies where underinvestment is value-increasing but risky projects may lead to significant losses in the value of these companies.

taking from the point of view of shareholders.

Some studies show that the relation between option-based compensation and risk-taking incentives is not uniform across different firms, and the incentives to undertake risk may vary depending on certain conditions.<sup>328</sup> For example, options that are deep in-the-money may lead the option holder to moderate risk exposure to protect the value of the option. On the other hand, options that are deep out-of-the-money may provide incentives for excessive risk-taking. Additionally, there is significant variation across companies with regard to the use of options in compensation arrangements. Stock options are a relatively more significant component of compensation arrangements for executives in companies where risk-taking is important for maximizing shareholder value.<sup>329</sup>

Another example of a characteristic in incentive-based compensation arrangements that is commonly considered to potentially provide incentives for actions that carry undesired risks is the disproportionate use of short-term (e.g., measured over a period of one year) performance measures (i.e., accounting, stock price-based, or nonfinancial measures) that may steer managers toward short-termism without adequate regard of the long-term risks potentially posed to long-term firm value.<sup>330</sup> In doing so, managers may reap the rewards of their actions in the short run but may not participate in the potentially negative outcomes that may materialize in the long run. Short-termism may lead to

investment distortions in the long run, such as under-<sup>331</sup> or over-investment,<sup>332</sup> that are potentially detrimental to shareholder value. Some academic studies suggest that managers' focus on short-term performance may arise simply out of their reputation and career concerns, and compensation awards tied to short-term performance measures may accentuate the tendency toward short-termism.<sup>333</sup>

Studies document that short-term incentive plans or annual bonuses typically represent a small fraction of executive compensation.<sup>334</sup> Additionally, a recent study provides evidence of a significant increase in the number of firms granting multi-year

accounting-based performance incentives to their chief executive officers ("CEOs").<sup>335</sup> Firms with relatively less volatile accounting performance measures and a stronger presence of long-term shareholders are more likely to utilize these compensation arrangements. As a whole, the academic evidence is mixed on whether short-term incentive plans induce inappropriate risk-taking from the point of view of certain shareholders. However, there is evidence that certain equity-based compensation arrangements may provide incentives for earnings management<sup>336</sup> and misreporting<sup>337</sup> that could lead to lower long-term shareholder value. Finally, there is also evidence that compensation contracts with relatively shorter horizons are positively related (in a statistical sense) to proxies for earnings management.<sup>338</sup>

<sup>331</sup> See Stein, J. 1989. Efficient Capital Markets, Inefficient Firms: A Model of Myopic Corporate Behavior. *Quarterly Journal of Economics* 104, 655–669.

<sup>332</sup> See Bebchuk, L., Stole, L. 1993. Do Short-Term Objectives Lead to Under- or Overinvestment in Long-Term Projects? *Journal of Finance* 48, 719–729. The paper develops a model showing that, depending on the nature of the information asymmetry between management and shareholders, either under- or over-investment in long-run projects is likely to occur. When shareholders cannot observe the level of investment in long-term projects, the model predicts that managers would underinvest. When shareholders can observe the level of investment but not the productivity of such investment, then managers have incentives to over-invest.

<sup>333</sup> See Narayanan, M.P. 1985. Managerial Incentives for Short-Term Results. *Journal of Finance* 40, 1469–1484; and Stein, J. 1989. Efficient Capital Markets, Inefficient Firms: A Model of Myopic Corporate Behavior. *Quarterly Journal of Economics* 104, 655–669. These studies examine managerial incentives to focus on shorter-term performance at the expense of longer-term value. When managers have information about firm decisions that investors do not have, focusing on short-term performance may be an optimal strategy for managers to enhance their perceived skill and reputation, as well as achieve higher compensation. The studies also argue that even if the market anticipates such short-termism from managers, the optimal strategy for managers would still be to focus on short-term results. Narayanan (1985) also shows that short-termism can be partially curbed by offering longer-term contracts to managers.

A survey of Chief Financial Officers indicates that, among other motivations, career concerns and reputation act as leading motivations for the significant focus of executives on delivering short-term performance (e.g., quarterly earnings expectations). The survey also documents that executives are willing to forgo long-term value enhancing activities and projects in order to deliver on short-term performance targets. See Graham, J., Harvey, C., and Rajgopal, S. 2005. The Economic Implications of Corporate Financial Reporting. *Journal of Accounting and Economics* 40, 3–73.

<sup>334</sup> See Frydman, C., and R. Saks, 2010. Executive Compensation: A New View from a Long-Term Perspective, 1936–2005. *Review of Financial Studies* 23, 2099–2138. The paper documents the evolution of various characteristics of executive compensation arrangements for the 50 largest U.S. companies since 1936. Long-term pay including deferred bonuses in the form of restricted stock and stock options comprised the largest part of executive compensation in recent years. For example, 35% of total executive pay for these companies was in the form of long-term bonuses in the form of restricted stock in 2005.

<sup>335</sup> See Li, Z., and L. Wang, 2013. Executive Compensation Incentives Contingent on Long-Term Accounting Performance, Working Paper. The study documents a significant increase in the use of long-term accounting performance plans for CEOs of S&P500 companies. More specifically, the study documents that 43% of S&P500 companies used long-term accounting performance plans in CEO compensation arrangements in 2008, compared to 16% of S&P500 companies in 1996. In general terms, these plans usually rely on a three-year performance measurement period of various accounting measures of performance such as earnings, revenues, cash flows and other metrics to determine payouts to CEOs in the form of mostly equity or cash. The paper does not find evidence that such compensation arrangements are used by CEOs to extract excessive compensation.

<sup>336</sup> See Bergstresser, D., Philippon, T. 2006. CEO incentives and earnings management. *Journal of Financial Economics* 80, 511–529. The paper presents evidence that highly incentivized CEOs, as measured by the significance of stock and options in CEOs' compensation arrangements, are more likely to engage in earnings management that misrepresents the true economic performance of a company, with the intent to personally profit from such misrepresentation of performance. Although tying CEOs' wealth to company performance aims at aligning the incentives of CEOs with those of shareholders, the strength of such incentives may lead to unintended consequences such as incentives to misrepresent company performance in efforts to increase the value of their compensation.

<sup>337</sup> See Burns, N., Kedia, S. 2006. The impact of performance-based compensation on misreporting. *Journal of Financial Economics* 79, 35–67. The study provides empirical evidence that CEOs whose option portfolios are more sensitive to the stock price of the company are more likely to misreport their performance. The paper does not find any evidence that the sensitivity of other components of performance-based compensation to stock price, such as restricted stock and bonuses, are related to the propensity to misreport performance. The asymmetric payoff structure of stock options provides incentives to CEOs to misreport because of the limited downside risk associated with the detection of misreporting.

<sup>338</sup> See Gopalan, R., Milbourn, T., Song, F., and Thakor, A. 2014. Duration of Executive Compensation. *Journal of Finance* 69, 2777–2817. The paper constructs a measure of executive pay duration that reflects the vesting periods of different pay components to investigate its association with

<sup>328</sup> See Ross, S. 2004. Compensation, Incentives, and the Duality of Risk Aversion and Riskiness. *Journal of Finance* 59, 207–225; Carpenter, J. 2000. Does Option Compensation Increase Managerial Risk Appetite? *Journal of Finance* 55, 2311–2332. Both studies question the common belief that stock options unequivocally induce holders to undertake more risk. Although the asymmetric payoff structure of options is likely to encourage risk-taking in some cases, there are also circumstances where options may lead to decreased appetite for risk taking by option holders.

<sup>329</sup> See Guay (1999).

<sup>330</sup> See Bizjak, J., Brickley, J., Coles, J. 1993. Stock-based incentive compensation and investment behavior. *Journal of Accounting and Economics* 16, 349–372. The authors argue that managerial concern about current stock prices could lead management to distort optimal investment decisions in an effort to influence the current stock price. Such short-termism is likely to be exacerbated when there is a significant information asymmetry between management and investors. The study argues that compensation arrangements with longer horizons are a potential solution to such behavior, and finds that firms with higher information asymmetries between management and shareholders actually use compensation arrangements with relatively longer horizons.

The presence of a number of mitigating factors may explain why evidence is inconclusive on the effects of incentive-based compensation on inappropriate risk-taking. One such factor is corporate governance and, more specifically, board of directors oversight over executive compensation. The board of directors, as an agent of shareholders, may monitor managers and review their performance (e.g., through the compensation committee of the board of directors) in the case of decreases in shareholder value that, among other factors, may be a result of inappropriate risk-taking.<sup>339</sup> Also, corporate boards may attempt to determine compensation arrangements for executives in a way that aligns executives' interests with those of shareholders. The empirical evidence on the effectiveness of board of directors oversight over executive compensation is mixed. One study finds evidence suggesting that certain boards are not effective in setting executive compensation because executives are often rewarded for performance due to luck.<sup>340</sup> Another study provides evidence that CEOs play an important role in the nomination and selection of board of directors members, suggesting that board of directors oversight may be impaired as a result.<sup>341</sup> Other studies

short-termism. Pay duration is positively related to growth opportunities, long-term assets, R&D intensity, lower risk and better recent stock performance. Longer CEO pay duration is negatively related with income increasing accruals.

<sup>339</sup> While the SEC is not aware of any literature that directly examines inappropriate risk-taking and managerial retention decisions, there is evidence in the academic literature documenting a higher likelihood of managerial turnover following poor performance measured with stock returns or accounting measures of performance (See for example, Engel, E., Hayes, R., and Wang, X. 2003. CEO Turnover and Properties of Accounting Information. *Journal of Accounting and Economics* 36, 197–226; and Farrell, K., and Whidbee, D. 2003. The Impact of Firm Performance Expectations on CEO Turnover and Replacement Decisions. *Journal of Accounting and Economics* 36, 165–196.).

<sup>340</sup> See Bertrand, M., and S. Mullainathan, 2001. Are CEOs rewarded for luck? The ones without principals are. *Quarterly Journal of Economics* 116, 901–932. The paper examines whether the component of firm performance that is outside of managerial control is related to managerial compensation. According to the efficient contracting view of compensation, i.e. compensation arrangements are used to mitigate principal-agent problems, executives should not be rewarded (nor penalized) for performance due to luck. The authors propose a 'skimming view' for managerial compensation where CEOs capture the compensation setting process and find evidence that CEOs of oil companies get rewarded when changes in oil prices induce favorable changes in company performance. See also Bebchuk, L.A., Fried, J.M., Walker, D.I., 2002. Managerial power and rent extraction in the design of executive compensation. *University of Chicago Law Review* 69, 751–846.

<sup>341</sup> See Coles, J., Daniel, N., and Naveen, L. Co-opted Boards. 2014. *Review of Financial Studies* 27, 1751–1796. The study examines whether

find that firms with strong governance are better than firms with weak governance at monitoring the CEO and have better control of size and structure of CEO pay.<sup>342</sup>

Another example of a mitigating factor is the implementation of risk controls over business activities that academic studies have generally found effective at curbing inappropriate risk-taking. One study<sup>343</sup> examines the relation between risk controls at bank holding companies ("BHCs") and outcomes related to risk-taking, such as the fraction of loans that are non-performing, during the financial crisis. In this study, the strength and quality of risk controls are proxied by the

independent directors that are appointed after the current CEO assumed office are effective monitors of the CEO. The findings show that there is a difference in the monitoring efficiency between independent directors holding their position prior to the current CEO's appointment vs. independent directors that join the board of directors after the current CEO has assumed office (Co-opted board members). The percentage of 'co-opted' board members in a company is negatively related with various measures of board monitoring. For example, these companies tend to pay their CEOs more and have lower turnover-performance sensitivity (i.e., CEOs are less likely to be fired following deteriorating firm performance). The study questions whether independent directors appointed after CEO assumed office are really independent to the CEO.

Relatedly, another study finds that on average directors receive a very high level of votes in elections, in the post-SOX era. The evidence points to the fact that if a director is slated, she is elected. However, the study also finds evidence that lower levels of director votes lead to reductions in 'abnormal' compensation and an increase in the level of CEO turnover. This latter result is particularly strong when these directors serve as chair or members of the compensation committee. See Cai, J., Garner, J., and Walking R. 2009. *Journal of Finance* 64, 2389–2421.

<sup>342</sup> See Core, J., R.W. Holthausen, and D.F. Larcker. 1999. Corporate Governance, Chief Executive Officer Compensation, and Firm Performance. *Journal of Financial Economics* 51, 371–406. The paper finds that board and ownership structure explain differences in CEO compensation across firms to a significant extent. Weaker governance structures are related to greater agency problems resulting in higher CEO compensation.

See Chhaochharia, V., and Grinstein, Y. 2009. CEO Compensation and Board Structure. *Journal of Finance* 64, 231–261, showing that companies that were least compliant with new regulations issued in 2002 by NYSE and NASDAQ (regarding governance listing standards) decreased compensation to their CEOs to a significant extent. The decrease in CEO compensation is mainly attributable to decreases in bonus and stock-based compensation. The results suggest that requirements for board of directors structure and procedures have a significant effect on the structure and size of CEO compensation. See also Fahlenbrach, R. 2009. Shareholder Rights, Boards, and CEO Compensation. *Review of Finance* 13, 81–113, finding evidence of a substitution effect between compensation and other governance mechanisms.

<sup>343</sup> See Ellul, A., Yerramilli, V. 2013. Stronger Risk Controls, Lower Risk: Evidence from U.S. Bank Holding Companies. *Journal of Finance* 68, 1757–1803.

existence, independence, experience and centrality of the Chief Risk Officer and the corresponding Risk Committee. The study finds that BHCs with strong risk controls during years preceding the crisis had lower frequencies of underperforming loans and better operating and stock performance during the crisis. In this study, this relation was not significant in the years outside of the financial crisis indicating that strong risk controls, as measured by this study, curtailed extreme risk exposures only during the financial crisis. Another study<sup>344</sup> shows that lenders with relatively powerful risk managers, as measured by the level of the risk manager's compensation relative to the level of named executive officers' compensation, experience lower loan default rates, interpreting this finding as evidence that strong risk management is effective in reducing the origination of low quality loans.

Another mechanism that could play a mitigating role at curtailing the potential effects of incentive-based compensation on inappropriate risk-taking is reputation and career concerns of executives. On one hand, some studies show that managers' concerns about the effects of current performance on their future compensation are important in affecting managerial incentives, even in the absence of formal compensation contracts.<sup>345</sup> For example, executives with greater career concerns typically have an incentive to take less risk than optimal for the company<sup>346</sup> and an executive's pay-for-performance sensitivity is higher as the executive becomes older.<sup>347</sup> This suggests that

<sup>344</sup> See Keys, B., Mukherjee, T., Seru, A., Vig, V. 2009. Financial regulation and securitization: Evidence from subprime loans. *Journal of Monetary Economics* 56, 700–720.

<sup>345</sup> See Gibbons, Robert, and Kevin J. Murphy. 1992. Optimal incentive contracts in the presence of career concerns: Theory and evidence. *Journal of Political Economy* 100, 468–505. The paper shows that career concerns can have important effects on incentives even in the absence of formal contracts. The importance of career concerns as a motivating mechanism is particularly relevant for younger managers whose ability is not yet established in the labor market. Moreover, the evidence shows that CEOs' pay-for-performance sensitivity is stronger for CEOs closer to retirement, consistent with the idea that career concerns are not strong for older CEOs and are thus re-enforced through formal contracts.

<sup>346</sup> See Holmstrom, B. 1999. Managerial Incentive Problems: A Dynamic Perspective. *Review of Economic Studies* 66, 169–182. The study models incentives for effort and risk taking by agents in the presence of career concerns. With regards to risk taking, the model shows that younger managers whose talent or ability is not yet known to the market may be reluctant to choose risky projects that are optimal from a shareholders' perspective.

<sup>347</sup> See Gibbons, Robert, and Kevin J. Murphy. 1992. Optimal incentive contracts in the presence

Continued

inappropriate risk-taking could be less severe for younger executives, for whom there are more periods over which to spread the reward for their efforts.<sup>348</sup> On the other hand, as mentioned above, some studies also argue that career concerns can lead executives to focus on delivering short-term performance to enhance their present reputation, at the expense of long-term value.<sup>349</sup>

Some studies argue that compensation structures did not encourage inappropriate risk-taking and that managers were severely penalized since their portfolio values suffered considerably during the financial crisis.<sup>350</sup> According to these studies, executives held significant amounts of their financial institutions' equity in the form of stock options and restricted stock when the crisis occurred and the value of these holdings declined dramatically and quickly, wiping out most of their value. The fact that executives were still significantly exposed to firm performance by holding on to stock options and restricted stock units when the crisis occurred can be viewed as an indicator that these executives had no knowledge of the significant risks associated with their actions.<sup>351</sup> According to this view,

of career concerns: Theory and evidence, *Journal of Political Economy* 100, 468–505.

<sup>348</sup> Young CEOs are likely to differ in other dimensions such as character, knowledge, and experience and hence establishing a causal effect of career concerns on risk taking could be difficult. See Cziraki, P., and M. Xu, 2013. CEO career concerns and risk-taking, working paper.

<sup>349</sup> See Narayanan, M.P. 1985. Managerial Incentives for Short-Term Results. *Journal of Finance* 40, 1469–1484; and Stein, J. 1989. Efficient Capital Markets, Inefficient Firms: A Model of Myopic Corporate Behavior. *Quarterly Journal of Economics* 104, 655–669.

<sup>350</sup> See Murphy, K. 2009. Compensation Structure and Systemic Risk. U.S.C. Marshall School of Business Working Paper. Compensation for CEOs and other named executive officers (NEOs) significantly suffered during the crisis. For TARP recipient institutions: Bonuses declined by approximately 80% from 2007 to 2008, and the value of stock options and restricted stock held by NEOs declined by more than 80% during the same time period. Executive compensation also significantly declined for non-TARP recipients but the decline was lower than for TARP recipients.

<sup>351</sup> See Fahlenbrach, R., Stulz, R. 2011. Bank CEO Incentives and the Credit Crisis. *Journal of Financial Economics* 99, 11–26. The study examines the link between bank performance during the crisis and CEO incentives from compensation arrangements preceding the crisis. The evidence shows that banks whose CEOs' incentives were better aligned with the interests of shareholders performed worse during the crisis. The authors argue that a potential explanation for their findings is that CEOs with better aligned incentives undertook higher risks before the crisis; such risks were not suboptimal for shareholders at the point in time when they were undertaken. This explanation is also corroborated by the fact that CEOs did not unload their equity holdings prior to the crisis and, as a result, their wealth significantly declined.

executives were held accountable and penalized upon the realization of the risks undertaken.

However, some other studies argue that, whereas bank executives lost significant amounts of wealth tied to their stock and stock option holdings during the crisis, they also received significant amounts of compensation during the years leading up to the financial crisis.<sup>352</sup> Significant amounts of short-term bonuses were paid in the years preceding the crisis, even to executives of financial institutions that failed soon thereafter. While bank executives walked away with significant gains during the years leading up to the crisis, investors suffered significant losses in their investments in these institutions and, in some cases, taxpayers provided capital support to save these institutions from default. Thus, the underlying actions that generated significant positive performance and resulted in significant payouts to executives in the short run were also responsible for the realization of the associated risks in the long run. Another study<sup>353</sup> finds that risk-taking incentives for CEOs at large commercial banks substantially increased around

<sup>352</sup> See Bebchuk, L., Cohen, A., Spamann, H. 2010. The Wages of Failure: Executive Compensation at Bear Stearns and Lehman 2000–2008. *Yale Journal on Regulation* 27, 257–282. The study presents details regarding payouts made to CEOs and executives of Bear Stearns and Lehman Brothers during the 2000–2008 period. During the 2000–2008 period, executive teams at Bear Stearns cashed out a total of \$1.4 billion in cash bonuses and equity sales whereas the executives at Lehman cashed out a total of \$1 billion. The authors argue that the divergence between how top executives and their shareholders fared may suggest that pay arrangements provided incentives for excessive risk taking.

See Bhagat, S., Bolton, B. 2013. Bank Executive Compensation and Capital Requirements Reform. Working Paper. The study examines, among other things, 2000–2008 net payouts to CEOs of 14 financial institutions that received TARP assistance during the crisis. Consistent with the findings of Bebchuk et al. (2010), this study shows that CEOs of TARP assisted institutions cashed out significant amounts of compensation prior to the crisis, but also suffered significant losses when the crisis hit. The authors find that TARP CEOs cashed out significantly higher amounts of compensation during the 2000–2008 period compared to other institutions that did not receive TARP assistance; the finding is interpreted as evidence that TARP CEOs were aware of the increased risks associated with their actions and significantly limited their exposure to firm performance before the crisis hit.

<sup>353</sup> See DeYoung, R., Peng, E., Yan, Meng. 2013. Executive Compensation and Business Policy Choices at U.S. Commercial Banks. *Journal of Financial and Quantitative Analysis* 48, 165–196. The study examines CEOs' risk-taking incentives at large commercial banks over the 1995–2006 period. The authors link the increase in risk-taking incentives at these banks to growth opportunities due to deregulation. They find that board of directors moderated CEO risk-taking incentives but this effect is absent at the largest banks with strong growth opportunities and a history of highly aggressive risk-taking incentives.

2000 and suggests that this increase in risk-taking incentives was, at least partly, a response to growth opportunities resulting from deregulation. The study also finds that CEOs responded to the increased risk-taking incentives by increasing both systematic and idiosyncratic risks. CEOs with strong risk-taking incentives were also more likely to invest in mortgage backed securities; this finding is interpreted as knowledge on behalf of these CEOs regarding the risks associated with such investments. Finally, the study finds that, whereas boards of directors responded by moderating risk-taking incentives in situations where these incentives were particularly strong, such an effect was absent at the very largest banks with strong growth opportunities.

Finally, there are also studies that argue that compensation structures were not responsible for the differential risk-taking and performance of financial institutions during crises. In particular, a study argues that the differential risk culture across banks determines the differential performance of these institutions.<sup>354</sup> For example, banks that performed poorly during the 1998 crisis were also found to perform poorly, and had higher failure rates, during the recent financial crisis. Another recent study argues that, prior to 2008, risk-taking was inherently different across financial institutions and the fact that high-risk financial institutions paid high amounts of compensation to their executives was not an indicator of excessive compensation practices but represented compensation for the additional risk to which executives' wealth was exposed.<sup>355</sup> The study

<sup>354</sup> See Fahlenbrach, R., Prilmeier, R., Stulz, R. 2012. This Time Is the Same: Using Bank Performance in 1998 to Explain Bank Performance during the Recent Financial Crisis. *Journal of Finance* 67, 2139–2185. The paper examines whether inherent business models or/and culture drive certain banks to perform worse during crises. The study documents that banks that performed poorly, performance measured in terms of stock returns, after Russia's default in 1998 were also likely to perform poorly during the recent financial crisis. These banks had greater degrees of leverage, relied more on short-term market funding and grew faster during the years leading up to both crisis periods. The authors interpret their findings as being attributable to differential risk-taking cultures across banks that persist over time.

<sup>355</sup> See Cheng, I., Hong, H., Scheinkman, J. 2015. Yesterday's Heroes: Compensation and Risk at Financial Firms. *Journal of Finance* 70, 839–879. The paper examines the link between managerial pay and risk taking in the financial industry. Specifically, the paper builds upon efficient contracting theory to predict that managers in companies facing greater amounts of uncontrollable risk would require higher levels of compensation. Given that higher levels of uncontrollable risk expose managerial compensation to increased risk, risk averse managers require additional

suggests that at financial institutions, compensation was the result of efficient contracting between managers and shareholders. The study did not find support for the view that compensation determined risk-taking and ultimately led to the failure of many institutions.

Taken all together, while there is debate about certain amounts, components, and features of incentive-based compensation that potentially encourage risk-taking, the existing academic literature does not provide conclusive evidence about a specific type of incentive-based compensation arrangement that leads to inappropriate risk-taking without taking into account other considerations, such as firm characteristics or other governance mechanisms. In particular, there may be mitigating factors—some more effective than others—that allow efficient contracting to develop compensation arrangements for managers to align managerial interests with shareholders' interests and provide incentives for maximization of shareholder value.

If it is the case that some institutions are able to contract efficiently for compensation arrangements, for any such institution that is a covered BD or IA with large balance sheet assets, and if such institution does not pose potentially negative externalities on taxpayers, the proposed rule may curtail the pay convexity resulting from such efficient contracting between managers and shareholders with potential unintended consequences. In particular, unintended consequences may include curbing risk-taking incentives to a level that is lower than what shareholders deem optimal, with consequent negative effects on efficiency and shareholder value. These potential negative effects on efficiency and shareholder value could manifest themselves in a number of ways. For example, the lower-than-optimal level of risk-taking could affect covered BDs' and IAs' transactions for their own accounts as well as operations that involve customers and clients. The SEC expects that whether such consequences occur would depend on the specific facts and circumstances of each covered BD or IA.

In addition, the proposed rule may result in losses of managerial talent that may migrate from covered institutions to firms in different industries or

abroad, especially if CEOs have developed, in recent decades, general managerial skills that are transferable across firms and industries, as some studies assert.<sup>356</sup> It should be noted, however, as the discussion in the Preamble suggests, that some foreign regulators (e.g., in UK) have adopted stricter limits on incentive-based compensation. Thus, some foreign regulators' restrictions on incentive-based compensation may limit the likelihood of human capital migrating to foreign institutions subject to those restrictions. Moreover, given that incentive-based compensation is also designed to attract and retain managerial talent, the proposed rule may result in an increased level of total compensation to make up for the limits imposed to award opportunities, for the decrease in present value of the awards that are deferred, or for the increase in the uncertainty associated with the fact that managers may not be able to retain the compensation awards due to the potential for forfeiture during the deferral period and/or clawback during the period following vesting of such awards. If these unintended consequences occur, they may contribute to reduce the competitiveness of certain U.S. financial institutions in their role of intermediation, potentially affecting other industries.

On the other hand, for those covered institutions, including BDs and IAs with large balance sheets, that do have the potential to generate negative externalities, the proposed rule may result in better alignment of incentives between managers at these institutions and taxpayers and hence may have potential benefits by lowering the likelihood of an outcome that may induce negative externalities. Lowering the likelihood of negative externalities would be beneficial for the long-term health of these institutions, other institutions that are interconnected with those covered institutions and, in turn, the long-term health of the U.S. economy. The extent of these potential benefits, as mentioned above, would depend on specific facts and circumstances at the firm level and individual level.

#### C. Baseline

The baseline for the SEC's economic analysis of the proposed rule includes the current incentive-based compensation practices of those covered

institutions that are regulated by the SEC—registered broker-dealers and investment advisers—and the relevant regulatory requirements that may currently affect such compensation practices.<sup>357</sup>

#### 1. Covered Institutions

Section 956(f) limits the scope of the requirements to covered institutions with total assets of at least \$1 billion. The proposed rule defines covered institution as a regulated institution that has average total consolidated assets of \$1 billion or more. Regulated institutions include covered BDs and IAs. Based on their average total consolidated assets, the proposed rule further classifies covered institutions into three levels: Level 1 covered institutions with average total consolidated assets greater than or equal to \$250 billion; Level 2 covered institutions with average total consolidated assets greater than or equal to \$50 billion, but less than \$250 billion; and Level 3 covered institutions with average total consolidated assets greater than or equal to \$1 billion, but less than \$50 billion.

In the case of BDs and IAs, a Level 1 BD or IA is a covered institution with average total consolidated assets greater than or equal to \$250 billion, or a covered institution that is a subsidiary of a depository institution holding company that is a Level 1 covered institution. A Level 2 BD or IA is a covered institution with average total consolidated assets greater than or equal to \$50 billion that is not a Level 1 covered institution; or a covered institution that is a subsidiary of a depository institution holding company that is a Level 2 covered institution. A Level 3 BD or IA is a covered institution with average total consolidated assets greater than or equal to \$1 billion that is not a Level 1 covered institution or Level 2 covered institution.

Table 1 shows the number of covered BDs and IAs as of December 31, 2014, sorted by the size of a BD or IA as a covered institution by itself, without considering the size of that covered institution's parent depository holding company, if any (hereafter, "unconsolidated Level 1," "unconsolidated Level 2," and "unconsolidated Level 3" BDs and

compensation for the increased risk exposure. Using various measures of arguably uncontrollable company risk, such as lagged risk measures and risk measures when the company had an IPO, the authors find a positive relation between current compensation and historical measures of risk. They interpret their results as inherent differences in risk among financial companies driving differences in compensation levels among these companies.

<sup>356</sup> See Custodio, Claudia, Miguel Ferreira, and Pedro Matos. 2013. Generalists versus Specialists: Lifetime Work Experience and Chief Executive Officer Pay. *Journal of Financial Economics* 108, 471–492.

<sup>357</sup> When referencing investment advisers, the SEC's economic analysis references those institutions that meet the definition of investment adviser under section 202(a)(11) of the Investment Advisers Act, including any such institutions that may be prohibited or exempted from registering with the SEC under the Investment Advisers Act and any that are exempt from registration but are reporting.

IA).<sup>358</sup> We use 2014 data in our analysis because this is the most recent year for which compensation data is available. From FOCUS reports, there were 131 BDs with total assets above \$1 billion at the end of calendar year

2014.<sup>359</sup> From Item 1(O) of Form ADV the SEC estimated that, out of 11,702 IAs registered with the SEC, or reporting to the SEC as an exempt reporting adviser, 669 IAs had total assets of at least \$1 billion as of December 31, 2014,

although the SEC lacks information that allows it to further classify these IAs as Level 1, Level 2, or Level 3 covered institutions.<sup>360</sup>

TABLE 1—NUMBER OF BROKER-DEALERS AND INVESTMENT ADVISERS

Institution	Unconsolidated Level 1	Unconsolidated Level 2	Unconsolidated Level 3	Total
Broker-dealers (BDs) .....	7	13	111	131
Investment advisers (IAs) .....	n/a	n/a	n/a	669

#### i. Broker-Dealers

In 2014, 4,416 unique BDs filed FOCUS reports. Of these 4,416 BDs, seven had total assets greater than \$250 billion (Level 1 BDs), 13 had total assets

between \$50 billion and \$250 billion (unconsolidated Level 2 BDs), and 111 had total assets between \$1 billion and \$50 billion (unconsolidated Level 3 BDs) in 2014.<sup>361</sup> As shown in Table 2,

these unconsolidated Level 3 BDs had total assets equal to \$9.6 billion on average and \$3.7 billion in median; and about 70 percent (78 out of 111) of them had total assets below \$10 billion.

TABLE 2—SIZE DISTRIBUTION OF BDs

BD size	Number of BDs	Mean size (\$ billion)	Median size (\$ billion)	Size range (\$ billion)	Number of BDs per size range
Below \$1 billion .....	4,285	\$0.02	\$0.001		
\$1–\$49 billion (Unconsolidated Level 3) .....	111	9.6	3.7	<=10	78
				10–20	16
				20–30	3
				30–40	12
				>40	2
\$50–\$250 billion (Unconsolidated Level 2) .....	13	90.6	80.3	50–100	9
				100–150	2
				150–200	2
				>200	0
Over \$250 billion (Level 1) .....	7	312.3	275.2	250–300	4
				300–350	2
				350–400	0
				>400	1

The SEC's analysis indicates that, in 2014, all of the unconsolidated Level 1 and unconsolidated Level 2 BDs were subsidiaries of a holding company or parent institution. Of these parent institutions, only one was not a depository institution holding company. The majority of the unconsolidated Level 3 BDs were also part of a larger corporate structure. It should be noted

that some parent institutions owned more than one BD. Out of the 111 unconsolidated Level 3 BDs, 21 BDs were non-reporting, stand-alone institutions (*i.e.*, entities that are not part of a larger corporate structure).

In Table 3, the parent institutions of the affected BDs are classified into Level 1, Level 2, or Level 3, based on the ultimate parent's total consolidated assets.<sup>362</sup> As of the end of 2014, there

were 23 unique Level 1 parents and 9 unique Level 2 parents that owned covered Level 1, unconsolidated Level 2, and unconsolidated Level 3 BDs. An additional 18 unique parents were Level 3 covered institutions, and those owned only unconsolidated Level 3 BDs. The SEC was not able to classify 29 parent institutions due to the lack of data on their total consolidated assets.

<sup>358</sup> The terms “unconsolidated Level 1 covered institution,” “unconsolidated Level 2 covered institution,” and “unconsolidated Level 3 covered institution” used in the SEC's economic analysis differ from the terms “Level 1 covered institution,” “Level 2 covered institution,” and “Level 3 covered institution” as defined in the proposed rule.

<sup>359</sup> Total assets are taken from FOCUS report, Part II Statement of Financial Condition. The assets reported in the FOCUS report are required to be consolidated total assets if a BD has subsidiaries.

<sup>360</sup> Form ADV requires IAs to report consolidated balance sheet assets. The 669 number includes 59

IAs that are not registered with the SEC but are reporting.

<sup>361</sup> For purposes of this analysis, the SEC determined the unconsolidated level of each BD. For example, if a BD alone had total assets between \$1 billion and \$50 billion at the end of at least one calendar quarter in 2014, it was classified in this economic analysis as an unconsolidated Level 3 BD. Similarly, if a BD alone had total assets between \$50 and \$250 billion (greater than \$250 billion) in at least one quarter in 2014, it was classified in this economic analysis as an unconsolidated Level 2 (Level 1) BD. This classification method differs from the proposed rule. Thus, some of the unconsolidated Level 2 and unconsolidated Level 3

BDs discussed in this economic analysis may be Level 1 and Level 2 covered institutions after consolidation and for purposes of the proposed rule. Given that an unconsolidated Level 1 BD alone has greater than or equal to \$250 billion in total assets, an unconsolidated Level 1 BD would be a Level 1 covered institution for purposes of the proposed rule, regardless of consolidation.

<sup>362</sup> The name of the ultimate parent was obtained using the company information in the Capital IQ database. The SEC found total assets information for public parents in the Compustat database. Total assets information for some of the private parents the SEC found in the Capital IQ database.

TABLE 3—DISTRIBUTION OF BDs BY LEVEL SIZE OF THE PARENT

	BD as a subsidiary of a				BD as a stand-alone institution
	Level 1 parent	Level 2 parent	Level 3 parent	Parent size n/a	
Number of unconsolidated Level 1 BDs .....	7	0	0	0	0
Number of unique parents .....	7	.....	.....	.....	.....
Number of public parents .....	7	.....	.....	.....	.....
Median BD assets (\$ billion) .....	\$275.2	.....	.....	.....	.....
Median parent assets (\$ billion) .....	\$1,882.9	.....	.....	.....	.....
Number of unconsolidated Level 2 BDs .....	13	0	0	0	0
Number of unique parents .....	11	.....	.....	.....	.....
Number of public parents .....	11	.....	.....	.....	.....
Median BD assets (\$ billion) .....	\$80.3	.....	.....	.....	.....
Median parent assets (\$ billion) .....	\$1,702.1	.....	.....	.....	.....
Number of unconsolidated Level 3 BDs .....	18	11	23	36	23
Number of unique parents .....	14	9	19	29	.....
Number of public parents .....	14	8	17	.....	.....
Median BD assets (\$ billion) .....	\$9.5	\$4.0	\$3.0	\$4.4	.....
Median parent assets (\$ billion) .....	\$850.8	\$127.7	\$9.2	n/a	.....
Total number of unique parents .....	23	9	19	29	.....
Total number of public parents .....	23	8	17	.....	.....

The majority of BDs that were subsidiaries were held by a parent registered with the SEC as a reporting institution (*i.e.*, public company). All parents of Level 1 BDs and almost all of the parents of unconsolidated Level 2 BDs were public companies, while 39 out of the 71 unique parents of unconsolidated Level 3 BDs were public companies. Twenty three BDs were not subsidiaries but stand-alone companies that were private Level 3 BDs.

#### ii. Investment Advisers

The SEC does not have a precise way of distinguishing among the largest IAs

because Form ADV requires an adviser to indicate only whether it has \$1 billion or more in assets on the last day of its most recent fiscal year.<sup>363</sup> In addition, the information contained on Form ADV relates only to registered investment advisers and exempt reporting advisers, while the proposed rule would apply to all investment advisers.<sup>364</sup> As of December 2014, there were 669 IAs with assets of at least \$1 billion, of which 129 IAs were affiliated with banking or thrift institutions.<sup>365</sup> For the remaining 540 IAs the SEC does not have information on how many of them are stand-alone companies and

how many are affiliated with non-bank parent companies. Of the 669 IAs, 51 are dually registered as BDs with the SEC.<sup>366</sup> Of the 129 IAs affiliated with banking or thrift institutions, 39 IAs are affiliated with banks and thrifts with \$50 billion or more in assets. Of the 39 IAs, 10 IAs were affiliated with banks and thrift institutions with assets between \$50 billion and \$250 billion; and 23 IAs were affiliated with banks and thrift institutions with assets of more than \$250 billion. As Table 4 shows, the 39 IAs have 25 unique parent institutions and most of these parent institutions (17) are public companies.

TABLE 4—DISTRIBUTION OF 39 IAs AFFILIATED WITH LEVEL 1 AND LEVEL 2 BANKS AND THRIFTS, BY LEVEL SIZE OF THE PARENT

	IA as a subsidiary of a		
	Level 1 parent	Level 2 parent	Parent size n/a
Number of IAs .....	23	10	6
Number of unique parents .....	10	9	6
Number of public parents .....	10	7	0

<sup>363</sup> See Item 1.O of Part 1A of Form ADV. As noted above, the SEC has not historically examined its regulated entities' use of incentive-based employee compensation. In this regard, Form ADV does not contain information with respect to such practices.

<sup>364</sup> By its terms, the definition of "covered financial institution" in section 956 includes any institution that meets the definition of "investment adviser" under the Investment Advisers Act, regardless of whether the institution is registered as an investment adviser under that Act. Most investment advisers (including registered investment advisers, exempt reporting advisers, or otherwise) currently do not report to the SEC their

average total consolidated assets, so the SEC is unable to determine with particularity how many have average total consolidated assets greater than or equal to \$1 billion and less than \$50 billion, greater than or equal to \$50 billion and less than \$250 billion, or greater than or equal to \$250 billion. The estimates used in this section with respect to investment advisers, however, are based on data reported by registered investment advisers and exempt reporting advisers with the SEC on Form ADV, because the SEC estimates that it is unlikely that investment advisers that are prohibited from registering with the SEC would be subject to the proposed rule.

<sup>365</sup> Form ADV requires an adviser to indicate whether it has a "related person" that is a "banking or thrift institution," but does not require an adviser to identify a related person by type (*e.g.*, a depository institution holding company). See Item 7 of Part 1A and Item 7.A of Schedule D to Form ADV. These estimates are therefore limited by the information reported by registered investment advisers and exempt reporting advisers in their Forms ADV and has necessitated manual referencing of the institutions specified.

<sup>366</sup> Because the data presented below for the effects on BDs and IAs are presented separately, in aggregate, they may overstate the costs and other economic effects for dual registrants.

## 2. Current Incentive-Based Compensation Practices

The SEC does not have information on the incentive-based compensation practices of the BDs and IAs themselves. The main reason why the SEC lacks such information is that BDs and IAs are generally not public reporting companies and as a result they do not provide the type of compensation information that a public reporting company would file with the SEC as part of its communications with shareholders. Notwithstanding these limitations on the data regarding the incentive-based compensation arrangements at BDs or IAs, when the BDs or IAs are subsidiaries of public reporting companies, the SEC has information for the public reporting company that is the parent of these BDs and IAs. In particular, the information on incentive-based compensation practices for named executive officers (“NEOs”) is annually disclosed in proxy statements and annual reports filed with the SEC. NEOs typically include the principal executive officer, the principal financial officer, and three most highly compensated executives.<sup>367</sup>

Given that it lacks data on the BDs and IAs themselves, for the purposes of this economic analysis, the SEC uses data on incentive-based compensation of the NEOs at the parent institutions, which for unconsolidated Level 1 and unconsolidated Level 2 BDs are mostly bank holding companies,<sup>368</sup> as an

indirect measure of incentive-based compensation practices at the subsidiary level.<sup>369</sup> The SEC also analyzes the incentive-based compensation of public reporting institutions with assets between \$1 billion and \$50 billion, many of which are not bank holding companies, because it is possible that size may be a determinant of incentive-based compensation arrangements and thus the incentive-based compensation of an unconsolidated Level 3 BD or IA may be more similar to that of a public reporting institution with assets between \$1 billion and \$50 billion.

While the SEC utilizes the above-referenced public reporting company data, it should be noted that there are a number of caveats that may impact the SEC’s analysis. First, the incentive-based compensation arrangement at the subsidiary level may differ from that of the parent level due to either the difference between the size of the subsidiary relative to the size of the parent, or because the business model of the subsidiary is different from that of the parent. More specifically, the incentive-based compensation arrangement of bank holding companies may be different than that of BDs or IAs given the fundamentally differing natures of the underlying business models and the composition of their respective balance sheets. Further, the incentive-based compensation practices at a public reporting company could be different than those at a non-public reporting company. The SEC also does not have information about incentive-based compensation of non-NEOs and of those employees included in the definition of significant risk-takers under the proposed rule. These caveats mean that the SEC’s analysis, which is mainly based on data from public bank holding companies, may not accurately reflect incentive-based compensation practices at BDs and IAs. To address this lack of data, the SEC has

holding companies. For unconsolidated Level 3 BDs, 20 of the 42 unique parent institutions for which data on their size is available are not bank holding companies.

<sup>369</sup> It is also possible that the compensation practices between Level 1 parent and unconsolidated Level 2 subsidiary (or between Level 2 parent and unconsolidated Level 3 subsidiary) may be closer to each other than those of Level 1 parent and unconsolidated Level 3 subsidiary.

supplemented its analysis with anonymized supervisory data from the Board and the OCC, with limitations to the generalizability of the analysis on non-NEOs and significant risk-takers similar to the ones discussed above.

### i. Named Executive Officers

Table 5A presents data on the compensation structure of NEOs at Level 1, Level 2, and Level 3 parent public reporting institutions of unconsolidated Level 1, unconsolidated Level 2, and unconsolidated Level 3 BDs as of the end of fiscal year 2014.<sup>370</sup> In addition to the CEO and the CFO, NEOs typically include the chief operating officer (“COO”), the general counsel (“GC”), and the heads of business units such as wealth management and investment banking. As shown in Table 5A, incentive-based compensation is a significant component of NEO compensation at parent institutions. It is approximately 90 percent of total compensation for Level 1 parent institutions and 85 percent for Level 2 parent institutions (median values are also reported in parentheses).<sup>371</sup> Additionally, a sizable fraction of incentive-based compensation is in the form of long-term incentive compensation, which is mainly awarded in the form of stock, stock options, or debt instruments.<sup>372</sup> The SEC observes that the use of stock options varies by size of the parent institution: Stock options represent on average 6 percent of long-term incentive compensation for Level 1 parents, while they represent approximately 20 percent of long-term incentive compensation for Level 2 parents.<sup>373</sup>

<sup>370</sup> Data comes from Compustat’s ExecuComp database. Out of 30 unique Level 1 and Level 2 parent institutions of Level 1, Level 2, and Level 3 BDs, compensation data is not available for 16 parent institutions.

<sup>371</sup> Incentive-based compensation is determined as Total compensation as reported in SEC filings—Salary.

<sup>372</sup> Long-term incentive compensation is determined using the following items from Compustat’s ExecuComp database: Total compensation as reported in SEC filings—Salary—Bonus—Other annual compensation. Short-term incentive compensation is determined as Bonus + Other annual compensation.

<sup>373</sup> This is consistent with evidence of decreased use of stock options in compensation arrangements over the last decade, with companies replacing the use of stock options with restricted stock units. See Frydman and Jenter, CEO Compensation, *Annual Review of Financial Economics* (2010).

<sup>367</sup> For a company that is not a smaller reporting company, Item 402(a)(3) of Regulation S-K defines named executive officers as: (1) All individuals serving as the company’s principal executive officer or acting in a similar capacity during the last completed fiscal year (PEO), regardless of compensation level; (2) All individuals serving as the company’s principal financial officer or acting in a similar capacity during the last completed fiscal year (PFO), regardless of compensation level; (3) The company’s three most highly compensated executive officers other than the PEO and PFO who were serving as executive officers at the end of the last completed fiscal year; and (4) Up to two additional individuals for whom disclosure would have been provided under the immediately preceding bullet point, except that the individual was not serving as an executive officer of the company at the end of the last completed fiscal year.

<sup>368</sup> For Level 1 and unconsolidated Level 2 BDs, the SEC’s analysis indicates that, as of December 2014, two of their 20 unique parent institutions are non-bank holding companies (one investment management firm and one investment bank/brokerage). For the 39 IAs described in Table 4, six of their 25 unique parent institutions are not bank

TABLE 5A—COMPENSATION STRUCTURE OF BD PARENT INSTITUTIONS BY LEVEL SIZE

	Level 1 parent	Level 2 parent	Level 3 parent
Incentive-based compensation as percent of total compensation .....	90% (90%)	85% (86%)	83% (87%)
Short-term incentive compensation as percent of total compensation .....	15% (0%)	1% (0%)	21% (0%)
Long-term incentive compensation as percent of total compensation .....	74% (81%)	85% (86%)	62% (77%)
Option awards as percent of long-term incentive compensation .....	6% (0%)	20% (18%)	4% (0%)
Stock awards as percent of long-term incentive compensation .....	68% (69%)	40% (37%)	44% (49%)
Number of NEOs per institution .....	5.5 (5)	5.3 (5)	5.4 (5)
Number of parent institutions with available compensation data .....	10	4	7

Table 5B presents similar statistics for the compensation structures of Level 1 and Level 2 parent institutions of IAs that were affiliated with banks and thrift institutions with assets of more than \$50 billion.<sup>374</sup> The summary statistics for

the parent companies of IAs mirrors the statistics for the BDs' parent companies: A significant portion of NEO compensation is in the form of incentive-based compensation, most of which is long-term incentive

compensation that comes in the form of stock awards.<sup>375</sup> Both Level 1 and Level 2 IA parents exhibit relatively little use of options.

TABLE 5B—COMPENSATION STRUCTURE OF LEVEL 1 AND LEVEL 2 IA PARENT INSTITUTIONS

	Level 1 parent	Level 2 parent
Incentive compensation as percent of total compensation .....	90% (90%)	84% (94%)
Short-term incentive compensation as percent of total compensation .....	20% (28%)	2% (0%)
Long-term incentive compensation as percent of total compensation .....	70% (65%)	82% (84%)
Option awards as percent of long-term incentive compensation .....	8% (0%)	9% (0%)
Stock awards as percent of long-term incentive compensation .....	71% (73%)	51% (55%)
Number of NEOs per institution .....	5.2 (5)	5.2 (5)
Number of parent institutions with available compensation data .....	8	5

Table 6A provides summary statistics for types of incentive-based compensation currently awarded by parent institutions of BDs, their vesting periods, and the specific measures on which these awards are based.<sup>376</sup> All

types of parent institutions use cash in their short-term incentive compensation. Only 12 percent of Level 1 parent institutions, and none of the Level 2 parent institutions, defer short-term incentive compensation that is

awarded in cash only. A significant fraction of Level 1 parent institutions awards short-term incentive compensation in the form of cash and stock.

TABLE 6A—TYPE AND FREQUENCY OF USE OF INCENTIVE-BASED COMPENSATION AWARDS—LEVEL 1, LEVEL 2, AND LEVEL 3 BD PARENT INSTITUTIONS

	Short-term incentive compensation			Long-term incentive compensation		
	Level 1 parent	Level 2 parent	Level 3 parent	Level 1 parent	Level 2 parent	Level 3 parent
Number of parent institutions with available compensation data.	16 .....	5 .....	13 .....	16 .....	5 .....	13.
Fraction of total compensation:						
CEO .....	25% .....	44% .....	39% .....	52% .....	45% .....	60%.
Other NEOs .....	27% .....	45% .....	59% .....	50% .....	40% .....	40%.
Award:						
Cash only—percent of institutions ..	44% .....	100% .....	100% .....	6% .....	0% .....	0%.
percent that defer cash .....	12% .....	0% .....	9% .....	6% .....	0% .....	0%.
Cash & stock—percent of institutions.	56% .....	0% .....	0% .....	6% .....	0% .....	9%.
Avg percent of stock in ST IC .....	55%.					
Avg deferral for stock .....	3 years.					
Restricted stock—percent of institutions.	.....	.....	.....	56% .....	60% .....	100%.
Avg percent of LT IC .....	.....	.....	.....	36% .....	26% .....	75%.
Avg vesting period .....	.....	.....	.....	3.5 years .....	3.3 years .....	3.4 years.
Type of vesting:						
percent with pro-rata .....	.....	.....	.....	87% .....	100% .....	82%.

<sup>374</sup> There is an overlap between the parent institutions of BDs and IAs: About half of the IAs' parents are also parents of BDs and included in Table 5A.

<sup>375</sup> This is not surprising given that approximately half of the IAs' parent institutions are also parent institutions of BDs and included in Table 5A.

<sup>376</sup> Data for tables 6A through 10B is collected from the 2015 and 2007 proxy statements, 10-Ks, and 20-Fs of the Level 1, Level 2, and Level 3 parent institutions.

TABLE 6A—TYPE AND FREQUENCY OF USE OF INCENTIVE-BASED COMPENSATION AWARDS—LEVEL 1, LEVEL 2, AND LEVEL 3 BD PARENT INSTITUTIONS—Continued

	Short-term incentive compensation			Long-term incentive compensation		
	Level 1 parent	Level 2 parent	Level 3 parent	Level 1 parent	Level 2 parent	Level 3 parent
percent with cliff .....	.....	.....	.....	13% .....	0% .....	18%.
Performance stock—percent of institutions.	.....	.....	.....	88% .....	80% .....	36%.
Avg percent of LT IC .....	.....	.....	.....	53% .....	42% .....	44%.
Avg performance period .....	.....	.....	.....	3.7 years .....	3 years .....	2 years.
percent with perf period <3yrs.	.....	.....	.....	6% .....	0% .....	100%.
percent with vesting .....	.....	.....	.....	14% .....	0% .....	0%.
Avg vesting period .....	.....	.....	.....	3.7 years.		
Type of vesting:						
percent with pro-rata .....	.....	.....	.....	100%.		
percent with cliff .....	.....	.....	.....	0%.		
Options—percent of institutions .....	0% .....	0% .....	.....	12% .....	60% .....	18%.
Avg percent of LT IC .....	.....	.....	.....	4% .....	20% .....	39%.
Avg vesting period .....	.....	.....	.....	3.5 years .....	3.3 years .....	3 years.
Notional bonds—percent of institutions.	0% .....	0% .....	.....	6% .....	0% .....	0%.
Avg percent of LT IC .....	.....	.....	.....	30%.		
Avg vesting period .....	.....	.....	.....	5 years.		
Performance measures:						
EPS or Net income .....	44% .....	100% .....	31% .....	19% .....	50% .....	38%.
ROA .....	6% .....	40% .....	0% .....	19% .....	25% .....	0%.
ROE .....	44% .....	0% .....	31% .....	44% .....	50% .....	31%.
Pre-tax income .....	25% .....	0% .....	62% .....	6% .....	0% .....	54%.
Capital strength .....	31% .....	0% .....	0% .....	6% .....	0% .....	0%.
Efficiency ratios .....	13% .....	40% .....	0% .....	6% .....	0% .....	0%.
Strategic goals .....	19% .....	25% .....	23% .....	13% .....	0% .....	23%.
TSR .....	19% .....	25% .....	46% .....	56% .....	75% .....	54%.

A significant percentage of long-term incentive compensation of BD parent institutions comes in the form of restricted or performance stock.<sup>377</sup> Restricted stock accounts for about 36 percent of long-term incentive compensation at Level 1 parent institutions and approximately 26 percent at Level 2 parent institutions. It has a vesting period of approximately 3.5 years. Performance stock awards are more popular: Over 80 percent of Level 1 and Level 2 parent institutions employ performance stock, which on average accounts for approximately 53 percent of the long-term incentive compensation of Level 1 parents and 42 percent of that

of Level 2 parents. Performance stock awards are frequently evaluated using total shareholder return (“TSR”), return on equity (“ROE”), return on assets (“ROA”), earnings per share (“EPS”), or a combination of TSR and one or more accounting measures of performance over an average of 3.7 years for Level 1 parent institutions and 3 years for Level 2 parent institutions. About 14 percent of Level 1 parent institutions impose deferral after the performance period for performance stock. The average deferral period for these awards is approximately 4 years.

Consistent with the results in Table 5A above, stock options do not appear

to be a popular component of incentive-based compensation arrangements among Level 1 parent institutions. They are more frequently used by Level 2 parent institutions, for which options account for approximately 20 percent of long-term incentive compensation. One of the Level 1 parents also uses debt instruments as a part of NEOs’ long-term incentive compensation, which fully vest after five years (*i.e.* cliff vest). Similar results are obtained when examining the compensation practices of Level 1 and Level 2 parent institutions of IAs, as the summary statistics in Table 6B suggest.

TABLE 6B—TYPE AND FREQUENCY OF USE OF INCENTIVE-BASED COMPENSATION AWARDS—LEVEL 1 AND LEVEL 2 IA PARENT INSTITUTIONS

	Short-term incentive compensation		Long-term incentive compensation	
	Level 1 parent	Level 2 parent	Level 1 parent	Level 2 parent
Number of parent institutions with available compensation data .....	10 .....	6 .....	10 .....	6.
Fraction of total compensation:				
CEO .....	23% .....	26% .....	64% .....	63%.
Other NEOs .....	27% .....	27% .....	58% .....	59%.

<sup>377</sup> Restricted stock includes actual shares or share units that are earned by continued employment, often referred to as time-based

awards. Performance stock consists of stock-denominated actual shares or share units (performance shares) and grants of cash or dollar-

denominated units (performance units) earned based on performance against predetermined objectives over a defined period.

TABLE 6B—TYPE AND FREQUENCY OF USE OF INCENTIVE-BASED COMPENSATION AWARDS—LEVEL 1 AND LEVEL 2 IA PARENT INSTITUTIONS—Continued

	Short-term incentive compensation		Long-term incentive compensation	
	Level 1 parent	Level 2 parent	Level 1 parent	Level 2 parent
Award:				
Cash only—percent of institutions .....	60% .....	83% .....	0% .....	0%.
percent that defer cash .....	10% .....	0% .....	0% .....	0%.
Cash & stock—percent of institutions .....	40% .....	17% .....	10% .....	17%.
Avg percent of stock in ST IC .....	50%.			
Avg deferral for stock .....	3 years.			
Restricted stock—percent of institutions .....			80% .....	67%.
Avg percent of LT IC .....			51% .....	30%.
Avg vesting period .....			3.5 years .....	3.8 years.
Type of vesting:				
percent with pro-rata .....			100% .....	100%.
percent with cliff .....			0% .....	0%.
Performance stock—percent of institutions .....			80% .....	100%.
Avg percent of LT IC .....			42% .....	56%.
Avg performance period .....			3.9 years .....	2.6 years.
percent with perf period <3yrs .....			13% .....	0%.
percent with vesting .....			13% .....	0%.
Avg vesting period .....			4 years.	
Type of vesting:				
percent with pro-rata .....			100%.	
percent with cliff .....			0%.	
Options—percent of institutions .....	0% .....	0% .....	10% .....	50%.
Avg percent of LT IC .....			25% .....	28%.
Avg vesting period .....			4 years .....	3.2 years.
Performance measures:				
EPS or Net income .....	60% .....	67% .....	20% .....	50%.
ROA .....	10% .....	17% .....	20% .....	17%.
ROE .....	40% .....	33% .....	60% .....	67%.
Pre-tax income .....	10% .....	0% .....	0% .....	0%.
Capital strength .....	30% .....	0% .....	10% .....	17%.
Efficiency ratios .....	30% .....	17% .....	10% .....	17%.
Strategic goals .....	20% .....	17% .....	20% .....	17%.
TSR .....	30% .....	17% .....	50% .....	17%.

Table 7A reports whether incentive-based compensation of NEOs at Level 1, Level 2, and Level 3 parent institutions of BDs is deferred or subject to clawback, forfeiture, and certain prohibitions.<sup>378</sup>

TABLE 7A—CURRENT DEFERRAL, CLAWBACK, FORFEITURE AND CERTAIN PROHIBITIONS FOR NEOs AT LEVEL 1, LEVEL 2, AND LEVEL 3 BDs PARENT INSTITUTIONS

	Level 1 parent	Level 2 parent	Level 3 parent
Number of parent institutions with available compensation data .....	16	5	13
Number of NEOs:			
Total number of NEOs .....	104	24	66
Average number of NEOs per institution .....	6	5	5
Deferred compensation:			
Institutions with deferred compensation .....	100%	80%	100%
Average percent of deferred compensation:			
CEO .....	75%	52%	65%
Other NEOs .....	73%	49%	43%
Average number of years deferred .....	3.5	2.6	3.3
Type of compensation deferred:			
Institutions with cash .....	19%	25%	8%
Institutions with stock .....	100%	100%	100%
Institutions with bonds .....	6%	N/A	8%
Clawback and forfeiture:			
Institutions with clawback .....	100%	80%	92%
Institutions with forfeiture .....	100%	60%	85%
Prohibitions:			
Institutions prohibiting hedging .....	75%	60%	62%

<sup>378</sup> From the disclosures provided by reporting companies on clawback, forfeiture and certain

prohibitions, the SEC is able to establish whether a reporting company currently uses policies that are

in line with the proposed rule, but was not able to establish compliance with certainty.

TABLE 7A—CURRENT DEFERRAL, CLAWBACK, FORFEITURE AND CERTAIN PROHIBITIONS FOR NEOs AT LEVEL 1, LEVEL 2, AND LEVEL 3 BDS PARENT INSTITUTIONS—Continued

	Level 1 parent	Level 2 parent	Level 3 parent
Institutions prohibiting volume-driven incentive-based compensation .....	N/A	N/A	N/A
Institutions prohibiting acceleration of payments except in case of death and disability ....	70%	14%	9%
Maximum incentive-based compensation:			
Average percent .....	155%	190%	134%
Risk Management:			
Institutions with Risk Committees .....	100%	67%	62%
Institutions with fully independent Compensation Committee .....	93%	88%	83%
Institutions where CROs review compensation packages .....	31.3%	20%	15%

In general, the SEC's analysis of the compensation information disclosed in proxy statements and annual reports by parent institutions of covered BDs suggests that NEO compensation practices at most of the parent institutions are in line with the main requirements and prohibitions in the proposed rule. This may not be surprising given that the baseline already reflects a regulatory response to the financial crisis.<sup>379</sup> For example, all Level 1 parents and 80 percent of Level 2 parents of BDs require some form of deferral of incentive-based executive compensation. The average Level 1 parent institution defers 75 percent of incentive-based compensation awarded to CEOs and 73 percent awarded to other NEOs, which is above the minimum deferral amount that would be required by the proposed rule. In a similar vein, an average of 52 percent of incentive-based compensation awarded to CEOs and 49 percent awarded to other NEOs is deferred at Level 2 parent institutions, similar to what would be required by the proposed rule. The length of the deferral period at Level 1 and Level 2 parent institutions is also currently in line with what would be required by the proposed rule: On average, 3.5 years for NEOs at Level 1 parent institutions and approximately 3 years for those at Level 2 parent institutions.

Regarding the type of incentive-based compensation that is being deferred, both Level 1 and Level 2 parent institutions defer equity-based

compensation. One of the Level 1 parent institutions uses debt instruments as incentive-based compensation and defers it as well. Only a fraction of them (20 percent of Level 1 and 25 percent of Level 2 parent institutions), however, currently defer incentive-based compensation in cash; the proposed rule would require deferral of substantial portions of both cash and equity-like instruments for senior executive officers and significant risk-takers at Level 1 and Level 2 covered institutions. Thus, for both Level 1 and Level 2 parent institutions the current composition of their deferred compensation appears to conform to the proposed rule requirements with respect to equity-like instruments, but only a few Level 1 and Level 2 parent institutions appear to conform to the proposed rule requirements with respect to deferral of cash.

Some of the other requirements and prohibitions for Level 1 and Level 2 covered institutions in the proposed rule are also currently in place at the parent institutions of covered BDs. For example, all of the Level 1 parent institutions and a large majority of Level 2 parent institutions require that the incentive-based compensation awards of NEOs be subject to clawback and forfeiture provisions. The frequency of the use of clawback and forfeiture by Level 1 and Level 2 parent institutions is higher than that reported by a commenter<sup>380</sup> based on the results of a study.<sup>381</sup> The commenter did not specify, however, when the study was

done, nor the number and type of companies covered by the study.

A majority of parent institutions also have prohibitions on hedging.<sup>382</sup> Consistent with the proposed prohibition of relying solely on relative performance measures when awarding incentive-based compensation, all of the Level 1 and Level 2 parent institutions currently use a mix of absolute and relative performance measures in their incentive-based compensation arrangements. Additionally, most Level 1 parent institutions prohibit acceleration of compensation payments except in the cases of death or disability, whereas very few Level 2 parent institutions do that. The average maximum incentive-based compensation opportunity is 155 percent of the target amount for Level 1 parent institutions and 190 percent for Level 2 parent institutions, which is above what would be permitted by the proposed rules. In the SEC's analysis of the compensation disclosure, the SEC did not find any mention about prohibition of volume-driven incentive-based compensation as would be proposed by the rule.

Similar results are obtained when analyzing the current practices of the Level 1 and Level 2 parent institutions of IAs (Table 7B). All IA parent institutions defer NEO compensation, on average, for three years. Almost all parent companies subject incentive-based compensation of NEOs to clawback and forfeiture and prohibit hedging transactions.

<sup>379</sup> See, 2010 Federal Banking Agency Guidance, available at: <http://www.federalreserve.gov/newsevents/press/bcreg/20100621a.htm>.

<sup>380</sup> All references to commenters in this economic analysis refer to comments received on the 2011 Proposed Rule.

<sup>381</sup> See comment letter from Financial Services Roundtable (May 31, 2011). The Roundtable conducted a study of a portion of its membership. Data was collected on the risk management strategies and the procedures for determining compensation since 2008.

<sup>382</sup> The proposed rule would prohibit covered institutions from purchasing hedging instruments

on behalf of covered persons. The statistics regarding hedging prohibitions presented in Table 7A and Table 7B, and Table 9A and Table 9B refer to complete prohibition regarding the use of hedging instruments by senior executives and directors respectively.

TABLE 7B—CURRENT DEFERRAL, CLAWBACK, FORFEITURE AND CERTAIN PROHIBITIONS FOR NEOs AT LEVEL 1 AND LEVEL 2 IA PARENT INSTITUTIONS

	Level 1 parent	Level 2 parent
Number of parent institutions with available compensation data .....	10	6
Number of NEOs:		
Total number of NEOs .....	53	32
Average number of NEOs per institution .....	5	5
Deferred compensation:		
Institutions with deferred compensation .....	100%	100%
Average percent of deferred compensation:		
CEO .....	77%	69%
Other NEOs .....	71%	68%
Average number of years deferred .....	3.6	3.3
Type of compensation deferred:		
Institutions with cash .....	20%	67%
Institutions with stock .....	100%	100%
Institutions with bonds .....	0%	0
Clawback and forfeiture:		
Institutions with clawback .....	100%	100%
Institutions with forfeiture .....	100%	83%
Prohibitions:		
Institutions prohibiting hedging .....	90%	67%
Institutions prohibiting volume-driven incentive-based compensation .....	N/A	N/A
Institutions prohibiting acceleration of payments but for death and disability .....	70%	0%
Maximum incentive-based compensation:		
Average percent .....	148%	188%
Risk Management:		
Institutions with Risk Committees .....	100%	100%
Institutions with fully independent Compensation Committee .....	80%	89%
Institutions where CROs review compensation packages .....	50%	33%

To examine how the use of the proposed rule's requirements and prohibitions has changed since the financial crisis, in Tables 8A and 8B the SEC reports the use of incentive-based compensation deferral, clawback, forfeiture, and some of the rule prohibitions by the Level 1 and Level 2

parent institutions of BDs and IAs in year 2007, just prior to the financial crisis. A comparison with the results in Tables 7A and 7B shows that just prior to the financial crisis Level 1 and Level 2 covered institutions deferred less of NEOs' incentive-based compensation compared to what they defer nowadays.

More importantly, the use of clawback and forfeiture in 2007 was far less common than it is now: For example, none of these institutions reported using clawback arrangements as of year 2007. Additionally, fewer covered institutions had risk committees in year 2007.

TABLE 8A—DEFERRAL, CLAWBACK, FORFEITURE AND CERTAIN PROHIBITIONS FOR NEOs AT LEVEL 1 AND LEVEL 2 BD PARENT INSTITUTIONS IN YEAR 2007

	Level 1 parent	Level 2 parent
Number of parent institutions with available compensation data .....	16	5
Number of NEOs:		
Total number of NEOs .....	101	26
Average number of NEOs per institution .....	6	5
Deferred compensation:		
Institutions with deferred compensation .....	100%	100%
Average percent of deferred compensation:		
CEO .....	49%	34%
Other NEOs .....	51%	28%
Average number of years deferred .....	3.3	3
Type of compensation deferred:		
Institutions with cash .....	0%	40%
Institutions with stock .....	100%	100%
Clawback and forfeiture:		
Institutions with clawback .....	0%	0%
Institutions with forfeiture .....	27%	40%
Prohibitions:		
Institutions prohibiting hedging .....	14%	0%
Institutions prohibiting volume-driven incentive-based compensation .....	N/A	N/A
Institutions prohibiting acceleration of payments except in case of death and disability .....	67%	20%
Maximum incentive-based compensation:		
Average percent .....	186%	N/A
Risk Management:		
Institutions with Risk Committees .....	60%	20%

TABLE 8A—DEFERRAL, CLAWBACK, FORFEITURE AND CERTAIN PROHIBITIONS FOR NEOs AT LEVEL 1 AND LEVEL 2 BD PARENT INSTITUTIONS IN YEAR 2007—Continued

	Level 1 parent	Level 2 parent
Institutions with fully independent Compensation Committee .....	93%	100%
Institutions where CROs review compensation packages .....	0%	0%

Thus, the analysis suggests that following the financial crisis, most Level 1 and Level 2 parent institutions of BDs and IAs have adopted to a certain extent some of the provisions and prohibitions that would be required by the proposed rule.

TABLE 8B—DEFERRAL, CLAWBACK, FORFEITURE AND CERTAIN PROHIBITIONS FOR NEOs AT LEVEL 1 AND LEVEL 2 IA PARENT INSTITUTIONS IN YEAR 2007

	Level 1 parent	Level 2 parent
Number of parent institutions with available compensation data .....	10	5
Number of NEOs:		
Total number of NEOs .....	53	26
Average number of NEOs per institution .....	5	5
Deferred compensation:		
Institutions with deferred compensation .....	100%	100%
Average percent of deferred compensation:		
CEO .....	45%	44%
Other NEOs .....	53%	33%
Average number of years deferred: .....	3.3	3.5
Type of compensation deferred:		
Institutions with cash .....	20%	40%
Institutions with stock .....	100%	100%
Clawback and forfeiture:		
Institutions with clawback .....	0%	0%
Institutions with forfeiture .....	40%	40%
Prohibitions:		
Institutions prohibiting hedging .....	20%	0%
Institutions prohibiting volume-driven incentive-based compensation .....	N/A	N/A
Institutions prohibiting acceleration of payments but for death and disability .....	40%	100%
Maximum incentive-based compensation Risk Management:		
Average percent .....	223%	N/A
Institutions with Risk Committees .....	60%	0%
Institutions with fully independent Compensation Committee .....	100%	100%
Institutions where CROs review compensation packages .....	0%	0%

Table 9A lists the most frequent triggers for clawback and forfeiture, which include some type of misconduct and adverse performance/outcome. About 19 percent of Level 1 parent institutions use improper or excessive risk-taking as a trigger for forfeiture and clawback. About 88 percent of Level 1 parent institutions use misconduct, and 75 percent of Level 1 parent institutions also use adverse performance as triggers for clawback, similar to the proposed rules.

TABLE 9A—PERCENTAGE OF LEVEL 1, LEVEL 2, AND LEVEL 3 BD PARENT INSTITUTIONS BY TRIGGER FOR FORFEITURE AND CLAWBACK

Trigger	Level 1 parents		Level 2 parents		Level 3 parents	
	Forfeiture: % of firms	Clawback: % of firms	Forfeiture: % of firms	Clawback: % of firms	Forfeiture: % of firms	Clawback: % of firms
Adverse performance/outcome .....	75	75	20	20	0	9
Misconduct/gross/detrimental conduct .....	88	88	40	60	57	63
Improper/excessive risk-taking .....	19	19	0	0	14	18
Managerial failure .....	6	6	0	0	0	0
Restatement/inaccurate reporting .....	19	19	40	60	71	73
Voluntary resignation/retirement .....	13	13	0	0	0	0
Misuse of confidential information/com- petitive activity .....					29	0
Policy/regulatory breach .....	6	6	0	0	0	0
For-cause termination .....	6	6	0	20	14	0

TABLE 9A—PERCENTAGE OF LEVEL 1, LEVEL 2, AND LEVEL 3 BD PARENT INSTITUTIONS BY TRIGGER FOR FORFEITURE AND CLAWBACK—Continued

Trigger	Level 1 parents		Level 2 parents		Level 3 parents	
	Forfeiture: % of firms	Clawback: % of firms	Forfeiture: % of firms	Clawback: % of firms	Forfeiture: % of firms	Clawback: % of firms
Number of parent institutions with available compensation data .....	16	.....	5	.....	13	.....

The use of forfeiture and clawback triggers is similar for IA parent institutions, as Table 9B shows. A

significant number of Level 1 parent institutions use adverse performance

and misconduct as triggers for both clawback and forfeiture.

TABLE 9B—TRIGGERS FOR FORFEITURE AND CLAWBACK OF LEVEL 1 AND LEVEL 2 IA PARENT INSTITUTIONS

Trigger	Level 1 parents		Level 2 parents	
	Forfeiture: % of firms	Clawback: % of firms	Forfeiture: % of firms	Clawback: % of firms
Adverse performance/outcome .....	80	80	33	33
Misconduct/gross/detrimental conduct .....	60	70	50	67
Improper/excessive risk-taking .....	40	40	17	17
Managerial failure .....	0	0	0	17
Restatement/inaccurate reporting .....	10	30	33	50
Misuse of confidential information/competitive activity .....	10	10	33	17
For-cause termination .....	10	10	33	17
Number of parent institutions with available compensation data .....	10	.....	6	.....

Some of the provisions of the proposed rule (*e.g.*, prohibition of hedging) would apply to covered persons that are non-employee directors who receive incentive-based compensation at Level 1 and Level 2 covered institutions. Table 10A presents

summary statistics on the current compensation practices of Level 1, Level 2, and Level 3 parent public institutions of BDs with respect to their non-employee directors. The data shows that most of the Level 1 parent institutions and all of the Level 2 parent institutions

provide incentive-based compensation to their non-employee directors, and this compensation comes mainly in the form of deferred equity. Additionally, a large percentage of both Level 1 and Level 2 parents prohibit hedging by non-employee directors.

TABLE 10A—INCENTIVE-BASED COMPENSATION OF NON-EMPLOYEE DIRECTORS OF BD PARENTS

	Level 1 parents	Level 2 parents	Level 3 parents
Percentage of institutions with non-employee directors receiving IBC .....	77% .....	100% .....	100%.
Non-employee director IBC as percentage of total compensation .....	56% .....	46% .....	55%.
Type of IBC:			
Deferred equity .....	90% .....	100% .....	100%.
Options .....	10% .....	50% .....	8%.
Vesting (average number of years) .....	2.6 years .....	2.3 years .....	1.9 years.
Percentage of institutions prohibiting hedging by non-employee directors .....	70% .....	100% .....	25%.

The analysis of non-employee director compensation at the Level 1 and Level 2 parent institutions of IAs in Table 10B shows similar results: In all of the

parent institutions non-employee directors receive incentive-based compensation and a significant fraction of parent institutions prohibit hedging

transactions related to incentive-based compensation.

TABLE 10B—INCENTIVE-BASED COMPENSATION OF NON-EMPLOYEE DIRECTORS OF IA PARENTS

	Level 1	Level 2
Percentage of institutions with non-employee directors receiving IBC .....	100% .....	100%.
Non-employee director IBC as percentage of total compensation .....	56% .....	46%.
Type of IBC:		
Deferred equity .....	90% .....	100%.
Options .....	0% .....	17%.
Vesting (average number of years) .....	1.5 years .....	1.6 years.
Percentage of institutions prohibiting hedging by non-employee directors .....	78% .....	83%.

ii. Executives Other Than Named Executive Officers

While the above statistics are based on publicly disclosed information on compensation for the five most highly compensated executive officers at parent institutions, the proposed rule would apply to any executive officer, employee, director or principal shareholder (covered persons) who receives incentive-based compensation. Thus, the data presented above may not be representative for non-NEOs. To provide some evidence on the current incentive-based compensation arrangements of non-NEOs, the SEC uses anonymized supervisory data from the Board. It should be noted that the composition of the supervisory data sample could be different than that of the Level 1 and Level 2 parent institutions analyzed above. To alleviate this potential selection problem, Table 10 compares NEO and non-NEO compensation arrangements only for the supervisory data sample. Also, the

supervisory data comes from banks, while the data above is from bank holding companies. Because there may be differences in incentive-based compensation arrangements and policies at the bank level and the bank holding company level, the supervisory data analysis could yield different results compared to the results presented in the tables above.

Since the supervisory data does not identify NEOs and non-NEOs but identifies the managerial position of each executive, the SEC uses an indirect approach to separate the two groups of executives. From the proxy statements of Level 1 and Level 2 parent institutions, the SEC identifies the executives that are most often included in the definition of NEOs, in addition to the CEO and the CFO. These executives are the COO, the GC, and often the heads of wealth management or investment banking. The SEC then classifies these executives as NEOs and any other executive as non-NEO. Table

11 presents summary statistics for NEOs and non-NEOs based on the supervisory data.

Similar to NEOs, non-NEOs tend to have a significant fraction of long-term incentive compensation in the form of restricted stock units ("RSUs") and performance stock units ("PSUs") that is deferred on average for about three years. Only 36 percent of institutions in the sample used cash as incentive-based compensation for non-NEOs and a significant fraction (on average about 50 percent across institutions that use cash as incentive-based compensation) of the cash incentive-based compensation is deferred. Similarly, 45 percent of the deferred incentive-based compensation for non-NEOs was in the form of restricted stock and 54 percent was in the form of performance share units. Fifty percent of the institutions in the sample used options as incentive-based compensation for non-NEOs, with average vesting period of approximately 3.7 years.

TABLE 11—EXISTING COMPENSATION ARRANGEMENTS FOR NEO AND NON-NEO EXECUTIVES

	Non-NEOs	NEOs
Number of institutions with available compensation data .....	14 .....	14.
Number of executives .....	112 .....	50.
ST IC/total IC .....	41% .....	40%.
Deferred IC/total IC .....	60% .....	64%.
Options/total IC .....	12% .....	13%.
percent of institutions with options .....	70% .....	70%.
Deferred IC subject to clawback and forfeit/deferred IC .....	57% .....	61%.
Types of IC compensation used:		
Cash:		
percent of institutions using cash .....	36% .....	36%.
cash as percent of deferred IC .....	48% .....	50%.
length of vesting .....	3 years .....	3 years.
type of vesting .....	40% immediate, 60% pro-rata ....	40% immediate, 60% pro-rata.
RSUs:		
percent of institutions using RSUs .....	64% .....	64%.
RSU as percent of deferred IC .....	45% .....	47%.
length of vesting .....	3.2 years .....	3.2 years.
type of vesting .....	11% immediate, 89% pro-rata ....	11% immediate, 89% pro-rata.
PSUs:		
percent of institutions using PSUs .....	64% .....	64%.
PSU as percent of deferred IC .....	54% .....	56%.
performance period .....	3 years .....	3 years.
length of vesting .....	3 years .....	3 years.
type of vesting .....	78% immediate, 22% pro-rata ....	78% immediate, 22% pro-rata.
Options:		
percent of institutions using options .....	50% .....	50%.
Options as percent of deferred IC .....	18% .....	19%.
length of vesting .....	3.7 years .....	3.7 years.
type of vesting .....	100% pro-rata .....	100% pro-rata.

iii. Significant Risk-Takers

The proposed rule requirements also would apply to significant risk-takers who receive incentive-based compensation. Because data on the compensation of significant risk-takers is not publicly available, the SEC relies on bank supervisory data from the OCC

to provide some evidence on the current practices regarding significant risk-taker compensation at covered institutions. In the OCC anonymized data, banks identify material risk-takers and specific compensation arrangements for them. The definition of a material risk-taker is similar, but not identical, to that of a significant risk-taker in the proposed

rule. Based on supervisory data from three Level 2 covered institutions, it seems that the incentive-based compensation of material risk-takers is subject to deferral, clawback and forfeiture. The fraction of incentive-based compensation that is subject to deferral depends on the size of the compensation a material risk-taker

receives. As Table 12 suggests, the percentage deferred varies, with some exceptions, from 40 percent to 60

percent. The average length of the deferral period is three years.

TABLE 12—DEFERRAL POLICY FOR MATERIAL RISK-TAKERS AT THREE LEVEL 2 COVERED INSTITUTIONS

Institutions	Deferral percent	Forfeiture/ clawback	Length of deferral (years)
Institution 1 .....	40%–60% .....	Yes .....	3
Institution 2 .....	40% .....	Yes .....	3
Institution 3 .....	10%–40%, 40% if bonus >\$750,000 .....	Yes .....	3

Due to the lack of data, the SEC is unable to shed light on current significant risk-taker compensation practices with respect to some of the other proposed rule requirements such as the use of hedging or the type of compensation that is being deferred (cash vs. stock vs. options). In addition, the data is based on information from only three Level 2 covered institutions. It is also worth noting that the OCC data is at the bank subsidiary level, not the depository institution holding company level. Thus, it is possible that the features of the compensation of significant risk-takers at the bank subsidiary level may not be representative of the compensation of significant risk-takers at BDs and IAs.

#### iv. Covered Persons at Subsidiaries

Economic theory suggests that, in large, complex, and interconnected financial institutions that are perceived to receive implicit government guarantee, managers of these institutions could have the incentive to take on more risk than they would have taken had there been no implicit government backstops, thus creating negative externalities for taxpayers. As discussed above, the proposed rule could decrease the likelihood of such negative externalities. To the extent that certain BDs and IAs pose high risk that may lead to externalities, covered persons likely would therefore include those individuals who, by virtue of receiving incentive-based compensation, are in a position of placing significant risks.

Under the proposed rule, senior executive officers and significant risk-takers of BDs and IAs that are covered institutions would be considered covered persons. The proposed rule would require consolidation of

subsidiaries of BHCs that are themselves covered institutions for the purpose of applying certain rule requirements and prohibitions to covered persons. As a result of this proposed consolidation, covered persons employed at BDs and IAs would be subject to the same requirements as the covered persons of their parent institutions, even though the BDs and IAs may be of a smaller size, and hence otherwise treated at a lower level, than their parent institutions. This proposed consolidation would significantly affect unconsolidated Level 3 BDs because most of them are held by Level 1 and Level 2 covered institutions, as well as Level 3 IAs that are held by Level 1 and Level 2 covered institutions. The proposed consolidation would also affect unconsolidated Level 2 BDs and IAs that are held by Level 1 covered institutions because those BDs and IAs will also become Level 1 covered institutions for the purposes of the rule.

As of December 2014, there were 29 unconsolidated Level 3 BDs whose parent institutions are Level 1 and Level 2 institutions (Table 3); only one of those parent institutions was not a covered institution as defined by the rule. Additionally, there were 38 unconsolidated Level 3 BDs whose parents were private institutions; while it is possible that some of these may be Level 1 or Level 2 institutions, the SEC lacks data to determine their size. With respect to the proposed rule requirements, the current compensation arrangements of NEOs of Level 3 parent institutions exhibit some important differences compared to Level 1 and Level 2 parent institutions. For example, Level 3 parent institutions typically defer a smaller fraction of NEOs' incentive-based compensation (Table 7A), defer cash less frequently (Table

7A), and tend to use more options as part of their incentive-based compensation arrangements (Table 6A), compared to Level 1 and Level 2 parent institutions. On the other hand, Level 3 covered institutions, like Level 1 and Level 2 covered institutions, tend to apply forfeiture and clawback and prohibit hedging (Table 7A).

The proposed rule also would require consolidation with respect to certain significant risk-takers. Under the proposed definition of significant risk-taker, employees of a subsidiary that could put substantial capital of the parent institution at risk would be deemed significant risk-takers of the parent institution, and the proposed rule requirements would apply to them in the same manner as the significant risk-taker at their parent institutions. Because data on the compensation of significant risk-takers is not publicly available, the SEC relies on bank supervisory data from the OCC regarding the current compensation practices for significant risk-takers at Level 3 financial institutions; the SEC does not have data on the compensation arrangements at Level 1 and Level 2 institutions. Table 13 shows summary statistics for the compensation arrangements of significant risk-takers at Level 3 covered institutions. The compensation arrangements of significant risk-takers of Level 3 covered institutions seem similar to those of NEOs of Level 3 covered institutions. It is also worth noting that the OCC data is at the bank subsidiary level, not the depository institution holding company level. Thus, it is possible that the features of the compensation of significant risk-takers at the bank subsidiary level may not be representative of the compensation of significant risk-takers at BDs and IAs.

TABLE 13—EXISTING COMPENSATION ARRANGEMENTS FOR SIGNIFICANT RISK-TAKERS OF LEVEL 3 COVERED INSTITUTIONS

	Significant risk-takers
Number of institutions with available compensation data .....	5.

TABLE 13—EXISTING COMPENSATION ARRANGEMENTS FOR SIGNIFICANT RISK-TAKERS OF LEVEL 3 COVERED INSTITUTIONS—Continued

	Significant risk-takers
ST IC/total IC .....	77%.
Deferred IC/total IC .....	23%.
Deferred IC subject to clawback and forfeit/deferred IC .....	89%.
Types of IC compensation used:	
Cash:	
percent of institutions using cash .....	80%.
cash as percent of deferred IC .....	22%.
length of vesting .....	0.33 years.
type of vesting .....	100% pro-rata.
RSUs:	
percent of institutions using RSUs .....	100%.
RSU as percent of deferred IC .....	31%.
length of vesting .....	3 years.
type of vesting .....	40% immediate, 60% pro-rata.
PSUs:	
percent of institutions using PSUs .....	80%.
PSU as percent of deferred IC .....	12%.
performance period .....	1.9 years.
length of vesting .....	3 years.
type of vesting .....	80% immediate, 20% pro-rata.
Options:	
percent of institutions using options .....	20%.
Options as percent of deferred IC .....	25%.
length of vesting .....	NA.
type of vesting .....	NA.

### 3. Regulatory Baseline

The existing regulatory environment, especially after the financial crisis of 2007–2008, is also relevant to the current compensation practices of covered institutions and the effects of the proposed rulemaking. Several guidance and codes that specifically target incentive-based compensation have been adopted by various financial regulators that may also apply to some BDs and IAs. Some of those prescribe compensation practices and suggest prohibitions that are similar to the requirements and prohibitions in the proposed rules.

#### i. Guidance on Sound Incentive Compensation Policies

In June 2010, the U.S. Federal Banking Agencies<sup>383</sup> adopted the Guidance on Sound Incentive Compensation Policies.<sup>384</sup> The guidance applies to banking institutions and, because most of the parents of Level 1 and Level 2 BDs are bank holding companies subject to the guidance, its principles may apply to these BDs as well if the compensation structures at subsidiaries are similar to those at the parent institutions and the parent institution determines to implement

relatively uniform incentive-based compensation policies for the consolidated institution. The guidance may also apply to the 39 IAs that are affiliated with banks and thrift institutions with assets of more than \$50 billion.

The guidance is designed to prevent incentive-based compensation policies at banking institutions from encouraging imprudent risk-taking and to aid in the development of incentive-based compensation policies that are consistent with the safety and soundness of the institution. It has three key principles providing that compensation arrangements at a banking institution should: (a) Provide employees with incentives that appropriately balance risk and reward; (b) be compatible with effective risk management and controls; and (c) be supported by strong corporate governance, including active and effective oversight by the institution's board of directors. Similar to the proposed rules, this guidance applies to senior executives and other employees who, either individually or as a part of a group, have the ability to expose the relevant banking institution to a material level of risk. The guidance suggests several methods of balancing risk and rewards: Risk adjustment of awards; deferral of payment; longer performance periods; and reduced sensitivity to short-term performance.

#### ii. UK Prudential Regulatory Authority Remuneration Code

The SEC notes that for BDs and IAs whose parents are regulated by foreign authorities, the foreign regulatory framework with respect to incentive-based compensation may also be relevant for compliance with the proposed rules.<sup>385</sup> For example, in 2010, the UK PRA adopted four remuneration codes that apply to banks and investment firms and share important similarities with the proposed rules.<sup>386</sup> For instance, the SYSC 19A remuneration code imposes a deferral of at least 40 percent for not less than 3–5 years. For higher earners, at least 60 percent has to be deferred. The code applies to senior management, risk takers, staff engaged in control functions, and any employee receiving compensation that takes them into the same income bracket as senior management and risk takers, whose professional activities have a material impact on the firm's risk profile. The code also requires that at least 50 percent of any bonus must be made in shares, share-linked instruments or

<sup>385</sup> For example, 3 Level 1 and Level 2 BDs have parent institutions that are subject to the UK PRA rules.

<sup>386</sup> There are four codes: SYSC 19A (covering Deposit Taker and Investment firms), SYSC 19B (covering Alternative Investment Fund Managers), SYSC 19C—BIPRU (covering Investment firms), and SYSC 19D (covering Dual-regulated firms Remuneration Code). See <https://www.thefca.org.uk/remuneration>.

<sup>383</sup> The Federal Banking Agencies, as of 2010, were the Board, OCC, FDIC, and Office of Thrift Supervision.

<sup>384</sup> See, 2010 Federal Banking Agency Guidance, available at: <http://www.federalreserve.gov/newsevents/press/bcreg/20100621a.htm>.

other equivalent non-cash instruments of the firm. These shares should be subject to an appropriate retention period. Firms also need to disclose details of their remuneration policies at least annually.

In July 2014, the Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA) published two joint consultation papers “aimed at improving individual responsibility and accountability in the banking sector.”<sup>387</sup> The papers seek feedback on proposed changes to the rules for remuneration for UK banks and PRA-designated investment firms.<sup>388</sup> The PRA and FCA’s new proposed rules follow recommendations made by the UK Parliamentary Commission on Banking Standards, “Changing Banking for Good,” published in June 2013, and are a response to the major role played by banks in the financial crisis in 2007–2008 and allegations of the attempted manipulation of LIBOR. Their new proposed rules were deemed necessary because the current rule on individual accountability is “often unclear or confused”<sup>389</sup> and thus undermines public trust in the banking sector and the financial regulators. The PRA and FCA proposed that banks defer bonuses for a minimum of 7 years for senior managers and 5 years for other material risk-takers. Financial institutions would be able to recover variable pay even if it was paid out or vested for up to 7 years after the award date.

#### D. Scope of the Proposed Rule

##### 1. Levels of Covered Institutions

The proposed rule would create a tiered system of covered institutions based on an institution’s average total consolidated assets during the most recent consecutive four quarters.<sup>390</sup>

<sup>387</sup> See “Prudential Regulation Authority and Financial Conduct Authority Consult on Proposals to Improve Responsibility and Accountability in the Banking Sector,” Press Release by the Financial Conduct Authority, (July 30, 2014), available at: <https://www.fca.org.uk/news/pru-and-fca-consult-on-proposals-to-improve-responsibility-and-accountability-in-the-banking-sector>.

<sup>388</sup> See “Strengthening Accountability in Banking: A New Regulatory Framework for Individuals,” PRA CP14/13, Consultation Paper, July 2014, available at: <https://www.fca.org.uk/news/cp14-13-strengthening-accountability-in-banking>. See also, “Strengthening the Alignment of Risk and Reward: New Remuneration Rules,” PRA CP14/14, Consultation Paper, July 2014, available at: <https://www.fca.org.uk/news/cp14-14-strengthening-the-alignment-of-risk-and-reward>.

<sup>389</sup> See FSA Consultation Paper 14/13: Strengthening accountability in banking: a new regulatory framework for individuals (<https://www.fca.org.uk/news/cp14-13-strengthening-accountability-in-banking>).

<sup>390</sup> For IAs, the tiered system would be based on year end balance sheet assets (excluding non-proprietary assets).

There are three levels of covered institutions: Level 1, Level 2, and Level 3 covered institutions. Some of the proposed rule requirements (e.g., deferral of compensation, forfeiture and clawback) would apply differentially to covered institutions based on their size tier, with more stringent restrictions on the incentive-based compensation arrangements at larger institutions (i.e., Level 1 and Level 2 covered institutions). In general, the importance of financial institutions in the economy tends to be positively correlated with their size. This is apparent from the use of implicit “too-big-to-fail” policies by governments and central banks, providing support to large financial institutions at times of financial crises because of their importance to the greater financial system.<sup>391</sup> In a similar vein, the 2010 Federal Banking Agency Guidance prescribes stricter compensation rules and related risk-management and corporate governance practices for large and more complex banking institutions.<sup>392</sup>

There are various measures developed to estimate the amount of risk<sup>393</sup> posed by an institution to the greater financial system. One study finds that the degree of leverage, maturity mismatch and the size of the institution are all related to a measure of systemic importance and risk.<sup>394</sup> Another study finds that institution size, degree of leverage and covariance of the institution’s stock with the market during distress are related to the systemic risk contribution of an institution.<sup>395</sup> Moreover, an

<sup>391</sup> See, for example, Frederic Mishkin, *Financial Institutions*.

<sup>392</sup> Large banking institutions include, in the case of banking institutions supervised by (i) The Board, large, complex banking institutions as identified by the Board for supervisory purposes; (ii) the OCC, the largest and most complex national banks as defined in the Large Bank Supervision booklet of the Comptroller’s Handbook; (iii) the FDIC, large, complex insured depository institutions (IDIs). See, 2010 Federal Banking Agency Guidance, available at: <http://www.federalreserve.gov/newsevents/press/bcreg/20100621a.htm>.

<sup>393</sup> See Bisias et al. 2012. A Survey of Systemic Risk Analytics. Office of Financial Research, Working Paper.

<sup>394</sup> See Adrian, T., Brunnermier, M. 2011. COVAR. *American Economic Review*, forthcoming. The paper proposes a measure for systemic risk contribution by financial institutions. The forward-looking measure of systemic risk contribution is significantly related to lagged characteristics of financial institutions such as size, leverage, and maturity mismatch.

<sup>395</sup> See Brownlees, C., Engle, R. 2015. SRISK: A Conditional Capital Shortfall Index for Systemic Risk Measurement. Working Paper. The paper develops a measure of systemic risk contribution of a financial firm. This measure associates systemic risk with the capital shortfall a financial institution is expected to experience conditional on a severe market decline. The measure is a function of the firm’s size, degree of leverage and the expected equity loss conditional on a market downturn.

academic study of the financial crisis states that the size of an institution is likely to magnify the impact of failure to the entire financial system.<sup>396</sup> In terms of defining systemic importance, bank holding companies with assets over \$50 billion are required to disclose to the Board on an annual basis, three indicators related to their systemic risk: Institution size, interconnectedness and complexity.<sup>397</sup>

By setting stricter restrictions on the incentive-based compensation arrangements at Level 1 and Level 2 covered institutions, the tiered approach could benefit taxpayers. To the extent that stricter incentive-based compensation rules are effective at curbing inappropriate risk-taking, this could lessen the default likelihood for Level 1 and Level 2 covered institutions, thus increasing the likelihood that taxpayers would not have to incur costs to rescue important institutions. Moreover, if the stricter incentive-based compensation rules lower the likelihood of default for Level 1 and Level 2 covered institutions, the likelihood of default for smaller institutions could decrease as well, to the extent that smaller institutions are exposed to counterparty risks due to their connection with larger Level 1 and Level 2 covered institutions.

Consolidation requirements aside, the tiered approach also would not impose as great a compliance burden on smaller Level 3 covered institutions for which the proposed rule requirements on deferral, forfeiture and clawback, and some other prohibitions and requirements do not apply. To the extent that compliance costs have a fixed component that may have a disproportionate impact on smaller institutions, excluding Level 3 covered institutions from more burdensome requirements would not place them at a competitive disadvantage compared to Level 1 and Level 2 covered institutions. Moreover, to the extent that executives’ incentives become distorted due to the implicit government guarantee, this is less likely to be the case for Level 3 covered institutions due to their relatively smaller size. Thus, the potential benefits of the proposed rule may be less substantial for smaller covered institutions since such institutions are less likely to be in a

<sup>396</sup> See French et al. 2010. *Squam Lake Report: Fixing the Financial System*. Princeton University Press.

<sup>397</sup> Size is correlated with the two other measures of systemic importance, complexity and interconnectedness. See FSOC 2015 Annual Report, available at: <https://www.treasury.gov/initiatives/fsoc/studies-reports/Documents/2015%20FSOC%20Annual%20Report.pdf>.

position to take risks that may lead to externalities.

However, to the extent that the stricter proposed requirements for incentive-based compensation arrangements at Level 1 and Level 2 covered institutions induce less than optimal risk-taking incentives for covered persons from shareholders' point of view, this could result in a decrease in firm value and hence lower returns for the shareholders of these institutions. Additionally, the stricter requirements for Level 1 and Level 2 covered institutions could make it more difficult to attract and retain human capital, thus creating competitive disadvantages in the labor market for these institutions. If these institutions become disadvantaged due to their stricter compensation requirements, they might be forced to increase overall compensation to be able to compete for managerial talent with firms that are not affected by the proposed rules.

As discussed above, besides an institution's average total consolidated assets, other indicators (for example, the size of that institution's open counterparty positions in a market) not perfectly correlated with size could be a proxy for the importance of financial institutions to the financial sector and the broader economy. If size is not a good proxy for the importance of a financial institution, then the proposed rule would likely pose a disproportionate compliance burden on larger institutions while not covering institutions that may be more significant to the overall financial system under different proxies for importance.

The proposed thresholds for identifying Level 1 covered institutions (over \$250 billion) and Level 2 covered institutions (between \$50 billion and \$250 billion) are similar to those used by banking regulators in other contexts. For example, the \$250 billion is used by Basel III as a threshold to identify core banks that must adopt the Basel standards; and the \$50 billion threshold is used in a number of sections of the Dodd-Frank Act.<sup>398</sup> The use of these two thresholds might place a higher compliance burden on institutions that,

are close to, but just above the threshold compared to institutions that are close, but just below the threshold. For example, a BD that has a size of \$49 billion is likely to be similar in many aspects to a BD that has a size of \$51 billion. Yet, with the current cutoff points, the former would not be subject to deferral, forfeiture and clawback, and other prohibitions in the proposed rule, while the latter would be.

By covering various types of financial institutions (e.g., banks, BDs, IAs, thrifts, etc.) with at least \$1 billion in assets, section 956 and the proposed rule implicitly assume that larger institutions pose higher risks, including risks that may impact the financial system at large. This assumption may not hold true for certain institutions. For example, in the case of BDs and IAs, which may have a much narrower scope of activities than a comparably sized commercial bank, the narrower range of activities could limit their impact on the overall financial system. On the other hand, larger BDs and IAs may pose higher risks than smaller BDs and IAs. Also, at least one study has suggested that the interconnectedness of financial institutions generally could affect multiple financial institutions in a crisis and impact otherwise unrelated parts of the larger financial system.<sup>399</sup> Another study asserts that financial institutions, including broker-dealers, have become highly interrelated and less liquid in the past decade, thus increasing the level of risk in the financial sector.<sup>400</sup>

<sup>399</sup> See, for example, Bisias D., M. Flood, A.W. Lo, and S. Valavanis, 2012. A Survey of Systemic Risk Analytics. Office of Financial Research, Working paper, available at: [https://www.treasury.gov/initiatives/wsr/ofr/Documents/OFRwp0001\\_BisiasFloodLoValavanis\\_ASurveyOfSystemicRiskAnalytics.pdf](https://www.treasury.gov/initiatives/wsr/ofr/Documents/OFRwp0001_BisiasFloodLoValavanis_ASurveyOfSystemicRiskAnalytics.pdf). On page 9, the authors argue that "In a world of interconnected and leveraged institutions, shocks can propagate rapidly throughout the financial network, creating a self-reinforcing dynamic of forced liquidations and downward pressure on prices." The study discusses the interconnectedness between financial institutions in general and does not focus on the potential role of BDs and IAs.

<sup>400</sup> See Billio M., M. Getmansky, A.W. Lo, and L. Pelizzon. 2012. Econometric Measures of Connectedness and Systemic Risk in the Finance and Insurance Sectors, *Journal of Financial Economics*, 104, 535–559. The study examines and finds evidence that banks, brokers, hedge funds and insurance companies have become highly interrelated during the last decade, thus increasing the level of systemic risk in the financial sector. For example, insurance companies have had little to do with hedge funds until recently when these companies expanded into markets such as providing insurance for financial products and credit default swaps. Such activities have potential implications for systemic risk when conducted on a large scale.

## 2. Senior Executive Officers and Significant Risk-Takers

The requirements under the proposed rule would place differential restrictions on compensation arrangements of covered persons. Within each covered institution, the proposed rule would create different categories of covered persons, which include any executive officer, employee, director, or principal shareholder that receives incentive-based compensation. While the proposed rule would apply to directors or principal shareholders who receive incentive-based compensation, the SEC's baseline analysis suggests that most of the parent institutions provide incentive-based compensation to non-employee directors but none of them provide such compensation arrangements to principal shareholders that are neither executives nor non-employee directors. Below, the SEC focuses the discussion of the economic effects of the proposed rule on two types of covered persons: Senior executive officers and significant risk-takers.

As discussed above, a senior executive officer is defined as a covered person who holds the title or, without regard to title, salary, or compensation, performs the function of one or more of the following positions at a covered institution for any period of time in the relevant performance period: President, executive chairman, CEO, CFO, COO, chief investment officer, chief legal officer, chief lending officer, chief risk officer, chief compliance officer, chief audit executive, chief credit officer, chief accounting officer, or head of a major business line or control function (as defined in the proposed rule). A significant risk-taker is defined as a covered person, other than a senior executive officer, who receives compensation of which at least one-third is incentive-based compensation and is: Either (1) placed among the highest 5 percent in annual base salary and incentive-based compensation among all covered persons (excluding senior executive officers) of a Level 1 covered institution or of any covered institution affiliate, or (2) placed among the highest 2 percent in annual base salary and incentive-based compensation among all covered persons (excluding senior executive officers) of a covered Level 2 covered institution or of any covered institution affiliate, or (3) may commit or expose 0.5 percent or more of the common equity tier 1 capital, or in the case of a registered securities broker or dealer, 0.5 percent or more of the tentative net capital, of the covered institution or of any affiliate of the covered institution

<sup>398</sup> For example, sections 165 and 166 of the Dodd-Frank Act require the Board to establish enhanced prudential standards for nonbank financial companies supervised by the Board and bank holding companies with total consolidated assets of \$50 billion or more. In prescribing more stringent prudential standards, the Board may, on its own or pursuant to a recommendation by the Council in accordance with section 115, differentiate among companies on an individual basis or by category, taking into consideration their capital structure, riskiness, complexity, financial activities (including the financial activities of their subsidiaries), size, and any other risk-related factors that the Board deems appropriate.

that is itself a covered institution, or (4) is designated as a significant risk-taker by the SEC or the covered institution.

The proposed rule would impose differential requirements on compensation arrangements of senior executive officers and significant risk-takers conditional on the size of the covered institution. Regarding senior executive officers, at least 60 percent of a senior executive officer's incentive-based compensation would be required to be deferred at a Level 1 covered institution, whereas 50 percent would be the minimum deferral amount for a senior executive officer at a Level 2 covered institution. Regarding significant risk-takers, 50 percent of a significant-risk-taker's incentive-based compensation at a Level 1 covered institution would be required to be deferred as compared to 40 percent for a significant risk-taker's incentive-based compensation at a Level 2 covered institution. Moreover, the minimum deferral period for all covered persons at Level 1 covered institutions would be four years for qualifying incentive-based compensation and two years for incentive-based compensation received under long-term incentive plans whereas the deferral period for covered persons at a Level 2 covered institution would be three years for qualifying incentive-based compensation and one year for compensation received under long-term incentive plans.

In general, the proposed rule would impose relatively stricter requirements for compensation arrangements of individuals who are more likely to be in a position to execute or authorize actions with accompanying risks that may have a significant impact on the financial health of the covered institution or of any covered institution affiliate. Specifically, the proposed rule would require a higher percentage of incentive-based compensation to be deferred for senior executive officers compared to significant risk-takers at covered institutions. If senior executive officers are in a position to make decisions that have a more significant impact on the degree of risk a covered institution takes than significant risk-takers, then the higher percentages of deferral amounts for senior executive officers appear to be commensurate with the degree of inappropriate risk-taking in which they could engage. This would likely provide proportionately stronger disincentives for inappropriate risk-taking by individuals that are more likely to be able to expose the covered institution to greater amounts of risk, thus potentially benefiting taxpayers and other stakeholders. In general, if certain significant risk-takers (e.g.,

traders with the ability to place significant bets that could endanger the financial health of the covered institution or of any affiliate of the covered institution) could engage in more or similarly significant risk-taking than senior executive officers, the proposed rules would place less stringent requirements on the compensation arrangements of such significant risk-takers compared to senior executive officers, lowering risk-taking disincentives for significant risk-takers and/or imposing a potential higher cost to senior executive officers. However, the proposed rules may also create an incentive for senior executive officers to monitor significant risk-takers in those situations when they do not directly supervise such significant risk-takers.

While the definition of senior executive officer would be primarily based on job function, the definition of significant risk-taker would be based on multiple criteria. To identify significant risk-takers, one direct approach would require knowledge of their authority to expose their institution to material amounts of risk. This risk-based approach has intuitive appeal because it relates the application of the rules to the potential for risk taking. Such an approach could, however, be designed in many different ways, including differences relating to determining the appropriate risk-based measure, whether it should be applied to individuals or a group (e.g., a trader or a trading desk), and whether it would be appropriate to subject all trading activity to the same risk-based measure (e.g., U.S. treasury securities versus collateralized mortgage obligations). One of the criteria in the definition of significant risk-takers in the proposed rules is based on individuals' relative size of annual base salary and incentive-based compensation within a covered institution and its affiliates. If the highest paid individuals at BDs and IAs are the ones that could place BDs and IAs, or their parent institutions, at risk of insolvency, then the use of this criterion is likely to reasonably identify individuals that are significant risk-takers and as a result lower the likelihood of inappropriate risks being undertaken and potentially safeguard the health of these institutions and the broader economy. If, however, the highest paid individuals at BDs and IAs are not likely to be able to expose their parent institution to significant risks, this criterion may be overly inclusive, resulting in individuals being designated as significant risk-takers without possessing the ability to inflict

substantial losses on BDs or IAs, or their parent institutions. This may impose restrictions on the compensation of those individuals and as a consequence may put BDs and IAs at a disadvantage in hiring or retaining human capital. BDs and IAs may have to increase the compensation of affected individuals to offset the restrictions imposed by the proposed rule.

For IAs that are covered institutions in another capacity and BDs, the proposed rules would also identify significant risk-takers using a measure of their ability to expose the covered institution to risks. More specifically, a person that receives compensation of which at least one-third is incentive-based compensation and may commit or expose 0.5 percent or more of the common equity tier 1 capital, or in the case of a registered securities broker or dealer, 0.5 percent or more of the tentative net capital, of the covered institution or of any affiliate of the covered institution would be a significant risk-taker. As discussed above, the Agencies are proposing the exposure test because individuals who have the authority to expose covered institutions to significant amounts of risk can cause material financial losses to covered institutions. For example, in proposing the exposure test, the Agencies were cognizant of the significant losses caused by actions of individuals, or a trading group, at some of the largest financial institutions during and after the financial crisis that began in 2007. In the case of a covered institution that is a subsidiary of another covered institution and is smaller than its parent, this particular criterion of the significant risk-taker definition could result in individuals being classified as significant risk-takers who do not have the ability to expose significant amounts of the parent's capital to risk.

Additionally, under the proposed definition of significant risk-taker, a covered person of a BD or IA subsidiary of a parent institution that is a Level 1 or Level 2 covered institution may be designated as a significant risk-taker relative to: (i) In the case of a BD subsidiary, the size of the BD's tentative net capital or; (ii) in the case of both BD and IA subsidiaries, the tentative net capital or common equity tier 1 capital of any section 956 affiliate of the BD or IA, if the covered person has the ability to commit capital of the affiliate, even if the BD or IA subsidiary has significantly fewer assets than its parent. Because the BD subsidiary would be treated as a Level 1 or Level 2 covered institution due to its parent, a covered person of a BD that is a

relatively smaller subsidiary would be subject to more stringent compensation restrictions than would an employee of a comparably sized BD that is not a subsidiary of a Level 1 or Level 2 covered institution. As a consequence, if such a designated significant risk-taker of a smaller BD subsidiary of a Level 1 or Level 2 covered institution is not in a position to undertake actions that place the entire institution at risk, then the proposed approach may impose disproportionately stricter compensation restrictions on such covered person.

An alternative would be to use an individual's level of compensation as a proxy for his or her ability or authority to undertake risks within a corporate structure. The main assumption under this approach would be that there is a positive link between an individual's total compensation and that individual's authority to commit significant amounts of capital at risk at the covered institution or any affiliate of the covered institution. A benefit of the total compensation-based approach would be the implementation simplicity in the identification of significant risk-takers. However, the main challenge would be the determination of the total compensation threshold that would appropriately qualify individuals as significant risk-takers. On one hand, setting the total compensation threshold too low could impose incentive-based compensation restrictions on individuals that do not have authority to undertake significant risks. As a result, it is possible that incentive-based compensation requirements imposed on individuals that do not have significant risk-taking authority could lead to a disadvantage in the efforts of the institutions to attract and retain talent. On the other hand, setting the total compensation threshold too high could impose incentive-based compensation restrictions on an incomplete set of significant risk-takers, limiting the potential benefits of the proposed rule.

### 3. Consolidation of Subsidiaries

The proposed rule would subject covered institution subsidiaries of a depository institution holding company that is a Level 1 or Level 2 covered institution to the same requirements as the depository institution holding company. In this manner, the proposed rule would capture the effect that risk-taking within the subsidiaries of a depository institution holding company could have on the parent, and the negative externalities that could result for taxpayers.

For example, covered persons at a \$10 billion BD subsidiary of a depository

institution holding company that is a Level 1 covered institution would be treated as covered persons of a Level 1 covered institution and subject to the proposed requirements and prohibitions applicable to covered persons at a Level 1 covered institution. One benefit of the proposed approach is the implementation simplicity of the proposed rule since the parent institution's size would determine the requirements for all covered persons in the covered institution's corporate structure. Such an approach also has the advantage that it may cover situations where the subsidiary could potentially expose the consolidated institution to substantial risks. This could be the case if for example the parent institution has provided capital to the subsidiary and the subsidiary is large enough that its failure would represent a significant loss for the parent institution. Moreover, such an approach curbs the possibility that a covered institution might place significant risk-takers in a smaller unregulated subsidiary, in order to evade the compensation restrictions of the proposed rule for individuals with authority to expose the institution to significant amounts of risk.

There may also be costs associated with the proposed consolidation approach. The main disadvantage of such approach is that it may impose requirements and prohibitions on individuals employed in smaller subsidiaries that are less likely to be in a position to expose the institution to significant risks. Thus, the assumptions underlying the rule's consolidation may not be accurate in all cases. The proposed rules' treatment of subsidiaries would depend on their size and the size of their parent, and also on the effect that risk-taking within those subsidiaries could have on the potential failure of the parent institution and the potential risk that such a failure could impose on the overall financial system and the subsequent negative externality that this could create for taxpayers. For example, if the parent institution does not explicitly provide capital or implicitly guarantee the subsidiary's positions, the proposed rules would impose similar requirements on the incentive-based compensation of individuals with different abilities to expose the institution to risk. Such compensation requirements may impose costs on individuals in these subsidiaries, and it might affect the ability of these subsidiaries to compete for managerial talent with stand-alone companies of the same size as the subsidiary. If that were the case, the subsidiaries of larger parent institutions

may have to provide additional pay to individuals to compensate for the relatively stricter compensation requirements and prohibitions. If these additional compensation requirements are significantly costly, there may be incentives for smaller subsidiaries to spin-off from their parents and operate as stand-alone firms to avoid the stricter compensation requirements that would be applicable based on the size of the parent institution.

Additionally, the costs of the proposed consolidation approach would depend on how different the current incentive-based compensation arrangements of a subsidiary are from those of its parent institution. If the compensation arrangements of BDs' and IAs' covered persons are similar to those of their parent institutions (*e.g.*, they use similar deferral percentages and terms, prohibit hedging, etc.), then the proposed consolidation approach is not likely to lead to significant compliance costs for BDs and IAs. The 2010 Federal Banking Agency Guidance has significantly limited differences in compensation arrangements between financial institutions and their subsidiaries. If, however, the compensation arrangements at BDs and IAs more closely resemble the compensation structures of financial institutions of similar size, than the proposed rule's consolidation requirement may lead to significant compliance costs. Unconsolidated Level 3 BDs and IAs are most likely to be affected by this proposition. The parent institutions of Level 3 BDs, to the extent that they are owned by one, are mainly Level 1 and Level 2 covered institutions. Although the SEC does not have data about the parent institutions of Level 3 IAs, the SEC expects that they would also be mainly Level 1 and Level 2 covered institutions. As shown above, compensation practices at Level 3 parent institutions differ significantly from Level 1 and Level 2 parent institutions on a number of dimensions: They defer a smaller fraction of NEOs incentive-based compensation (Table 7A), defer cash less frequently (Table 7A), and tend to use more options as part of their incentive-based compensation (Table 6A) compared to Level 1 and Level 2 parent institutions. They also rather infrequently prohibit hedging with respect to non-employee directors that receive incentive-based compensation (Table 10A). If the compensation arrangements of unconsolidated Level 3 BDs and IAs are similar to those of Level 3 parent institutions, under the proposed rule they would need to make significant

changes to certain features of their compensation arrangements to be compliant with the proposed rule. On the other hand, to the extent that their current compensation practices are not optimal from the perspective of taxpayers and other stakeholders of such BDs and IAs, there may be potential benefits. This point holds for the remainder of the economic analysis where the SEC discusses the potential costs and benefits to unconsolidated Level 3 BDs and IAs of a larger covered institution from applying the proposed rule requirements and prohibitions.

An alternative to the proposed consolidation approach would be to use the subsidiary's size to determine its status as a Level 1, Level 2, or Level 3 covered institution. For example, a \$10 billion BD subsidiary of a Level 1 depository institution holding company would be treated as a Level 3 covered institution and covered persons within the subsidiary would be subject to all requirements and prohibitions applicable to a Level 3 covered institution. This alternative approach would not entail the potential costs identified in the proposed approach described above. However, differential application of the rule depending on subsidiary size could provide covered institutions with an incentive to re-organize their operations by placing significant risk-takers into relatively smaller subsidiaries to bypass the proposed requirements. This type of behavior, however, might be mitigated in some circumstances by the proposed rule's prohibition on such indirect actions: A covered institution must not indirectly, or through or by any other person, do anything that would be unlawful for such covered institution to do directly under this part. Moreover, this type of behavior would be constrained by the fact that the SEC's capital requirements for broker-dealers require that the broker-dealer itself carry the necessary capital for all broker-dealer positions.<sup>401</sup> Additionally, the rule's definition of a significant risk-taker would treat any employee of the subsidiary with the ability to commit certain amount of capital or to create risks for the parent institution as a significant risk-taker of the parent, further limiting the ability of institutions to bypass the proposed requirements by placing such individuals into relatively smaller subsidiaries.

#### E. Potential Costs and Benefits of the Proposed Rule's Requirements and Prohibitions

In the following sections, the SEC provides an analysis of the potential costs and benefits associated with the proposed rule's requirements and prohibitions and possible alternatives.<sup>402</sup> For purposes of this analysis, the SEC addresses the potential economic effects for covered BDs and IAs resulting from the statutory mandate and from the SEC's exercise of discretion together, recognizing that it is often difficult to separate the costs and benefits arising from these two sources. The SEC also requests comment on any economic effect the proposed requirements may have on covered BDs and IAs. The SEC appreciates comments that include both qualitative information and data quantifying the costs and the benefits identified in the analysis or alternative implementations of the proposed rule.

##### 1. Limitations on Excessive Compensation

The proposed rule would prohibit covered institutions from establishing or maintaining any type of incentive-based compensation arrangement, or any feature of any such arrangement, that encourages inappropriate risk-taking by providing a covered person with excessive compensation, fees, or benefits or that could lead to material loss for the institution.

The proposed rule would not define excessive compensation; instead, it would use a principles-based approach that would provide covered institutions with the flexibility to structure incentive-based compensation arrangements that do not constitute excessive compensation based on several factors that are outlined below. These factors would include: The total size of a covered person's compensation; the compensation history of the covered person and other individuals with comparable expertise at the institution; the financial condition of the covered institution; compensation practices at comparable institutions based upon such factors as

asset size, geographic location, and the complexity of the covered institution's operations and assets; for post-employment benefits, the projected total cost and benefit to the covered institution; and any connection between the covered person and any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the covered institution.

The flexibility that the proposed rule provides would likely benefit covered institutions by allowing them to tailor the incentive-based compensation arrangements to the skills and job requirements of each covered person and to the nature of a particular institution's business and the risks thereof instead of applying a "one size fits all" approach. The differences in the size, complexity, interconnectedness, and degree of competition in the market for managerial talent among the institutions covered by the proposed rule make excessive compensation difficult to define universally.

As mentioned above, a principles-based approach is likely to provide greater discretion to covered institutions in tailoring compensation arrangements that do not provide incentives for inappropriate risk-taking. Such discretion may potentially allow for differential interpretation among covered institutions on what constitutes excessive compensation and as a consequence, differential compensation arrangements even for similar institutions could be designed. Given the flexibility inherent under a principles-based approach, it is also possible that in fact some compensation contracts to covered persons constitute excessive compensation that could lead to inappropriate risk-taking, particularly if the compensation setting process is not efficient or unbiased.<sup>403</sup> It is also possible that boards of directors may find it difficult to evaluate whether a compensation arrangement creates excessive compensation that could lead to inappropriate risk-taking. As such, it is likely that governance mechanisms in place would be crucial for institutions to benefit from the flexibility of the principles-based approach and avoid the potential costs described above.

An alternative would be a more prescriptive approach in defining compensation arrangements that constitute excessive compensation. For example, an explicit definition of excessive compensation could be provided for covered institutions. As mentioned above, such an approach has

<sup>402</sup> Commenters on the 2011 Proposed Rule suggested more expansive discussion and analysis of economic effects of the proposed rulemaking on items such as the ability of covered institutions to compete for talent acquisition and retention (*See, for example, letters by the U.S. Chamber and FSR*), and also on the effects of the rule on risk taking incentives and its consequences for covered institutions' ability to compete (*See, for example, FSR*). Below, the SEC's economic analysis outlines and discusses potential economic effects of the various rule provisions, including items identified in comment letters discussing economic considerations.

<sup>403</sup> For example, *see* Coles, J., Daniel, N., and Naveen, L. Co-opted Boards. 2014. *Review of Financial Studies* 27, 1751–1796.

<sup>401</sup> *See* 17 CFR 15c3–1(a).

the disadvantage of restricting compensation arrangement options for covered institutions and thus an increased likelihood that inefficient compensation arrangements would be applied to at least some covered institutions, given the significant differences among covered institutions and covered persons.

2. Performance Measures

The proposed rule would require covered institutions to use a variety of performance measures when determining the incentive-based compensation of covered persons. Incentive-based compensation arrangements would be required to include a mix of financial (*i.e.*, accounting and stock-based) measures and non-financial measures, with the ability for non-financial measures to override financial measures when appropriate. Additionally, any amounts to be awarded under the arrangement would be subject to adjustment to reflect actual losses, inappropriate risks taken, compliance deficiencies, or other measures or aspects of financial and non-financial performance.

There is evidence in the economic literature suggesting that non-financial measures of performance are incremental predictors of long-term financial performance relative to financial measures of performance, and provide important information about executives' performance.<sup>404</sup> Moreover, non-financial measures of performance in compensation arrangements may better capture progress or milestones of

strategic goals that may be unique to specific institutions.<sup>405</sup> Thus, the proposed requirement to use a mix of the two types of measures would likely provide more relevant information to enable covered institutions to set up incentive compensation arrangements for covered persons. In addition, the flexibility that the proposed rule would provide to covered institutions to adjust the compensation awards based on various factors would allow covered institutions to tailor their compensation arrangements to their specific circumstances.

The baseline analysis suggests that many of the public parent institutions of some BDs and IAs already use a mix of financial and non-financial measures in determining the incentive-based compensation awards of senior executive officers. To the extent that BDs and IAs use a similar mix of measures to determine the incentive-based compensation awards of their senior executive officers, the SEC expects the costs of compliance with this provision of the proposed rule to be relatively low. If BDs and IAs do not use the same mixture of financial and non-financial measures as their parents, or do not rely on non-financial measures when determining the compensation of their senior executive officers and significant risk-takers, the compliance costs associated with this particular rule requirement may be significant. Such costs may be in the form of additional expenditures related to hiring compensation consultants and/or lawyers to design compensation

schemes and assure the compliance of newly designed compensation schemes with the proposed rule.

The SEC has attempted to quantify such costs using data reported by Level 1, Level 2, and Level 3 covered institutions that are parents of BDs and IAs. Table 14 provides some summary statistics on the use of compensation consultants and the fees paid to those over the period 2007–2014.<sup>406</sup> Based on the results in the table, Level 1 and Level 2 covered institutions use on average two compensation consultants, while Level 3 covered institutions use one compensation consultant on average. If a Level 1 BD or IA has to hire compensation consultant(s) to help them meet this rule requirement, it may incur costs of approximately \$185,515 per year. If an unconsolidated Level 2 BD or IA has to hire compensation consultant(s) to help them meet this rule requirement, it may incur costs of approximately \$77,000 per year.<sup>407</sup> If an unconsolidated Level 3 BD or IA, because of the consolidation requirement, has to hire compensation consultant(s) to help meet this rule requirement, it may incur costs of approximately \$18,788 per year. These costs could be higher if the compensation consultant is asked to provide additional services other than compensation consulting services. These costs could be lower, however, if the parent institutions of BDs and IAs already employ compensation consultants and could extend their services to meet the proposed rule requirements for BDs and IAs.

TABLE 14—THE USE AND COSTS OF COMPENSATION CONSULTANTS BY CERTAIN LEVEL 1, LEVEL 2, AND LEVEL 3 COVERED INSTITUTIONS THAT ARE PARENTS OF BDs AND IAs, 2007–2014

	Average number of compensation consultants used	Median fees for consulting services to the compensation committee	Number of institutions
Level 1 .....	2	185,515	7
Level 2 .....	2	77,000	9
Level 3 .....	1	18,788	6

<sup>404</sup> See, e.g., Banker, R., G. Potter, and D. Srinivasan, 1999. An Empirical Investigation of an Incentive Plan that Includes Nonfinancial Performance Measures. *The Accounting Review* 75, 65–92. The study examines whether non-financial measures of performance, specifically customer satisfaction, are incremental predictors of future performance and whether inclusion of such measures of performance in compensation contracts is efficient. The study finds that customer satisfaction is incremental in predicting future financial performance and inclusion of such performance measure in compensation contracts leads to improved future performance.

<sup>405</sup> See, e.g., Ittner, C., D. Larcker, and T. Randall, 2003. Performance Implications of Strategic Performance Measurement in Financial Services Firms. *Accounting, Organizations and Society* 28, 715–741. The study uses a sample of 140 U.S. financial services firms to examine the relation between measurement system satisfaction, economic performance, and two general approaches to strategic performance measurement: Greater measurement diversity and improved alignment with firm strategy and value drivers. The study finds evidence that firms making more extensive use of a broad set of financial and non-financial measures than firms with similar strategies or value drivers have higher measurement system satisfaction and stock market returns.

<sup>406</sup> Data used in the table comes from the ISS database.

<sup>407</sup> We note that while we report the median consulting fee for covered institutions in Table 14, the average compensation consultant fees are higher. For example, for Level 1 covered institutions the average consulting fee is \$198,673, for Level 2 covered institutions the average consulting fee is \$293,501, and for Level 3 covered institutions the average consulting fee is \$59,828. The presence of outliers in the compensation consulting fee data and the small sample size are the reason for the large difference between average and median consulting fee.

### 3. Board of Directors

Additionally, the proposed rule would require that the board of directors of covered institutions oversee a covered institution's incentive-based compensation program, and approve incentive-based compensation arrangements for senior executive officers or any material exceptions or adjustments to incentive-based compensation policies or arrangements.

Since overseeing and approving executive compensation arrangements is one of the primary functions of the compensation committee of the corporate board, the SEC believes that this rule requirement would not impose significant compliance costs on covered institutions that already have compensation committees. Moreover, because the baseline analysis suggests that the majority of the parents of some covered institutions already employ most of the requirements and limitations of the proposed rule, it may not be particularly costly for boards of directors or compensation committees to comply with the proposed rule. However, there might be additional compliance costs for covered institutions if the board of directors or the compensation committee have to exert incremental effort (*i.e.*, meet more frequently) in designing and approving compensation arrangements. Additionally, if because of the rule's definition of significant risk-takers the compensation committee of a covered institution has to cover a much larger number of employees and consider additional factors than it does at present, this may increase compliance costs.

For covered BDs and IAs that do not have compensation committees, the board of directors as a whole may be able to oversee and approve executive compensation arrangements. Thus, for such BDs and IAs the compliance costs of this rule requirement could result in more time being spent for the board of directors on these issues, which might entail higher directors' fees and possibly additional compensation consulting costs.

### 4. Disclosure and Recordkeeping

The proposed rule would require all covered institutions to create annually and maintain for a period of at least 7 years records that document the structure of all its incentive-based compensation arrangements and demonstrate compliance with the proposed rule. At a minimum, these must include copies of all incentive-based compensation plans, a record of who is subject to each plan, and a

description of how the incentive-based compensation program is compatible with effective risk management and controls.

The SEC is proposing an amendment to Exchange Act Rule 17a-4(e)<sup>408</sup> and Investment Advisers Act Rule 204-2<sup>409</sup> to require that registered broker-dealers maintain and investment advisers, respectively, the records required by the proposed rule, in accordance with the recordkeeping requirements of Exchange Act Rule 17a-4 and Investment Advisers Act Rule 204-2, respectively. Exchange Rule 17a-4 and Investment Advisers Act Rule 204-2 establish the general formatting and storage requirements for records that registered broker-dealers and investment advisers, respectively, are required to keep. For the sake of consistency with other broker-dealer and investment adviser records, the SEC believes that registered broker-dealers and investment advisers, respectively, should also keep the records required by the proposed rule, in accordance with these requirements.

The proposed recordkeeping requirement would assist covered BDs and IAs in monitoring incentive-based compensation awards and payments and comparing them with actual risk outcomes to determine whether incentive-based compensation payments to senior executive officers and significant risk-takers lead to inappropriate risk-taking. The proposed recordkeeping requirement would also help BDs and IAs to modify the incentive-based compensation arrangements of senior executive officers and significant risk-takers, if, over time, incentive-based compensation paid does not appropriately reflect risk outcomes. These records would be available to SEC staff for examination, which may enhance compliance and facilitate oversight.

This proposed requirement would likely impose compliance costs on covered institutions. The SEC expects the magnitude of the compliance costs to depend on whether broker-dealers and investment advisers already have a system in place to generate information regarding their compensation practices for internal use (*e.g.*, for reports to the board of directors or the compensation committee) or for required disclosures under the Exchange Act (for reporting companies). To the extent that such existing platforms can be expanded to produce the records required under the proposed rule, the SEC expects this

requirement to impose lower compliance costs on these institutions. The compliance costs associated with this particular proposed rule requirement would likely be higher for covered institutions that may not be generating such information, if for example they are not subject to related reporting obligations, or may not keep the type and detail of records that would be required under the proposed rule. Given that all Level 1 and unconsolidated Level 2 BDs, and most unconsolidated Level 3 BDs and IAs, are non-reporting companies, the SEC expects that the recordkeeping costs associated with the rule may be substantial for these BDs and IAs. The SEC notes, however, that because it does not have information on the compensation reporting and recordkeeping at the subsidiary level, the SEC may be overestimating compliance costs for BDs and IAs with reporting parent institutions. For example, if the parent institution reports and keeps records of the incentive-based compensation arrangements at the subsidiary level, and on the same scale and detail as required by the proposed rule, it is possible that the compliance costs for such BDs could be lower than the compliance costs for BDs with non-reporting parent institutions. Since the SEC does not have data on how many covered IAs have parent institutions, it is also possible that a significant number of these IAs may be stand-alone companies and therefore could have higher costs to comply with the proposed rule compared to covered IAs and BDs that are part of reporting parent institutions.

According to the 2010 Federal Banking Agency Guidance, a banking organization should provide an appropriate amount of information concerning its incentive compensation arrangements for executive and non-executive employees and related risk-management, control, and governance processes to shareholders to allow them to monitor and, where appropriate, take actions to restrain the potential for such arrangements and processes to encourage employees to take imprudent risks. Such disclosures should include information relevant to employees other than senior executive officers. The scope and level of the information disclosed by the institution should be tailored to the nature and complexity of the institution and its incentive compensation arrangements. Thus, private covered institutions that are banking institutions and apply the policies of the 2010 Federal Banking Agency Guidance may already be

<sup>408</sup> 17 CFR 240.17a-4(e).

<sup>409</sup> 17 CFR 275.204-2.

collecting the information that would be required by the proposed rule. The SEC expects the compliance costs to be lower for such covered institutions, to the extent that there is an overlap between the information collected under the 2010 Federal Banking Agency Guidance and the information that would be required for disclosure and recordkeeping under the proposed rule. The BDs and IAs that are stand-alone non-reporting firms or have non-reporting parent institutions that are not banking institutions would most likely be the ones to incur higher compliance costs of disclosure and recordkeeping.

By requiring covered institutions to create and maintain records of incentive-based compensation arrangements for covered persons at all covered BDs and IAs, the proposed recordkeeping requirement is expected to facilitate the SEC's ability to monitor incentive-based compensation arrangements and could potentially strengthen incentives for covered institutions to comply with the proposed rule. As a consequence, an increase in investor confidence that covered institutions are less likely to be incentivizing inappropriate actions through compensation arrangements may occur and potentially result in greater market participation and allocative efficiency, thereby potentially facilitating capital formation. As discussed above, it is difficult for the SEC to estimate compliance costs related to the specific provision. However, for covered institutions that do not currently have a similar reporting system in place, there could be significant fixed costs that may disproportionately burden smaller covered BDs and IAs and hinder competition. Overall, the SEC does not expect the effects of the proposed recordkeeping requirements on efficiency, competition and capital formation to be significant.

#### 5. Reservation of Authority

Under the proposed rule, an Agency may require a Level 3 covered institution with average total consolidated assets greater than or equal to \$10 billion and less than \$50 billion to comply with some or all of the provisions of §§ 5 and 7 through 11 of the proposed rule applicable to Level 1 and Level 2 covered institutions if the agency determines that such Level 3 covered institution's complexity of operations or compensation practices are consistent with those of a Level 1 or Level 2 covered institution.

This proposed rule requirement would allow the SEC to treat senior executive officers and significant risk-

takers at BDs and IAs that have total consolidated assets below \$50 billion as covered persons of a Level 1 or Level 2 covered institution, because, for example, the complexity of the BDs' and IAs' operations or risk profile could have a significant impact on the overall financial system and could generate negative spillover effects for taxpayers. As a result, the number of BDs and IAs that would be subject to the portions of the proposed rule applicable to Level 1 and Level 2 covered institutions may increase relative to the estimates presented in the baseline.<sup>410</sup>

The proposed requirement may increase compliance costs for these BDs and IAs. As shown above, Level 3 parent institutions differ significantly from Level 1 and Level 2 parent institutions on a number of dimensions: They tend to defer a smaller fraction of NEOs incentive-based compensation (Table 7A), tend to defer cash less frequently (Table 7A), and tend to use more options as part of their incentive-based compensation (Table 6A) compared to Level 1 and Level 2 parent institutions. They also use rather infrequently the prohibition of hedging with respect to non-employee directors that receive incentive-based compensation (Table 9A). If the compensation arrangements of Level 3 BDs and IAs are similar to those of Level 3 parent institutions, then for Level 3 BDs and IAs that are designated as Level 1 or Level 2 covered BDs and IAs by an Agency, the proposed rule is likely to require significant changes to certain features of their compensation arrangements to be in compliance.

#### F. Potential Costs and Benefits of Additional Requirements and Prohibitions for Level 1 and 2 Covered Institutions

##### 1. Mandatory Deferral

The proposed rule would require a minimum amount of annual incentive-based compensation to be deferred for a minimum number of years for senior executive officers and significant risk-takers at Level 1 and Level 2 covered institutions. For senior executive officers and significant risk-takers at Level 1 and Level 2 BDs and IAs, such requirement is expected to establish a minimum accountability horizon with respect to the outcomes of actions of these individuals, including the

realization of longer-term risks that may be associated with such actions.

As discussed above, from an economic standpoint, managerial actions carry associated risks, and the horizon over which such risks unfold is uncertain. If the risk realization horizon is longer than the performance period used to measure and compensate the performance of senior executive officers and significant risk-takers, they may have an incentive to undertake projects that deliver strong short-term performance at the potential expense of long-term value. A minimum compensation deferral period aims to curb incentives for such undesired behavior by increasing senior executive officers' and significant risk-takers' accountability for the potential adverse outcomes of their actions that may be realized in the long run, which in turn may discourage short-termism and inappropriate risk-taking and as a consequence lower the likelihood of default for the covered institution and the potential risk such a default could pose to the greater financial system.

As discussed above, the proposed minimum deferral periods required by the proposed rule for Level 1 and Level 2 BDs and IAs covered institutions would relate to the horizons over which the risks in these institutions may be realized. The deferral periods are likely to overlap with a traditional business cycle to identify outcomes associated with a senior executive officer's or significant risk-taker's performance and risk-taking activities. As noted, the business cycle reflects periods of economic expansion or recession, which typically underpin the performance of the financial sector. There might be specific facts and circumstances (for example, the variety of assets held, the changing nature of those assets over time, the normal turnover in assets held by financial institutions, and the complexity of the business models of BDs and IAs) that may affect the horizon over which risks may be realized for particular covered institutions, so a uniform deferral period may be more or less aligned with the horizon over which a particular covered institution realizes certain risks.

With regard to the type of incentive-based compensation instruments to be deferred, the rule proposes to require deferred compensation to consist of substantial amounts of both cash and equity-linked instruments. Whereas deferred equity-linked compensation would be subject to both upside potential (for example, if the stock price of the firm increases during the deferral period) and downside risk, the cash component of deferred compensation

<sup>410</sup> As discussed above in the Baseline section, as of the end of 2014, there were 33 BDs with total consolidated assets between \$10 and \$50 billion. Due to the lack of data, the SEC cannot determine the number of IAs with total consolidated assets between \$10 and \$50 billion.

would be mainly subject to downside risk, thus resembling the payoff structure of a debt security. More specifically, the cash component of deferred compensation would not appreciate in value if firm performance during the deferral period is positive, but would be subject to downward adjustment, forfeiture, and clawback if, for example, the executive has engaged in inappropriate risk-taking that results in poor performance during the performance, deferral and post-deferral periods respectively. This asymmetry in the payoff structure of the cash component of deferred compensation is expected to provide incentives for responsible risk-taking by covered persons thus lowering the likelihood of default at these institutions as well as the corresponding risk to the greater financial system posed by certain large, complex, and interconnected institutions.<sup>411</sup> Economic studies suggest a negative relation between pre-crisis levels of managerial debt holdings and measures of default risk during the crisis for bank holding companies—bank holding companies whose executives held larger debt holdings were less likely to default.<sup>412</sup>

<sup>411</sup> The academic literature provides evidence regarding the effect of compensation instruments resembling a debtholder's payoff and the effect of such compensation instruments on various aspects of the agency costs of debt. For example, there is evidence of a negative relation between levels of inside debt and the cost of debt; see Anantharaman et al. 2013. Inside debt and the design of corporate debt contracts. *Management Science* 60, 1260–1280. Also, studies have documented a negative relation between inside debt and restrictiveness of debt covenants and demand for accounting conservatism, and a positive relation between CEO inside debt and firm liquidation values; see Chen, F., Y. Dou, and X. Wang. 2010. Executive Inside Debt Holdings and Creditors' Demand for Pricing and Non-Pricing Protections. Working Paper. With respect to the mechanism through which inside debt holdings lead to lower firm risk, evidence suggests that such firms apply more conservative investment as well as financing choices. Inside debt in particular has been shown to be negatively related to future stock return volatility, a market-based measure of risk; see Cassell, Cory A., Shawn X. Huang, Juan Manuel Sanchez, and Michael D. Stuart. 2012. The relation between CEO inside debt holdings and the riskiness of firm investment and financial policies. *Journal of Financial Economics* 103, 588–610.

It must be noted that the academic literature proxies for such debt-like compensation instruments mostly through pensions and other forms of deferred compensation. Such instruments may not fully resemble the characteristics of deferred cash under the rule, particularly with respect to the horizon of deferral as well as the vesting schedules (pro-rata vs. cliff-vesting).

<sup>412</sup> See Bennett et al. (2015). Inside Debt, Bank Default Risk, and Performance during the Crisis. *Journal of Financial Intermediation* 24, 487–513. The study examines the relation between pre-crisis levels of inside equity vs. inside debt holdings by bank holding company CEOs and risk and performance of these BHCs during the crisis. The findings reveal a negative relation between pre-

As mentioned above, the deferral requirements of the proposed rule for senior executive officers and significant risk-takers at the largest covered institutions are also consistent with international standards on compensation. Having standards that are generally consistent across jurisdictions would ensure that covered institutions in the United States, compared to their non-U.S. peers, are on a level playing field in the global competition for talent.

The mandatory deferral requirements of the proposed rule may impose significant costs on affected BDs and IAs.<sup>413</sup> As a consequence of the mandatory deferral requirement, the wealth of covered persons would be likely less diversified and more tied to prolonged periods of a covered institution's performance. This potential deterioration of wealth diversification may induce covered persons to demand an increase in pay which could result in higher compensation-related costs for covered institutions.<sup>414</sup> This increase in compensation costs may be necessary in order for covered institutions to be able to both attract and retain human talent. The SEC notes, however, that there may be other factors affecting the ability of a covered institution to attract and retain human talent, such as the supply of talent and non-pecuniary benefits of employment at covered institutions. These factors may exacerbate or mitigate the potential increase in compensation costs. For example, if senior executive officers and significant risk-takers value non-pecuniary job benefits such as prestige, networking, and visibility, these benefits may offset the costs associated with deterioration in the diversification of their portfolios.

As a result of the proposed compensation deferral requirement, covered persons at BDs and IAs may be incentivized to curb inappropriate risk-taking given the increased accountability over their actions. There could be situations, however, where bonus deferral could actually lead to an increase in risk-taking incentives.<sup>415</sup> For

crisis CEO inside debt holdings and default risk during the crisis, and higher supervisory ratings for these BHCs before the crisis.

<sup>413</sup> Several commenters raised accounting related issues with respect to covered institutions' financial statements under the proposed rule (see, e.g., KPMG, CEC) and tax related issues with respect to individuals affected by the proposed rule (see, e.g., KPMG, MFA, SIFMA, CEC, PEGCC).

<sup>414</sup> Three commenters argued that the proposed rule could result in unintended consequences such as higher fixed compensation or other benefits (See FSR, WLF, U.S. Chamber).

<sup>415</sup> See Leisen, D. (2014). Does Bonus Deferral Reduce Risk Taking? Working Paper. The paper develops a model comparing risk-taking incentives

example, if firm performance during the deferral period significantly declines and causes a significant loss in the value of deferred compensation, senior executive officers and significant risk-takers could potentially have an incentive to engage in high-risk actions in an effort to recoup at least some of the value of their deferred compensation.

As discussed above, deferral of the cash component of compensation resembles the payoff structure of debt and as a consequence may expose managerial compensation to risk without a corresponding upside. Whereas this may provide incentives to covered persons to avoid actions that would expose a covered institution to higher likelihood of default and for important institutions risks to the financial system, such incentives may result in misalignment of interests between managers and shareholders and potentially harm shareholder value. Several studies suggest that managers with significant debt instruments in their compensation arrangement tend to undertake a more conservative approach in managing their firms.<sup>416</sup> The significant use of debt in compensation arrangements is viewed negatively by shareholders: Stock prices of companies whose executives hold significant debt positions experience a decrease upon disclosure of such compensation arrangements.<sup>417</sup> Thus, whereas the utilization of debt-like instruments in compensation arrangements in important institutions may lower the risk to the greater financial system, this may come at the expense of shareholder value at these institutions. One commenter suggested that the proposed rule could cause covered institutions to perform in a less competitive way given lower incentives for risk-taking.<sup>418</sup>

Alternatively, the Agencies could have proposed higher deferral percentages and/or longer deferral horizons. Some commenters<sup>419</sup> suggested more stringent deferral requirements, such as a longer deferral

from bonuses with and without deferral. The results challenge the common belief that bonus deferral unequivocally leads to reduced risk-taking incentives; under certain conditions, deferral of bonus could lead to stronger risk-taking incentives during the deferral period.

<sup>416</sup> See Anantharaman, D., V.W. Fang, and G. Gong. 2014. Inside Debt and the Design of Corporate Debt Contracts. *Management Science* 60, 1260–1280; Chen et al. (2010); and Cassell et al. (2012).

<sup>417</sup> See Wei, C., and Yermack, D. (2011).

<sup>418</sup> See FSR.

<sup>419</sup> It should be noted that comments were based on the 2011 Proposed Rule's 3-year deferral period (as opposed to the 4-year deferral period currently proposed).

horizon,<sup>420</sup> a higher percentage subject to deferral,<sup>421</sup> and holding the entire deferred amount back until the end of the deferral period.<sup>422</sup> For example, the Agencies could have selected a seven-year deferral for senior executive officers and a five-year horizon deferral horizon for significant risk-takers, similar to the rules that the Prudential Regulation Authority has recently proposed in the UK. Such long deferral periods may have allowed for longer-term risks to materialize and thus be accounted for when calculating managerial compensation. On the other hand, as mentioned above, longer deferral periods could result in inappropriate risk-taking if firm performance during the deferral period significantly declines and causes a significant loss in the value of deferred compensation. Additionally, a longer deferral period increases the probability that financial performance is impacted by actions or factors that are not related to covered persons' actions and as such result in an inefficient compensation contract. Moreover, lengthening of the deferral period is likely to lead to increased liquidity issues for covered persons since their compensation cannot be cashed out on a timely basis to meet their liquidity needs. Finally, it is also possible that further prolonging of the deferral period could create incentives for institutions to shift away from incentive-based compensation and increase the fixed component of compensation. A potential consequence from such action may be distortion of value-enhancing incentives that are generated through incentive-based compensation. Another potential cost from deferral requirements that are more strict could be that affected institutions may not be able to compete and as a consequence lose talent to other sectors that are not subject to the proposed rule.

Another alternative could be shorter deferral periods (e.g., deferral period of less than four years for the qualifying incentive-based compensation of senior executive officers at Level 1 covered institutions; for example, 3 years as in the 2011 Proposed Rule) and/or smaller deferral percentages (e.g., deferral of less than 60 percent of qualifying incentive-based compensation for senior executive officers at Level 1 covered institutions; for example, 50 percent as in the 2011 Proposed Rule). A shorter deferral period and/or smaller deferral percentage amount, however, may not provide adequate incentives to covered

persons to engage in responsible risk-taking. On the other hand, if the risk realization horizon is actually shorter than the deferral horizon proposed in the rule, then using a shorter deferral period would avoid exposing covered persons' wealth to risks that do not result from their actions and would also impose lower liquidity constraints on undiversified executives. From the baseline analysis of current compensation practices, it appears that all of the Level 1 public parent institutions and most of the Level 2 public parent institutions of BDs and IAs already have deferral policies in place similar to the proposed rule requirements. Currently, about 50 percent to 75 percent of incentive-based compensation is deferred for a period of about three years, and the deferral includes NEOs, non-NEOs and significant risk-takers.

If the compensation structure of BDs and IAs is similar to that of their parent institutions, and the compensation structure of private institutions is similar to that of public institutions, for the covered BDs and IAs the implementation of the deferred aspect of the proposed rule is unlikely to lead to significant compliance costs. The only potentially significant compliance costs that such covered institutions could incur with respect to the deferral requirement is related to the deferral of cash compensation, which currently only 20 percent to 25 percent of Level 1 and Level 2 covered institutions defer, and the prohibition on accelerated vesting, which very few of the Level 2 covered parent institutions currently use. On the other hand, if the compensation practices of parent institutions are significantly different than those at their subsidiaries, covered BDs and IAs could experience significant compliance costs when implementing the proposed deferral rule. Since the SEC does not have data on how many covered IAs have parent institutions, it is also possible that a significant number of these IAs may be stand-alone companies and therefore could have higher costs to comply with the proposed rule compared to covered IAs and BDs that are part of reporting parent institutions. As discussed above, the SEC has data regarding the incentive-based compensation arrangements at the depository institution holding company parents of Level 1 and unconsolidated Level 2 and unconsolidated Level 3 BDs and IAs because many of those bank holding companies are public reporting companies under the Exchange Act. The SEC lacks information regarding the

compensation arrangements of BDs and IAs that are not so affiliated, and hence the SEC cannot accurately assess the compliance costs for those issuers. The same holds true if the incentive-based compensation practices at BDs and IAs are generally different than those at banking institutions, which most of their parent institutions are. Lastly, because some BDs and IAs are subsidiaries of private parent institutions, if there is a significant difference in the compensation practices between public and private covered institutions such private BDs and IAs could face larger compliance costs. To better assess the effects of deferral on compliance costs for BDs and IAs the SEC requests comments on these issues.

## 2. Options

For senior executive officers and significant risk-takers at Level 1 and Level 2 covered institutions, the proposed rule would limit the amount of stock option-based compensation that can qualify for mandatory deferral at 15 percent, effectively placing a cap on the use of stock options as part of the incentive-based compensation arrangements for senior executive officers and significant risk-takers at Level 1 and Level 2 covered institutions.<sup>423</sup> This implies that 45 percent of incentive-based compensation would have to be in some other form to fulfill the 60 percent deferral amount for a senior executive officer or significant risk-taker at a Level 1 and Level 2 covered institution. As discussed in the Broad Economic Considerations section, the payoff structure from stock options is asymmetric and thus generates incentives for executives to undertake risks. For the financial services industry in general, economic studies find that higher levels of stock options in compensation arrangements of publicly traded bank CEOs are positively related to multiple measures of risk, such as equity volatility.<sup>424</sup> Thus, limiting the

<sup>423</sup> If stock options awarded are not part of incentive-based compensation, there is no limit to such awards.

<sup>424</sup> See Mehran, H., Rosenberg, J. 2009. The Effect of CEO Stock Options on Bank Investment Choice, Borrowing, and Capital. Federal Reserve Bank of New York. The study finds a positive relation between the use of stock options in bank CEO compensation arrangements and risk-taking as evident by higher levels of equity and asset volatility. The paper also finds that the increased risk exposure in these banks comes from riskier project choices rather than increased use of leverage.

See DeYoung, R., Peng, E., Yan, M. 2013. Executive Compensation and Business Policy Choices at U.S. Commercial Banks. *Journal of Financial and Quantitative Analysis* 48, 165–196.

<sup>420</sup> See AFR, Public Citizen, Chris Barnard, AFSCME, AFL-CIO, Senator Brown.

<sup>421</sup> See AFR, Public Citizen, AFSCME.

<sup>422</sup> See AFR, Senator Brown, Public Citizen.

use of stock options in compensation arrangements could result, on average, in lower risk-taking incentives for senior executive officers and significant risk-takers at Level 1 and Level 2 covered institutions. As previously noted, however, the link between stock options and risk-taking is not indisputable. For example, a study that examined the effect of a decrease in the provision of stock options in compensation arrangements due to an unfavorable change in accounting rules regarding option expensing, did not identify decreased risk-taking by executives as a response to a decrease in stock options awards.<sup>425</sup>

The unique characteristics of the financial services sector compared to the rest of the economy—significantly higher leverage,<sup>426</sup> interconnectedness with other institutions and markets, and the possibility for negative externalities—may create a conflict of interest between shareholders (managers) of important financial institutions and taxpayers with respect to the optimal level of risk-taking. In other words, shareholders may enjoy the upside of risk-taking actions whereas taxpayers and other stakeholders have to bear the costs associated with such risk-taking. While the literature does not specifically reference BDs and IAs, but rather the financial services sector more generally, the SEC believes that the global point may be applicable to BDs and IAs given that these entities

constitute a segment of the financial services sector. In addition, many BDs and IAs that would be covered by the proposed rule are subsidiaries of bank holding companies and as such these studies may be relevant for them. Thus, for BDs and IAs the use of options in compensation arrangements could potentially amplify this conflict of interest as it provides covered persons with an asymmetric payoff structure and an incentive to undertake risks that may be optimal from shareholders' point of view but may provide risk-taking incentives to management that could lead to higher likelihood of default at these institutions and potentially increase the risk to the greater financial system. Consequently, capping the use of stock options and curbing covered persons' incentives for inappropriate risk-taking at BDs and IAs could decrease their likelihood of default, better align managers' incentives with those of a broader group of stakeholders and limit potential negative externalities generated by the default of particularly important institutions.<sup>427</sup> However, although BDs and IAs are financial institutions, any generalization based on the findings in the literature may not be very accurate because BDs and IAs also have some differences with respect to other financial institutions. For example, BDs and IAs differ from other financial institutions with respect to business models, nature of the risks posed by the institutions, and the nature and identity of the persons affected by those risks.

To the extent that the asymmetric payoff structure of options encourages covered persons at BDs and IAs to undertake risks that are also suboptimal from a shareholders' point of view, the proposed rule's limitation on the use of options as part of compensation arrangements may also improve incentive alignment between executives and shareholders. However, as discussed in the Broad Economic Considerations section, executives may be reluctant to undertake value-increasing but risky projects due to the undiversified nature of their wealth and as such may engage in actions that lower firm value (*i.e.*, forgo risky but value-increasing projects). For example, an economic study found that low sensitivity of compensation to risk resulted in a loss of firm value due to suboptimal risk-taking by executives in

these companies.<sup>428</sup> Mechanisms that are put in place to curb such undesired behavior by executives include incentive-based compensation components whose value is generally increasing in risk, such as stock options. Thus, risk-taking incentives induced by options may be valuable in order to provide covered persons at BDs and IAs with incentives to take risks that are desirable by shareholders. As a consequence, a potential cost of the proposed limit to the use of stock options in incentive-based compensation arrangements at covered institutions is the potential for such limit to generate sub-optimally low risk-taking incentives for the covered persons at BDs and IAs, potentially leading to lower shareholder values for these institutions.

Limiting the amount of stock option based compensation that can qualify for mandatory deferral at 15 percent suggests that a covered institution could theoretically award up to 55 percent of its annual incentive-based compensation in the form of stock options (for senior executive officers and significant risk-takers at Level 1 and Level 2 covered institutions). Based on the SEC's baseline analysis, it appears that the use of options is increasingly infrequent in incentive-based compensation arrangements at public parent institutions of BDs and IAs. Stock options at Level 1 covered institutions represent about 4 percent of total incentive-based compensation, while at Level 2 covered institutions they represent about 20 percent.

If the compensation structure of BDs and IAs is similar to that of their parent institutions, and the compensation structure of private institutions is similar to that of public institutions, the specific restriction imposed by the proposed rule would be unlikely to affect the usage of options at Level 1 or unconsolidated Level 2 BDs and IAs and would likely result in insignificant compliance costs. On the other hand, if the compensation practices of parent institutions are significantly different from those at their subsidiaries, covered BDs and IAs could experience

<sup>425</sup> See Chen, C., Steiner, T., Whyte, A. 2006. Does stock option-based executive compensation induce risk-taking? An analysis of the banking industry. *Journal of Banking and Finance* 30, 915–945. The paper examines whether option-based compensation is related to various measures of risk for a sample of commercial banks. Option-based compensation is positively related to various market measures of risk such as systematic and idiosyncratic risk. However, causality cannot be inferred; risk also has an effect on the structure of compensation arrangements.

<sup>426</sup> See Hayes, R., Lemmon, M., Qiu, M., 2012. 'Stock options and managerial incentives for risk taking: Evidence from FAS 123R'. *Journal of Financial Economics* 105, 174–190. This study examines the effect of changes in option-based compensation, due to a change in the accounting treatment of stock options in 2005, on risk-taking behavior. Firms significantly reduce the use of stock options in compensation arrangements as a response to the unfavorable treatment of stock options in financial statements. However, the study finds little evidence that the decline in option usage resulted in less risky investment and financial policies.

<sup>427</sup> See Bolton, P., Mehran, H., Shapiro, J. 2011. Executive Compensation and Risk Taking. Federal Reserve Bank of New York Staff Reports, available at: [https://www.newyorkfed.org/medialibrary/media/research/staff\\_reports/sr456.pdf](https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr456.pdf). The report shows the significant difference between the composition of financing for the average non-financial firm (having about 40% of debt on its balance sheet), as opposed to the average financial institution (having at least 90% of debt on its balance sheet).

<sup>428</sup> See French et al., 2010. The Squam Lake Report: Fixing the Financial System. *Journal of Applied Corporate Finance* 22, 8–21; and McCormack, J., Weiker, J. 2010. Rethinking 'Strength of Incentives' for Executives of Financial Institutions. *Journal of Applied Corporate Finance* 22, 25–72.

<sup>429</sup> See Low, A., 2009. Managerial risk-taking behavior and equity-based compensation. *Journal of Financial Economics* 92, 470–490. The study examines changes in risk-taking by CEOs whose firms have become more protected from a takeover due to a change in anti-takeover laws. The study finds that CEOs with compensation arrangements with a low sensitivity of compensation to volatility decrease risk-taking following the adoption of the anti-takeover law, and that such a decrease in risk-taking activity is value destroying. The study also shows that as a response, firms increase the sensitivity of CEO compensation to volatility to encourage risk-taking following the adoption of the anti-takeover law.

significant compliance costs when implementing the specific requirement of the proposed rule. Since the SEC does not have data on how many covered IAs have parent institutions, it is also possible that a significant number of these IAs may be stand-alone companies and therefore could have higher costs to comply with this specific requirement of the proposed rule compared to covered IAs and BDs that are part of reporting parent institutions.

As discussed above, BDs and IAs could also incur direct economic costs such as decrease in firm value if the proposed rule leads to lower than optimal use of options in senior executive officers and significant risk-takers incentive-based compensation arrangements. The same holds true if the compensation of BDs and IAs is generally different than that of banking institutions, which most of their parent institutions are. Lastly, because some BDs and IAs are subsidiaries of private parent institutions, if there is a significant difference in the compensation practices of public and private covered institutions such BDs and IAs could face large compliance costs and direct economic costs. The SEC does not have data for the use of options at subsidiaries of Level 1 or Level 2 parents, and thus cannot quantify the impact of the proposed rule on those institutions. To better assess the effects of options on compliance costs for BDs and IAs, the SEC requests comments on the use of options in the compensation structures of BDs and IAs below.

The Agencies could have selected as an alternative not to place a limit on the use of stock options to meet the minimum required deferral amount requirement for a performance period. Such an alternative would provide covered persons at BDs and IAs with more incentives to undertake risks compared to the alternative the SEC has chosen in the proposed rule. Taxpayers would potentially be worse off under the alternative since the combination of high leverage and government guarantees, coupled with additional risk-taking incentives from stock options could lead to inappropriate risk-taking from taxpayers' point of view. Such an alternative likely would have led to a higher probability of default at covered institutions. For important institutions, such an alternative would also increase the likelihood of risks at the institution also propagating to the greater financial system. On the other hand, it is possible that shareholders would potentially prefer increased risk-taking and as a consequence compensation arrangements that

encourage such behavior. From the SEC's baseline analysis, provided that BDs and IAs have similar compensation arrangements as their parents, the proposed rule should not significantly affect existing compensation arrangements of covered institutions.

### 3. Long-Term Incentive Plans

For senior executive officers and significant risk-takers at Level 1 and Level 2 covered institutions the proposed rule would require a minimum deferral period and a minimum deferral percentage amount of incentive-based compensation awarded through long-term incentive plans (LTIPs), where LTIPs are characterized by having a performance measurement period of at least three years. The proposed rule would require deferral of 60 percent (50 percent) of LTIP awards for senior executive officers of Level 1 (Level 2) covered institutions, and deferral of 50 percent (40 percent) of LTIP awards for significant risk-takers of Level 1 (Level 2) covered institutions. The deferral period for deferred LTIPs must be at least two years for covered persons of Level 1 covered institutions and at least one year for covered persons of Level 2 covered institutions.

LTIPs are designed to reward long-term performance, performance that is usually measured over the three-years following the beginning of the performance period.<sup>429</sup> Thus, these plans reward long-term performance outcomes and as such generate incentives for long-term value. LTIP awards can be in the form of cash or stock and these awards occur at the end of the performance period. The amount of the award depends on the degree to which the company meets some predetermined performance milestones. These performance milestones can include a variety of accounting-based performance measures, such as sales and earnings, and research shows that the choice of performance measures is related to company specific strategic goals.<sup>430</sup> Requiring a minimum percentage of LTIP awards to be deferred would lengthen the period over which senior executive officers and significant risk-takers receive compensation under these plans and subject such compensation to downward adjustment during the performance measurement period (prior to the award) as well as forfeiture and clawback during the deferral and post-deferral periods respectively. Some

studies have criticized LTIPs for having short performance periods.<sup>431</sup> The limited economic literature on LTIPs currently does not provide a clear indication of the effect of LTIPs on excessive risk-taking. The only study that investigates the role of LTIPs<sup>432</sup> suggests that companies that use them experience improvement in operating performance and their NEOs do not appear to take higher risks. Similar to the discussion on the benefits and costs of mandatory deferral of other forms of incentive-based compensation, deferral of the LTIP award could allow for long-term risks taken by BD and IA senior executive officers and significant risk-takers to materialize and thus for their compensation to be more appropriately adjusted for the risks they have taken. LTIP deferral may decrease risk-taking because covered persons may have an incentive to manage the institution such that they receive their full compensation under these plans. If the additional deferral of LTIPs lowers risk-taking incentives at covered BDs and IAs to suboptimally low levels, then firm value at these institutions could suffer as a consequence. However, if the additional deferral of LTIPs mitigates incentives for inappropriate risk-taking at covered BDs and IAs, then such outcome would lower the likelihood of default at these institutions, better align managers' incentives with those of a broader group of stakeholders, and also lower the likelihood of negative externalities.

As an alternative, the Agencies could have selected a larger fraction of LTIPs to be deferred (*e.g.*, more than 60 percent for senior executive officer at a Level 1 covered institution) and increased the LTIPs' deferral period (*e.g.*, for more than two years for senior executive officers and significant risk-takers at Level 1 covered institutions). A longer deferral period for LTIPs would prolong the exposure of senior executive officers' and significant risk-takers' compensation to adverse outcomes of their actions. If outcomes of some inappropriate risks are only realized in the longer-term, then prolonging the deferral period for LTIPs would provide incentives to senior executive officers and significant risk-takers to avoid such actions. On the other hand, such an alternative might have exposed senior executive officers and significant risk-takers to outcomes of actions that they are less likely to have been responsible for. Additionally, long deferral period for LTIPs could create potential

<sup>429</sup> See Frederic W. Cook & Co., Inc. The 2014 Top 250 Report: Long-term incentive grant practices for executives.

<sup>430</sup> See Li and Wang (2014).

<sup>431</sup> See The alignment gap between creating value, performance measurement, and long-term incentive design, IRRCI research report, 2014.

<sup>432</sup> See Li and Wang, 2014.

liquidity issues for senior executive officers and significant risk-takers since their compensation cannot be cashed out on a timely basis to meet their liquidity needs.<sup>433</sup> It is also possible that a long deferral period for LTIPs would create incentives for institutions to pay higher fixed pay and as a consequence distort the value-enhancing incentives that are generated through variable pay.

As another alternative, the Agencies could have decided to exclude LTIPs from the amount of incentive-based compensation that is to be deferred in a given year. Such an alternative could have excluded a major part of covered persons' incentive-based compensation arrangements from the deferred amount. LTIPs typically have a performance period of three years, which is shorter than the deferral period proposed in the rulemaking. Under this alternative, not including LTIPs as part of the deferred amount may have limited the ability of the proposed rule to curb inappropriate risk-taking. However, if the current use of LTIPs by covered institutions is consistent with generating optimal risk-taking incentives from the perspective of certain shareholders, then not subjecting LTIPs to mandatory deferral would maintain these value-enhancing incentives.

#### 4. Downward Adjustment and Forfeiture

For senior executive officers and significant risk-takers at Level 1 and Level 2 covered institutions, the rule proposes placing at risk of downward adjustment all incentive-based compensation amounts not yet awarded for the current performance period and at risk of forfeiture all deferred but not yet vested incentive-based compensation. As the analysis in the baseline section suggests, the triggers for downward adjustment and forfeiture consist of adverse outcomes such as poor financial performance due to significant deviations from approved risk parameters, inappropriate risk-taking (regardless of the impact on financial performance), risk management or control failures, and non-compliance with regulatory and supervisory standards resulting in either legal action against the covered institution or a restatement to correct a material error. The compensation of covered persons with either direct accountability or failure of awareness of

an undesirable action would be subject to downward adjustment and/or forfeiture.

With regard to the determination of the compensation amount to be downward adjusted or forfeited, the proposed rule would condition the magnitude of the adjustment or forfeiture amounts on both the intent and the participation of covered persons in the event(s) triggering the review, as well as the magnitude of costs generated by the related actions (including financial performance, fines and litigation and related reputational damage). Compensation would be subject to downward adjustment and forfeiture during the performance period and the deferral period, respectively. As a consequence, this requirement would provide incentives to senior executive officers and significant risk-takers at BDs and IAs to avoid inappropriate risk-taking since they could be penalized in situations where inappropriate risks had been undertaken, regardless of whether such risks resulted in poor performance.

The downward adjustment or forfeiture amounts is conditional on the intent, responsibility and the magnitude of the financial loss caused to the covered institution by inappropriate actions of covered persons. In other words, the penalty imposed on the covered person would increase with the intent, responsibility and the magnitude of financial loss generated. This "progressiveness" characteristic in the proposed rule requirement would imply that the covered person's incentive-based compensation award would be increasingly at stake. Thus, covered persons would be expected to have incentives to avoid excessive risk-taking in order to secure at least part of incentive-based compensation award.

Additionally, provided that senior executive officers and significant risk-takers at BDs and IAs may be deemed accountable and risk their compensation for inappropriate actions that were undertaken by other executives or significant risk-takers, they may have an incentive to establish an effective governance system that would monitor risk exposure. Such an incentive and the corresponding actions would strengthen risk oversight within the covered institution and potentially lower the probability that any inappropriate action taken might go undetected. To this point, a recent economic study indicates that bank holding companies with strong risk controls, as proxied by the presence of an independent and strong risk committee, were found to be exposed to lower tail risk, lower amount of underperforming loans, and had better

operating and financial performance during the financial crisis.<sup>434</sup>

On the other hand, the risk of downward adjustment and forfeiture could increase uncertainty on covered persons' expectations for receiving the compensation. A possibility exists that risks a covered person believes ex-ante to be appropriate may be classified as ex-post inappropriate and thus trigger downward adjustment or forfeiture of related compensation. Such uncertainty about the interpretation of appropriate risk-taking could generate incentives for managers to take approaches with respect to risk-taking that are not optimal from the perspective of shareholders. Such an avoidance of risks, if it occurs, could lead to lower firm value and losses for shareholders.

Based on the SEC's baseline analysis of current compensation practices, it appears that all of the Level 1 public parent institutions and most of the Level 2 public parent institutions already employ forfeiture with respect to deferred compensation. The forfeiture rules are based on various triggers and apply to NEOs, non-NEOs and significant risk-takers. Thus, if the compensation structure of BDs and IAs is similar to that of their parent institutions, and the compensation structure of private institutions is similar to that of public institutions, the implementation of the proposed rule related to forfeiture would be unlikely to lead to significant compliance costs. On the other hand, if the compensation practices of parent institutions are significantly different than those at their subsidiaries (e.g., BDs and IAs do not use downward adjustment and forfeiture in their compensation packages), covered BDs and IAs could experience significant compliance costs when implementing this specific requirement of the proposed rule. Since the SEC does not have data on how many covered IAs have parent institutions, it is also possible that a significant number of these IAs may be stand-alone companies and therefore could have higher costs to comply with this specific requirement of the proposed rule compared to covered IAs and BDs that are part of reporting parent institutions. BDs and IAs could also incur direct economic costs such as decrease in firm value if the proposed rule requirements regarding downward adjustment or forfeiture lead to less risk-taking than is optimal from shareholders' point of view. The same

<sup>433</sup> Interest rates charged to covered persons on loans used to cover their liquidity needs could proxy for the related cost stated in the text. Such costs are likely to be determined by multiple factors (for example, the macroeconomic environment) and vary over time and by individuals making them difficult to quantify.

<sup>434</sup> See Ellul, A., Yerramilli, V. 2013. Stronger Risk Controls, Lower Risk: Evidence from U.S. Bank Holding Companies. *Journal of Finance* 68, 1757–1803.

holds true if the compensation of BDs and IAs is generally different than that of banking institutions, which most of their parent institutions are.

Lastly, because some BDs and IAs are subsidiaries of private parent institutions, if there is a significant difference in the compensation practices of public and private covered institutions such BDs and IAs could face large compliance costs and direct economic costs. The SEC does not have data for the use of downward adjustment and forfeiture at subsidiaries of Level 1 or Level 2 parents, and thus cannot quantify the impact of the rule for those institutions. To better assess the effects of downward adjustment and forfeiture on compliance costs for BDs and IAs. The SEC requests comments below.

#### 5. Clawback

For senior executive officers and significant risk-takers at Level 1 and Level 2 covered institutions, the proposed rule would require clawback provisions in incentive-based compensation arrangements to provide for the recovery of paid compensation for up to seven years following the vesting date of such compensation. Such a clawback requirement would be triggered when senior executive officers and significant risk-takers are determined to have engaged in fraud, intentional misrepresentation of information used to determine a covered person's incentive-based compensation, or misconduct resulting in significant financial or reputational harm to the covered institution. Other existing provisions of law contain clawback requirements that potentially have some overlap with those in the proposed rulemaking. Thus, certain covered institutions may have experience with recovering executive compensation via clawback. For example, section 304 of the Sarbanes Oxley Act ("SOX") contains a recovery provision that is triggered when a restatement occurs as a result of issuer misconduct. This provision applies only to the chief executive officer ("CEO") and chief financial officer ("CFO") and the amount of required recovery is limited to compensation received in the year following the first improper filing.<sup>435</sup> The Interim Final Rules under section 111 of the Emergency Economic Stabilization Act of 2008 ("EESA") required institutions receiving assistance under TARP to mandate Senior Executive Officers to repay compensation if awards based on statements of earnings, revenues, gains,

or other criteria that were later found to be materially inaccurate.<sup>436</sup> Relative to either SOX or EESA, the clawback requirement of the proposed rule is more expansive in that its application is not only limited to CEOs and CFOs but would cover any senior executive officer and significant risk-taker in a Level 1 or Level 2 covered institution. In addition to the broader scope of the clawback provision in the proposed rule regarding covered persons, there is also a broader scope with respect to the circumstances that would trigger clawback. More specifically, the proposed rule includes misconduct that resulted in reputational or financial harm to the covered institution as a trigger for clawback.

The inclusion of the clawback provision in the incentive-based compensation of senior executive officers and significant risk-takers at BDs and IAs could increase the horizon of accountability with respect to the identified actions that are likely to bring harm to the covered institution. As a consequence of the clawback horizon, senior executive officers and significant risk-takers are likely to have lower incentives to engage in actions that may put the covered institution at risk in the longer run. Moreover, the proposed rule may also increase incentives to senior executive officers and significant risk-takers to put in place stronger mechanisms such as governance in an effort to protect their incentive-based compensation from events that may trigger a clawback. Finally, in addition to lowering the incentives of senior executive officers and significant risk-takers for undesirable actions that may harm the covered institution, stakeholders of the covered institution are also expected to benefit from the clawback provision since in the event of an action triggering a clawback, any recovered incentive-based compensation amount would accrue to the institution.

The fact that incentive-based compensation is to a large extent determined by reported performance, coupled with the lowered incentives for covered persons to intentionally misrepresent information, can lead to improved financial reporting quality for covered institutions. Thus, indirectly the potential to claw back incentive-based compensation that is awarded on

erroneous financial information could generate incentives for high quality reporting. The literature finds that market penalties for reporting failures, as captured by restatements of financial reports, *i.e.*, financial reports of (extremely) low quality, are non-trivial and may translate into an increase in the cost of capital for such firms.<sup>437</sup> To the extent that the quality of financial reporting increases as a result of the proposed rule, capital formation may be fostered since the improved information environment may lead to a decrease in the cost of raising capital for covered institutions.<sup>438</sup>

However, the relatively long clawback horizon may generate uncertainty regarding incentive-based compensation of senior executive officers and significant risk-takers. For example, that could be the case if certain actions that trigger a clawback are outside of a covered person's control. As a response to the potentially increased uncertainty, senior executive officers and significant risk-takers may demand higher levels of overall compensation, or substitution of incentive-based compensation with other forms of compensation such as salary. Such potential may distort incentives for risk-taking and as a consequence lower shareholder value. Also, the increased allocation of resources to the production of high-quality financial reporting may divert resources from other activities that may be value enhancing. Finally, covered persons may have a decreased incentive to pursue those projects that would require more complex accounting judgments, perhaps lowering shareholder value.<sup>439</sup>

<sup>437</sup> See Palmrose, Z., Richardson, V., Scholz, S. 2004. Determinants of Market Reactions to Restatement Announcements. *Journal of Accounting and Economics* 37, 59–89. This study observes an average abnormal return of –9% over the 2-day restatement announcement window for a sample of restatements announced over the 1995–1999 period.

See Hribar, P., Jenkins, N. 2004. The Effect of Accounting Restatements on Earnings Revisions and the Estimated Cost of Capital. *Review of Accounting Studies* 9, 337–356. This study observes a significant increase in the cost of capital for firms that restated their financial reports due to lower perceived earnings quality and an increase in investors' required rate of return.

<sup>438</sup> See Francis, J., LaFond, R., Olsson, P., Schipper, K. 2005. The Market Pricing of Accruals Quality. *Journal of Accounting and Economics* 39, 295–327. This study observes a negative relation between measures of earnings quality and costs of debt and equity. The study focuses on the accrual component of earnings to infer earnings quality since this component of earnings involves more discretion in its estimation and is more prone to be manipulated by firms.

<sup>439</sup> For example, if an executive is under pressure to meet an earnings target, rather than manage earnings through accounting judgments, the executive may elect to reduce or defer to a future

<sup>436</sup> Under EESA a "Senior Executive Officer" was defined as an individual who is one of the top five highly paid executives whose compensation was required to be disclosed pursuant to the Securities Exchange Act of 1934. See Department of Treasury, TARP Standards for Compensation and Corporate Governance; Interim Final Rule (June 15, 2009), available at <http://www.gpo.gov/fdsys/pkg/FR-2009-06-15/pdf/E9-13868.pdf>.

<sup>435</sup> See 15 U.S.C. 7243.

Moreover, the potential compliance costs related with the implementation of the clawback provision could be significant. For example, covered institutions may have to rely on the work of outside experts to estimate the amount of incentive-based compensation to be clawed back following a clawback trigger.

Based on the SEC's baseline analysis, it appears that all of the Level 1 covered institutions and most of the Level 2 covered institutions already employ clawback policies with respect to deferred compensation. The clawback policies are based on various triggers and apply to NEOs, non-NEOs and significant risk-takers. Thus, if the BDs and IAs have similar policies on clawback, and the compensation structure of private institutions is similar to that of public institutions, the implementation of the proposed clawback rule would unlikely lead to significant compliance costs. On the other hand, if the compensation practices of parent institutions are significantly different than those at their subsidiaries (e.g., BDs and IAs do not include clawback policies in their compensation packages), covered BDs and IAs could experience significant compliance costs when implementing the proposed rule. The same holds true if the compensation of BDs and IAs is generally different than that of banking institutions, which most of their parent institutions are. Additionally, since the SEC does not have data on how many covered IAs have parent institutions, it is also possible that a significant number of these IAs may be stand-alone companies and therefore could have higher costs to comply with this specific requirement of the proposed rule compared to covered IAs and BDs that are part of reporting parent institutions.

The SEC has attempted to quantify such costs using data in Table 14. We note that these costs are not necessarily going to be in addition to the compliance costs discussed above, as covered institutions may hire a compensation consultant to help them with several requirements in the proposed rules.

Lastly, because some BDs and IAs are subsidiaries of private parent institutions, if there is a significant difference in the compensation practices

of public and private covered institutions such BDs and IAs could face large compliance costs. The SEC does not have data for the use of clawback at subsidiaries of Level 1 or Level 2 parents, and thus cannot quantify the impact of the rule on those institutions. To better assess the effects of clawback on compliance costs for BDs and IAs the SEC requests detailed comments below.

## 6. Hedging

The proposed rule would prohibit the purchase of any instrument by a Level 1 or Level 2 covered institution to hedge against any decrease in the value of a covered person's incentive-based compensation. As discussed above, introducing a minimum mandatory deferral period for incentive-based compensation aims at increasing long-term managerial accountability, including long-term risk implications associated with covered persons' actions. Using instruments to hedge against decreases in firm value would provide downside insurance to covered persons' wealth, including equity holdings that are part of deferred compensation. If the value of (deferred) incentive-based compensation is protected from potential downside through a hedging transaction, this is likely to increase the covered person's tolerance to risk. Thus, the effect of compensation deferral would likely be weakened.<sup>440</sup> For BDs and IAs that currently initiate hedges on behalf of their covered persons, a benefit from the prohibition on hedging is that the incentives of covered persons to exert effort could be strengthened given the same compensation contract. This in turn would imply a stronger alignment between executives' and taxpayers' and other stakeholders' interests for the same amount of performance-based pay.

While the proposed rule intends to eliminate firm initiated hedging, a personal hedging transaction by covered persons would still be permitted (unless

the institution prohibits such transactions from occurring). Thus, a covered person at BDs and IAs could potentially substitute the firm-initiated hedge with a personal hedging<sup>441</sup> contract and restore any changes in incentives from the prohibition of the firm-initiated hedge.

To the extent that the covered person's compensation contract is not adjusted as a response to the elimination of the hedge, the covered person would face stronger incentives to exert effort whereas her tolerance for risk-taking would decrease with the prohibition on hedging. Whether the resulting lower risk-taking tolerance is beneficial for BDs and IAs is difficult to determine. On one hand, if the covered persons' risk-taking incentives are at an optimal level with the hedging transaction in place, then eliminating the hedge may reduce their risk-taking incentives to levels that could be detrimental for shareholder value. If this were the case, however, the institution's compensation committees could adjust compensation structures in a manner to achieve pre-prohibition risk-taking incentives if the distortion from hedging prohibition is deemed to be detrimental to firm value; however, some provisions of the proposed rule could potentially constrain board of directors' flexibility to make such adjustments.<sup>442</sup> On the other hand, if covered persons had incentives to undertake undesirable risks given the downside protection provided by the hedge, then eliminating such protection could lead them to engage in risk-taking which could lead to higher firm values.

Based on the SEC's baseline analysis, it appears that most Level 1 covered institutions (70 percent) and Level 2 covered institutions (60 percent) are already using prohibition on hedging with respect to executive compensation of executives and significant risk-takers. Additionally, 70 percent of Level 1 covered institutions and 100 percent of Level 2 covered institutions already prohibit hedging with respect to executive compensation of non-employee directors. If BDs and IAs have similar policies as their parent institutions, and the compensation structure of private institutions is similar to that of public institutions, the

<sup>440</sup> See Bebchuk, L., Fried, J. Paying for long-term performance. *University of Pennsylvania Law Review* 158, 1915–1959. The paper argues that potential benefits from tying executive compensation to long-term shareholder value are weakened when executives are allowed to hedge against downside risk.

See also Gao, H. 2010. Optimal compensation contracts when managers can hedge. *Journal of Financial Economics* 97, 218–238. This study shows that the ability to hedge against potential downside makes the executive more risk tolerant. In other words, holding the compensation arrangement constant, hedging is predicted to weaken the sensitivity of compensation to performance and also the sensitivity of compensation to risk. However, the study also shows that for executives who can engage in low-cost hedging transactions, compensation contracts tend to provide higher sensitivity of executive pay to both performance and volatility.

<sup>441</sup> Refer to Tables 7a and 7b for statistics regarding the complete prohibition of hedging by parent institutions of BDs and IAs.

<sup>442</sup> For example, boards of directors or compensation committees at covered BDs and IAs would be constrained from increasing the risk-taking incentives of covered persons through the additional provision of stock options, if banning hedging lowers risk-taking incentives to a sub-optimal level.

period research and development or advertising expenses. This could improve reported earnings in the short-term, but could result in a suboptimal level of investment that adversely affects performance in the long run. See Chan, L., Chen, K., Chen, T., Yu, Y. 2012. The effects of firm-initiated clawback provisions on earnings quality and auditor behavior. *Journal of Accounting and Economics* 54, 180–196.

implementation of the proposed rule in its part related to the prohibition of hedging is unlikely to lead to significant compliance costs. The cost of compliance with the proposed requirement of the rule would mostly affect the few BDs and IAs whose parent institutions do not currently implement such a prohibition. On the other hand, if the compensation practices of parent institutions are significantly different than those at their subsidiaries (e.g., BDs and IAs do not prohibit hedging), covered BDs and IAs could experience significant compliance costs when implementing the proposed rule. Since the SEC does not have data on how many covered IAs have parent institutions, it is also possible that a significant number of these IAs may be stand-alone companies and therefore could have higher costs to comply with this specific requirement of the proposed rule compared to covered IAs and BDs that are part of reporting parent institutions. BDs and IAs could also incur direct economic costs such as decrease in firm value if the proposed prohibition on hedging leads to less risk-taking than is optimal. The same holds true if the compensation of BDs and IAs is generally different than that of banking institutions, which most of their parent institutions are. If BDs and IAs do not prohibit hedging and this provides incentives to their covered persons to undertake undesirable risks because of the downside protection provided by the hedge, then applying the rule provisions could lead to more appropriate risk-taking.

Lastly, because some BDs and IAs are subsidiaries of private parent institutions, if there is a significant difference between the compensation practices of public and private covered institutions such BDs and IAs could face large compliance costs and direct economic costs. The SEC does not have data for a prohibition of hedging at subsidiaries of Level 1 or Level 2 private parents, and thus cannot quantify the impact of the rule on those institutions. To better assess the effects of the prohibition on hedging on compliance costs for BDs and IAs the SEC requests comments below.

As an alternative, some commenters suggested disclosure of hedging transactions instead of prohibition.<sup>443</sup> One commenter suggested instead of prohibiting the use of hedging instruments to require full disclosure of all outside transactions in financial markets by covered persons, including hedging transactions, to the extent that these transactions affect pay-

performance sensitivity.<sup>444</sup> This disclosure should be made to the compensation committee of the board of directors and the appropriate regulator, and the board of directors should attest to the fact that these transactions do not distort proper risk-reward balance in the compensation arrangement. According to the commenter, sometimes covered persons may have legitimate purposes for engaging in hedging transactions such as when they are exposed excessively to the riskiness of the covered institution and need to rebalance their personal portfolio. Such an alternative, however, might not prevent covered persons from unwinding the effect of the mandatory deferral. For example, it would not be easy to disentangle hedging transactions that diminish individuals' exposure to the riskiness of the covered institutions from transactions that reverse the effect of the deferral. Additionally, the compensation committee might not have the expertise to evaluate complex derivatives transactions.

#### 7. Maximum Incentive-Based Compensation Opportunity

The proposed rule would prohibit Level 1 and Level 2 covered institutions from awarding incentive-based compensation to senior executive officers and significant risk-takers in excess of 125 percent (for senior executive officers) or 150 percent (for significant risk-takers) of the target amount for that incentive-based compensation. Placing a cap on the amount by which the incentive-based compensation award can exceed the target would essentially limit the upside pay potential due to performance and a potential impact of such restriction could be to lower risk-taking incentives by senior executive officers and significant risk-takers. That could be the case because the cap on incentive-based compensation implies that managers would not be rewarded for performance once the cap is reached.

As discussed above, high levels of upside leverage could lead to senior executive officers and significant risk-takers taking inappropriate risks to maximize the potential for large amounts of incentive-based compensation. Given the positive link between risk and expected payoffs from managerial actions, a potential impact of such restriction could be to lower risk-taking incentives by senior executive officers and significant risk-takers. Whether such an effect is beneficial or not for covered BDs and IAs firm value is likely to depend on many factors

including the level of the incentive-based compensation targets set in compensation arrangements. If the proposed cap excessively lowers appropriate risk-taking incentives, then firm value could suffer. Moreover, another potential cost from the proposed restriction is that effort inducing incentives may be diminished once the cap is achieved, possibly misaligning the interests of shareholders with those of managers. On the other hand, if the cap on incentive-based compensation awards eliminates a range of payoffs that could only be achieved by actions associated with taking suboptimally high risks, then such a restriction would improve firm value.

As the baseline analysis shows, the maximum incentive-based compensation opportunity for Level 1 parent institutions is on average 155 percent and that for Level 2 parent institutions is on average 190 percent. Both are significantly higher than would be permitted under the proposed rule. If BDs and IAs have similar policies as their parent institutions, and the compensation structure of private institutions is similar to that of public institutions, the implementation of the proposed rule in its part related to maximum incentive-based compensation opportunity could lead to significant compliance costs. The cost could result from changing the current practices and, as a result, potentially having to compensate senior executive officers and significant risk-takers for the decreased ability to earn compensation in excess of the target amount. If the current compensation practices with regard to maximum incentive-based compensation opportunity are optimal, it is possible that affected BDs and IAs could experience loss of human capital. On the other hand, as discussed above, if the cap on incentive-based compensation awards eliminates a range of payoffs that could only be achieved by actions associated with taking suboptimally high risks, then such a restriction would improve firm value. Since the SEC does not have data on how many covered IAs have parent institutions, it is also possible that a significant number of these IAs may be stand-alone companies and therefore could have higher costs to comply with this specific requirement of the proposed rule compared to covered IAs and BDs that are part of reporting parent institutions.

Additionally, because some BDs and IAs are subsidiaries of private parent institutions, if there is a significant difference between the compensation practices of public and private covered

<sup>443</sup> See CFP, FSR, SIFMA.

<sup>444</sup> See CFP.

institutions such as BDs and IAs could face large compliance costs when applying this rule requirement. The SEC does not have data on the use of maximum incentive-based compensation opportunity at subsidiaries of Level 1 or Level 2 private parents, and thus cannot quantify the impact of the rule on those institutions. To better assess the effects of the proposed limitations to the maximum incentive-based compensation opportunity on compliance costs for BDs and IAs the SEC requests comments below.

#### 8. Acceleration of Payments

The proposed rule would prohibit the acceleration of payment of deferred regulatory incentive-based compensation except in cases of death or disability of covered persons at Level 1 and Level 2 covered institutions. This would prevent covered institutions from undermining the effect from the mandatory deferral of incentive-based compensation by accelerating the deferred payments to covered persons. It could, however, negatively affect covered persons that decide to leave the institution in search for other employment opportunities. In such cases, these covered persons might have to forgo a significant portion of their compensation.

As the analysis in the Baseline section shows, most Level 1 parent institutions (approximately 70 percent) already prohibit acceleration of payments to their executives, while very few of the Level 2 parent institutions do. The only exceptions are in cases of death or disability. Given that current practices of BDs' and IAs' Level 1 parent institutions already apply most of the prohibitions required by the proposed rule (except employment termination), if those BDs and IAs have similar policies as their parent institutions, and the compensation structure of private institutions is similar to that of public institutions, the implementation of the proposed with respect to the prohibition on the acceleration of payments is unlikely to lead to significant compliance costs. The cost of compliance with the requirement of the rule will mostly affect the BDs and IAs whose parent institutions are Level 2 covered institutions or Level 1 covered institutions that do not currently implement such a prohibition. On the other hand, if the compensation practices of parent institutions are significantly different than those at their subsidiaries (e.g., BDs and IAs do not prohibit acceleration of payments), covered BDs and IAs could experience significant compliance costs when implementing the proposed rule.

Additionally, since the SEC does not have data on how many covered IAs have parent institutions, it is also possible that a significant number of these IAs may be stand-alone companies and therefore could have higher costs to comply with this specific requirement of the proposed rule compared to covered IAs and BDs that are part of reporting parent institutions.

Lastly, because some BDs and IAs are subsidiaries of private parent institutions, if there is a significant difference in the compensation practices of public and private covered institutions such as BDs and IAs could face large compliance costs when applying this rule requirement. The SEC does not have data for the prohibition of acceleration of payments at subsidiaries of Level 1 or Level 2 parents, and thus cannot quantify the impact of the rule on those institutions. The SEC requests comment on the effects of the prohibition on acceleration of payments may have on compliance costs for BDs and IAs.

#### 9. Relative Performance Measures

The proposed rule would prohibit the sole use of relative performance measures in incentive-based compensation arrangements at Level 1 and Level 2 covered institutions. Although relative performance measures are widely used to filter out uncontrollable events that are outside of management control and can reduce the efficiency of the compensation arrangement, a peer group could be opportunistically selected to justify compensation awards at a covered institution. To the extent that covered persons may influence peer selection, opportunism in choosing a performance benchmark may translate into covered persons selectively choosing benchmark firms in order to increase or justify increases in their compensation awards.

Evidence on whether such practices take place is mixed. For example, one study examined the selection of peer firms used as benchmarks in setting compensation for a wide range of firms and showed that, on average, chosen peer firms provided higher levels of compensation to their executives. The study asserts that managers tend to choose higher paying firms as peers to justify increases in the level of their own compensation.<sup>445</sup> The same study

<sup>445</sup> See Faulkender, M., Yang, J. 2010. Inside the black box: The role and composition of compensation peer groups. *Journal of Financial Economics* 96, 257–270. The study suggests that companies appear to select highly paid peers as a benchmark for their CEO's pay to justify higher CEO compensation. The study also suggests that such an effect is stronger when governance is weaker: In

also found that the choice of highly paid peers is more prevalent when the CEO is also the chair of the board of directors, re-enforcing the argument for opportunism in peer selection. Another study found that executives attempt to justify increases in their compensation by choosing relatively larger firms as their peers since larger firms are likely to offer higher compensation to their executives.<sup>446</sup> However, the study also showed that boards of directors exercise conservative discretion in using information from benchmark firms when setting compensation practices. Finally, a third related study<sup>447</sup> suggests that firms choose peers with (relatively) highly paid CEOs when their own CEO is highly talented, a finding that is not consistent with opportunism regarding the choice of peers in compensation setting. Overall, empirical studies suggest that opportunism in the peer group selection may exist, particularly in companies where the CEO may exert influence over her compensation setting process. By restricting the sole use of relative performance measures in compensation arrangements, the proposed rule would curb the ability of covered persons to engage in such opportunistic behavior, which would benefit covered BDs and IAs.

As mentioned above, the proposed rule would prohibit the sole use of relative performance measures in determining compensation at covered institutions. Constraining the use of relative performance measures in incentive-based compensation contracts has potential costs. Absolute firm performance is typically driven by multiple factors and not all of these factors are under the covered persons' control. If incentive-based compensation is tied to measures of absolute firm performance, then at least

companies where the CEO is also the chairman of the board, has longer tenure, and when directors are busier serving on multiple boards.

<sup>446</sup> See Bizjak, J., Lemmon, M., Nguyen, T. 2011. Are all CEOs above average? An empirical analysis of compensation peer groups and pay design. *Journal of Financial Economics* 100, 538–555. The study suggests that companies use compensation peer groups that are larger or provide higher pay in order to inflate pay in their own company and this practice is more prevalent for companies outside of the S&P500. However, the study also shows that boards exercise discretion in adjusting compensation due to the peer group effect; pay increases only close about one-third of the gap between company CEO and peer group CEO pay.

<sup>447</sup> See Albuquerque, A., De Franco, G., Verdi, R. 2013. Peer Choice in CEO Compensation. *Journal of Financial Economics* 108, 160–181. The study examines whether companies that benchmark CEO pay against highly paid peer CEOs is driven by incentives to increase CEO pay. Whereas the study suggests that benchmarking pay against highly paid peer CEOs is driven by opportunism, such practice mostly represents increased compensation for CEO talent.

a part of incentive-based compensation will be tied to events out of covered persons' control. This could generate uncertainty about compensation outcomes for covered persons, reducing the efficiency of the incentive-based compensation arrangement. Whereas the proposed rule would not prohibit the use of relative performance measures, if the proposed limitation regarding the use of performance measures in determining compensation awards leads to less filtering out of the uncontrollable risk component of performance, then covered institutions may increase overall pay to compensate covered persons for bearing uncontrollable risk.

The SEC's baseline analysis of current compensation practices suggests that most Level 1 and Level 2 covered institutions use a mix of absolute and relative performance measures. If BDs and IAs have similar policies as their parent institutions, and the compensation structure of private institutions is similar to that of public institutions, the SEC does not expect this rule requirement to generate significant compliance costs for covered institutions. The cost of compliance with the proposed rule would mostly affect the few BDs and IAs whose parent institutions do not currently implement such a requirement. On the other hand, if the compensation practices of parent institutions are significantly different than those at their subsidiaries (e.g., they do not use absolute performance measures, or use mostly absolute measures), covered BDs and IAs could experience significant compliance costs when implementing the proposed rule. Since the SEC does not have data on how many covered IAs have parent institutions, it is also possible that a significant number of these IAs may be stand-alone companies and therefore could have higher costs to comply with this specific requirement of the proposed rule compared to covered IAs and BDs that are part of reporting parent institutions. The same holds true if the compensation of BDs and IAs is generally different than that of banking institutions, which most of their parent institutions are.

The SEC has attempted to quantify such costs based on the estimates in Table 14. The SEC also notes that these costs are not necessarily going to be in addition to the compliance costs discussed above, as covered institutions may hire a compensation consultant to help them with several requirements in the proposed rules. These costs could be lower, however, if the parent institutions of BDs and IAs already employ compensation consultants and could extend their services to meet the

proposed rule requirements for BDs and IAs. Lastly, because some BDs and IAs are subsidiaries of private parent institutions, if there is a significant difference in the compensation practices of public and private covered institutions such as BDs and IAs could face large compliance costs. The SEC does not have data for the prohibition of the sole use of relative performance measures at subsidiaries of Level 1 or Level 2 parents, and thus cannot quantify the impact of the rule on those institutions. To better assess the effects of this prohibition on compliance costs for BDs and IAs. The SEC requests detailed comments below.

#### 10. Volume-Driven Incentive-Based Compensation

For covered persons at Level 1 and Level 2 covered institutions, the proposed rule would prohibit incentive-based compensation arrangements that are based solely on the volume of transactions being generated without regard to transaction quality or compliance of the covered person with sound risk management. Such a compensation contract would provide incentives for employees to maximize the number of transactions since that outcome would lead to maximizing their compensation. A compensation contract that solely uses volume as the performance indicator is likely to provide employees with incentives for inappropriate risk-taking since employees benefit from one aspect of performance but do not bear the negative consequences of their actions—the associated costs and risks incurred to generate revenue/volume. There is limited academic literature addressing the effect of volume-driven compensation on employee incentives. A study examined the behavior of loan officers at a major commercial bank when compensation switched from a fixed salary structure to a performance-based structure where the measure of performance was set as loan origination volume.<sup>448</sup> The study found a 31 percent increase in loan approvals, holding other factors related to the probability of loan approvals constant.

<sup>448</sup> See Agarwal, S., Ben-David, I. 2014. Do Loan Officers' Incentives Lead to Lax Lending Standards? NBER Working Paper. This study examines changes in lending practices in one of the largest U.S. commercial banks when loan officers' compensation structure was altered from fixed salary to volume-based pay. The study suggests that following the change in the compensation structure, loan origination became more aggressive as evident by higher origination rates, larger loan sizes, and higher default rates. The study estimates that 10% of the loans under the volume-based compensation structure were likely to have negative net present value.

The study also found that the 12-month probability of default in originating loans increased by 27.9 percent. Whereas the study did not conclude whether the bank was better or worse off due to the introduction of the compensation scheme, the authors found that interest rates charged to lower quality loans did not reflect the increased riskiness of the borrowers. Another related study<sup>449</sup> finds that loan officers who are incentivized based on lending volume rather than on the quality of their loan portfolio originate more loans of lower average quality. The study also finds that due to the presence of career concerns or reputational motivations, loan officers with lending volume incentives do not indiscriminately approve all applications. Whereas the study examines the effects of volume-driven compensation on employees that are not likely to be covered by the proposed rule, it confirms intuition that providing incentives for volume maximization may lead to behaviors that do not necessarily maximize firm value.

It is unclear to the SEC whether volume-driven incentive-based compensation arrangements are utilized by IAs and BDs given the nature of the business conducted by IAs and BDs. Assuming that these incentive-based compensation arrangements are relevant to IAs and BDs, restricting the sole use of volume-driven compensation practices may curb incentives that reward employees of BDs and IAs on only partial outcomes of their actions; partial in the sense that costs and risks associated with those actions are not part of the performance indicators used to determine their compensation. As a consequence, to the extent that BDs and IAs contribute significantly to the overall risk profile of their parent institutions, covered persons' incentives would likely become aligned with the interests of stakeholders, including taxpayers, since covered persons would bear both the benefits and the costs from their actions. Likewise, the prohibition on the sole use of volume-driven compensation practices is also likely to

<sup>449</sup> See Cole, S., Kanz, M., Klapper, L. 2015. Incentivizing Calculated Risk-Taking: Evidence from an Experiment with Commercial Bank Loan Officers. *Journal of Finance* 70, 537–575. The study examines the effect of different incentive-based compensation arrangements on loan originators behavior in screening and approving loans in an Indian commercial bank. In general, the study finds that the structure of incentive-based arrangements for loan officers affects their decisions; the performance metric used in compensation arrangements of loan officers as well as whether pay is deferred affect loan officers screening and approval incentives and corresponding decisions.

limit covered persons' incentives for inappropriate risk-taking.

The effect of this proposed rule on BDs and IAs cannot be unambiguously determined because of the lack of data on the current use of volume-driven compensation practices. If BDs and IAs have already instituted similar policies with respect to senior executive officers and significant risk-takers, the SEC does not expect this rule requirement to generate significant compliance costs for covered institutions. On the other hand, if covered BDs and IAs' compensation practices with respect to senior executive officers and significant risk-takers rely exclusively on volume-driven transactions, covered BDs and IAs could experience significant compliance costs when implementing the proposed rule. To better assess the effects of this prohibition on compliance costs for BDs and IAs the SEC requests comments below.

#### 11. Risk Management

The proposed rule would include specific requirements with regard to risk management functions to qualify a covered person's incentive-based compensation arrangement at Level 1 and Level 2 covered institutions as compatible with the rule. Specifically, the proposed rule would require that a Level 1 or Level 2 covered institution have a risk management framework for its incentive-based compensation arrangement that is independent of any lines of business, includes an independent compliance program that provides for internal controls, testing, monitoring, and training, with written policies and procedures consistent with the proposed rules, and is commensurate with the size and complexity of a covered institution's operations. Moreover, the proposed rule would require that covered persons engaged in control functions be provided with the authority to influence the risk-taking of the business areas they monitor and be compensated in accordance with the achievement of performance objectives linked to their control functions and independent of the performance of the business areas they monitor. Finally, a Level 1 or Level 2 covered institution would be required to provide independent monitoring of all incentive-based compensation plans, events related to forfeiture and downward adjustment and decisions of forfeiture and downward adjustment reviews, and compliance of the incentive-based compensation program with the covered institution's policies and procedures.

The proposed requirements may strengthen the risk management and

control functions of covered BDs and IAs, which could result in lower levels of inappropriate risk-taking. Academic literature suggests that stronger risk controls in bank holding companies resulted in lower risk exposure, as evident by lower tail-risk and lower fraction of non-performing loans; and better performance, as evident by better operating performance and stock return performance, during the crisis.<sup>450</sup> This study also shows that the risk management function is stronger for larger banks, banks with larger derivative trading operations and banks whose CEOs compensation is more closely tied to stock volatility. Additionally, the study shows that stronger risk function, as measured by this study, was associated with better firm performance only during crisis years, whereas the same relation did not hold during non-crisis periods. As such, a strong and independent risk management function can curtail tail risk exposures at banks and potentially enhance value, particularly during crisis years. Another study shows that lenders with a relatively powerful risk manager, as measured by the level of the risk manager's compensation relative to the top named executives' level of compensation, experienced lower loan default rates. Thus, the evidence in the study seems to suggest that powerful risk executives curb risk-taking with respect to loan origination.<sup>451</sup>

It is also possible that the proposed requirements may not have an effect on the current level of risk-taking at BDs and IAs. For example, if risk-taking is driven by the culture of the institution, then governance characteristics (including risk management functions) may reflect the choice of control functions that match the inherent risk-taking appetite in the institution.<sup>452</sup> A potential downside of applying a strict risk management control function over covered BDs and IAs is that it could lead to decreased risk-taking and potential loss of value for those BDs and IAs that already employ an optimal risk management function. For such BDs and IAs, the implementation of the rule requirements with respect to risk management could result in lower than optimal risk-taking by covered persons.

Based on the SEC's baseline analysis, it appears that all Level 1 parent institutions and most Level 2 parent institutions (67 percent) of BDs already have an independent risk management and control function (e.g., a risk committee) and compensation monitoring function (e.g., a fully independent compensation committee)<sup>453</sup> that could apply the rule requirements. Similarly, all of the Level 1 and Level 2 parent institutions of IAs have risk committees and substantial portion (80 percent and above) have fully independent compensation committees. The SEC, however, does not have information on whether risk committees review and monitor the incentive-based compensation plans. The SEC's analysis suggests that there are some Level 1 covered institutions (30 percent) and Level 2 covered institutions (20 percent) where CROs review compensation packages.

If BDs and IAs have similar policies as their parent institutions, and the risk management structure of private institutions is similar to that of public institutions, the implementation of the proposed rule in its part related to risk management and control is unlikely to lead to significant compliance costs for the majority of covered BDs and IAs because, as mentioned in the previous paragraph, a large percentage of the parent institutions already have fully independent risk committees. Some BDs with Level 2 parent institutions and some IAs with Level 1 and Level 2 parent institutions may face high compliance costs because their parent institutions currently do not employ risk management and compensation monitoring practices similar to the one prescribed by the proposed rule. On the other hand, if the risk management practices of parent institutions are significantly different from those at their subsidiaries (e.g., BDs and IAs do not have risk management and control functions), covered BDs and IAs could experience significant compliance costs when implementing the proposed rule. Since the SEC does not have data on how many covered IAs have parent institutions, it is also possible that a significant number of these IAs may be stand-alone companies and therefore could have higher costs to comply with this specific requirement of the proposed rule compared to covered IAs and BDs that are part of reporting parent institutions. BDs and IAs could also incur direct economic costs such as decrease in firm value if the proposed

<sup>450</sup> See Ellul, A., Yerramilli, V. 2013. Stronger Risk Controls, Lower Risk: Evidence from U.S. Bank Holding Companies. *Journal of Finance* 68, 1757–1803.

<sup>451</sup> See Keys, B., Mukherjee, T., Seru, A., Vig, Vikrant. 2009. Financial regulation and securitization: Evidence from subprime loans. *Journal of Monetary Economics* 56, 700–720.

<sup>452</sup> See Cheng, I., Hong, H., Scheinkman, J. 2015. Yesterday's Heroes: Compensation and Risk at Financial Firms. *Journal of Finance* 70, 839–879.

<sup>453</sup> A risk committee is "fully independent" for purposes of this discussion if it consists only of directors that are not employees of the corporation.

rule requirements regarding risk management lead to less risk-taking than is optimal. The same holds true if the risk management and controls of BDs and IAs is generally different than that of banking institutions, which most of their parent institutions are.

Lastly, because some BDs and IAs are subsidiaries of private parent institutions, if there is a significant difference in the risk management practices of public and private covered institutions such BDs and IAs could face large compliance costs and direct economic costs. The SEC does not have data for the risk management and control functions at subsidiaries of Level 1 or Level 2 parents, and thus cannot quantify the impact of the rule on those institutions. To better assess the effects of these rule requirements on compliance costs for BDs and IAs the SEC requests comments below.

The SEC has attempted to quantify the potential compliance costs for BDs and IAs associated with the proposed rule's requirements regarding the existence and structure of compensation committees and risk committees. BDs and IAs that are currently not in compliance with the proposed committee requirements, either because such a committee does not exist or because the composition of such committee is not consistent with the rule requirements, may have to elect additional individuals in order to either establish the required committees or alter the structure of such committees to be in compliance with the rule's requirements. Table 15 provides estimates of the average annual total compensation of non-employee (*i.e.* independent) directors for Level 1 and Level 2 parents of BDs and Level 1 and Level 2 parents of IAs covered by the proposed rule.<sup>454</sup> Assuming that the cost estimates in the table approximate the compensation requirements for independent members of compensation and/or risk committees, the incremental compliance costs of electing an additional non-employee director to comply with this specific provision of the rule for BDs and IAs that currently do not meet the rule's requirements could be approximately \$333,086 and \$309,513 annually per independent director for a Level 1 BDs and IAs, respectively, and approximately \$208,009 and \$194,563 annually per independent director for unconsolidated Level 2 BDs and IAs, respectively.

**TABLE 15—AVERAGE TOTAL ANNUAL COMPENSATION OF A NON-EMPLOYEE DIRECTOR FOR LEVEL 1 AND LEVEL 2 COVERED INSTITUTIONS**

	Average total annual compensation of a non-employee director
BD parents:	
Level 1 covered institutions .....	\$333,086
Level 2 covered institutions .....	208,009
IA parents:	
Level 1 covered institutions .....	309,513
Level 2 covered institutions .....	194,563

The SEC considers these estimates an upper bound of potential costs that BDs and IAs may incur to comply with these requirements of the proposed rule. It is possible that some BDs and IAs are able to reshuffle existing personnel in order to comply with the rule's requirements (*e.g.*, use existing directors to create a risk committee or fully independent compensation committee) and as such would not incur any of the costs described in the analysis.

## 12. Governance, Policies and Procedures

For Level 1 and Level 2 covered institutions, the proposed rule would include specific corporate governance requirements to support the design and implementation of compensation arrangements that provide balanced risk-taking incentives to affected individuals. More specifically, the proposed rule would require the existence of a compensation committee composed solely of directors who are not senior executive officers, input from the corresponding risk and audit committees and risk management on the effectiveness of risk measures and adjustments used to balance incentive-based compensation arrangements, and a written assessment, submitted at least annually to the compensation committee from the management of the covered institution, regarding the effectiveness of the covered institution's incentive-based compensation program and related compliance and control processes and an independent written assessment of the effectiveness of the covered institution's incentive-based compensation program and related compliance and control processes in providing risk-taking incentives that are consistent with the risk profile of the covered institution, submitted on an annual or more frequent basis by the

internal audit or risk management function of the covered institution, developed independently of the covered institution's management.

The proposed governance requirements would benefit covered BDs and IAs by further ensuring that the design of compensation arrangements is independent of the persons receiving compensation under these arrangements, thus curbing potential conflicts of interest. It could also facilitate the optimal design of compensation arrangements by incorporating relevant information from committees whose mandate is risk oversight. For example, by having a fully independent compensation committee that designs compensation arrangements and a risk committee that reviews those compensation arrangements to make sure they are consistent with the institution's optimal risk policy, a BD or IA may be able to devise compensation arrangements that provide a better link between pay and performance for covered persons.

Based on the SEC's baseline analysis, it appears that the majority of Level 1 and Level 2 covered parent institutions already have a fully independent compensation committee. The SEC does not have information whether BDs and IAs that are subsidiaries have compensation committees and boards of directors. In 2012, the SEC adopted rules requiring exchanges to adopt listing standards requiring a board compensation committee that satisfies independence standards that are more stringent than those in the proposed rule.<sup>455</sup> Therefore, all covered parent institutions with listed securities on national exchanges, or any covered BDs and IAs with listed securities, should have compensation committees that would satisfy the proposed rule's compensation committee independence requirements. Thus, this proposed requirement should place no additional burden on those IAs and BDs that have listed securities on national exchanges, or have governance structures similar to those of their listed parent institutions.

For those BDs and IAs that have compensation committees, the SEC does not have information whether management of the covered BDs and IAs submits to the compensation committee on an annual or more frequent basis a written assessment of the effectiveness of the covered institution's incentive-based compensation program and related compliance and control processes in providing risk-taking incentives that are consistent with the risk profile of the covered institution.

<sup>454</sup> Data is taken from 2015 proxy statements.

<sup>455</sup> 17 CFR parts 229 and 240.

Additionally, the SEC does not have information on whether the compensation committee obtains input from the covered institution's risk and audit committees, or groups performing similar functions. If covered BDs and IAs have already instituted similar policies with respect to the proposed rule's governance requirements, the SEC does not expect this proposed requirement to generate significant compliance costs for them.

On the other hand, if covered BDs and IAs' governance practices are significantly different (e.g., they do not have independent compensation committees, or the compensation committees do not obtain input from the risk and audit committees), then covered BDs and IAs could experience significant compliance costs when implementing the proposed rule. Similarly, for BDs and IAs that do not have securities listed on a national exchange or have governance structures different from those of their parent institutions with listed securities, this rule proposal may result in significant costs. Also, since the SEC does not have data on how many covered IAs have parent institutions, or whether the IAs themselves or their parents have listed securities, it is also possible that a significant number of these IAs may be stand-alone companies that do not have independent compensation committees, and therefore could have higher costs to comply with the proposed rule compared to covered IAs and BDs that are part of reporting parent institutions with independent compensation committees. To better assess the effects of the proposed rule requirement on compliance costs for BDs and IAs, the SEC requests comments below.

For Level 1 and Level 2 covered BDs and IAs, the proposed rule would require the development and implementation of policies and procedures relating to its incentive-based compensation programs that would require among other things, specifying the substantive and procedural criteria for the application of the various policies such as forfeiture and clawback, identifying and describing the role of employees, committees, or groups with authority to make incentive-based compensation decisions, and description of the monitoring mechanism over incentive-based compensation arrangements.

The SEC does not have information about whether covered BDs and IAs have policies and procedures in place as required by the proposed rule. If BDs and IAs have already instituted similar policies, the SEC does not expect this rule requirement to generate significant

compliance costs for them. On the other hand, if the covered BDs and IAs do not have such policies and procedures, or if their policies and procedures are significantly different than what the proposed rule requires, then covered BDs and IAs could experience significant compliance costs when implementing the proposed rule. To better assess the effects of these rule requirements on compliance costs for BDs and IAs the SEC requests comments below.

### 13. Additional Disclosure and Recordkeeping

All covered institutions would be required to create annually and maintain for a period of at least 7 years records that document the structure of all incentive-based compensation arrangements and demonstrate compliance with the proposed rules. Level 1 and Level 2 covered institutions would be required to create annually and maintain for at least 7 years records that document additional information, such as identification of the senior executive officers and significant risk-takers within the covered institution, the incentive-based compensation arrangements of these individuals including deferral details, and any material changes in incentive-based compensation arrangements and policies. Level 1 and Level 2 covered institutions must create and maintain such records in a manner that allows for an independent audit of incentive-based compensation arrangements, policies, and procedures.

The SEC is proposing an amendment to Exchange Act Rule 17a-4(e)<sup>456</sup> and Investment Advisers Act Rule 204-2<sup>457</sup> to require that registered broker-dealers and investment advisers maintain the records required by the proposed rule for registered Level 1 and Level 2 broker-dealers and investment advisers, in accordance with the recordkeeping requirements of Exchange Act Rule 17a-4 and Investment Advisers Act Rule 204-2, respectively. Exchange Act Rule 17a-4 and Investment Advisers Act Rule 204-2 establish the general formatting and storage requirements for records that registered broker-dealers and investment advisers are required to keep. For the sake of consistency with other broker-dealer and investment adviser records, the SEC believes that registered broker-dealers and investment advisers should also keep the records required by the proposed rule for registered Level 1 and Level 2

broker-dealers and investment advisers, in accordance with these requirements.

Such recordkeeping requirements would provide information availability to the SEC in examining and confirming the design and implementation of compensation arrangements for a prolonged period of time. This may enhance compliance and facilitate oversight.

The proposed requirement may increase compliance costs for covered BDs and IAs. The SEC expects that the magnitude of the compliance costs would depend on whether covered BDs and IAs are part of reporting companies or not. Most Level 1 and Level 2 BDs are subsidiaries of reporting parent institutions. Reporting covered institutions provide compensation and disclosure analysis and compensation tables for their named executive officers in their annual reports, and disclose the incentive-based compensation arrangements for named executive officers in the annual proxy statement. In addition, reporting companies have to make an assessment each year whether they need to make Item 402(s) disclosure, which, among other things includes disclosure of compensation policies and practices that present material risks to the company and the board of directors' role in risk oversight. Thus, given that reporting covered institutions create certain records and provide certain disclosures for their annual reports and proxy statements and for internal purposes (e.g., for reports to the board of directors or the compensation committee) that are similar to those required by the proposed rule, the BDs and IAs that are subsidiaries of such parent institutions may experience lower disclosure and recordkeeping compared to BDs and IAs of non-reporting parent institutions or institutions that do not provide such disclosures. Even BDs and IAs of reporting companies, however, would have to incur costs associated with disclosure and recordkeeping of information required by the proposed rule that currently is not disclosed by their parent institutions, such as identification of significant risk-takers details on deferral of incentive-based compensation. The SEC also notes that because it does not have information on the compensation reporting and recordkeeping at the subsidiary level, the SEC may be underestimating compliance costs for BDs with reporting parent institutions. For example, even if the parent institution reports and keeps records of the incentive-based compensation arrangements, this might not be done on the same scale and detail at the subsidiary level.

<sup>456</sup> 17 CFR 240.17a-4(e).

<sup>457</sup> 17 CFR 275.204-2.

The compliance costs associated with this particular rule requirement may be higher for non-reporting covered institutions, since they may not be disclosing such information and as such may not be keeping the type of records required. However, according to 2010 Federal Banking Agency Guidance, a banking institution should provide an appropriate amount of information concerning its incentive compensation arrangements for executive and non-executive employees and related risk-management, control, and governance processes to shareholders to allow them to monitor and, where appropriate, take actions to restrain the potential for such arrangements and processes to encourage employees to take imprudent risks. Such disclosures should include information relevant to employees other than senior executives. The scope and level of the information disclosed by the institution should be tailored to the nature and complexity of the institution and its incentive-based compensation arrangements. The SEC expects the compliance costs to be lower for such covered institutions. Since the SEC does not have data on how many covered IAs have parent institutions, it is also possible that a significant number of these IAs may be stand-alone companies and therefore could have higher costs to comply with this specific requirement of the proposed rule compared to covered IAs and BDs that are part of reporting parent institutions.

By requiring Level 1 and Level 2 covered institutions to create and maintain records of incentive-based compensation arrangements for covered persons, the proposed recordkeeping requirement is expected to facilitate the SEC's ability to monitor incentive-based compensation arrangements and could potentially strengthen incentives for covered institutions to comply with the proposed rule. As a consequence, an increase in investor confidence that covered institutions are less likely to be incentivizing inappropriate actions through compensation arrangements may occur and potentially result to greater market participation and allocative efficiency, thereby potentially facilitating capital formation. As discussed above, it is difficult for the SEC to estimate compliance costs related to the specific provision. However, for covered institutions that do not currently have a similar reporting system in place, there could be significant fixed costs that could disproportionately burden smaller covered BDs and IAs and hinder competition. Overall, the SEC does not expect that the effects of the proposed

recordkeeping requirements on efficiency, competition and capital formation to be significant.

#### H. Request for Comment

The SEC requests comments regarding its analysis of the potential economic effects of the proposed rule. With regard to any comments, the SEC notes that such comments are of particular assistance to the SEC if accompanied by supporting data and analysis of the issues addressed in those comments. For example, the SEC is interested in receiving estimates, data, or analyses on incentive-based compensation at BDs and IAs for all aspects of the proposed rule, including thresholds, on the overall economic impact of the proposed rule, and on any other aspect of this economic analysis. The SEC also is interested in comments on the benefits and costs it has identified and any benefits and costs it may have overlooked.

1. In the SEC's baseline analysis, the SEC uses data from publicly held covered institutions as a proxy for incentive-based compensation arrangements at privately held institutions. The SEC requests comment on the validity of the assumption that privately held institutions employ similar compensation practices to publicly held institutions. The SEC also requests data or analysis with respect to incentive-based compensation arrangements of covered persons at privately held covered institutions.

2. The SEC does not have comprehensive data on incentive-based compensation arrangements for affected individuals, other than those senior executive officers who are named executive officers (NEOs) and some significant risk-takers, for either public or privately held covered institutions. The SEC requests data or analysis related to compensation practices of all senior executive officers and significant risk-takers at covered BDs and IAs as defined in the proposed rule.

3. The SEC uses incentive-based compensation arrangements of NEOs at the parent level as a proxy for incentive-based compensation arrangements of covered persons at covered BDs and IAs that are subsidiaries. The SEC requests comment on the validity of the assumption that incentive-based compensation arrangements for senior executive officers at the parent level is similar to incentive-based compensation arrangements followed at the subsidiary level for other senior executive officers or for significant risk-takers. The SEC also requests any data or related analysis on this issue.

4. Are the economic effects with respect to the asset thresholds (\$50 billion and \$250 billion) utilized to scale the proposed requirements for covered BDs and IAs adequately outlined in the analysis? The SEC also invites comment on the economic consequences of any alternative asset thresholds, as well as economic consequences of potential alternative measures.

5. The proposed consolidation approach would impose restrictions on covered persons' incentive-based compensation arrangements in BDs and IAs that are subsidiaries of depository institution holding companies based on the size of their parent institution. Are the economic effects from the proposed consolidation approach adequately described in the analysis? Are there specific circumstances, such as certain organizational structures, that would deem such a consolidation approach more or less effective?

6. Are there additional effects with respect to the proposed definition of significant risk-takers to be considered? Are there alternative ways to identify significant risk-takers and what would be the economic consequences of alternative ways to identify significant risk-takers?

7. Are the economic effects on the proposed minimum deferral periods and the proposed minimum deferral percentage amounts adequately described in the analysis? What would be the economic effects of any alternative? The SEC also requests literature or evidence regarding the length and amount of deferral of incentive-based compensation that would lead to incentive-based compensation arrangements that best address the underlying risks at covered institutions.

8. Are the economic effects from the proposed vesting schedule for deferred incentive-based compensation adequately described in the analysis? What would be the economic effects from any alternatives?

9. Are there additional economic effects to be considered from the proposed prohibition of increasing a senior executive officer or significant risk-taker's unvested deferred incentive-based compensation? What would be the economic effects of any alternatives?

10. The proposed rule would require deferred qualifying incentive-based compensation to be composed of substantial amounts of both deferred cash and equity-like instruments for covered persons. Are the economic effects of the proposed rule adequately described in the analysis? Would explicitly specifying the mix between

cash and equity-like instruments to be included in the deferral amount be preferred? What would be the economic effects of such an alternative? Are there additional alternatives to be considered?

11. For senior executive officers and significant risk-takers at Level 1 and Level 2 covered institutions, the total amount of options that may be used to meet the minimum deferral amount requirements is limited to no more than 15 percent of the amount of total incentive-based compensation awarded for a given performance period.

Indirectly, this policy choice would place a cap on the amount of options that covered BDs and IAs may provide to affected persons as part of their incentive-based compensation arrangement. Are the economic effects of the provision adequately described in the analysis? What would be the economic effects from any alternatives?

12. Are the triggers for forfeiture or downward adjustment review effective for both senior executive officers and significant risk-takers? Are some of the triggers more effective for significant risk-takers while others are more effective for senior executive officers? What other triggers would be effective for forfeiture or downward adjustment review?

13. Are the economic effects from the 125 percent (150 percent) limit on the amount by which incentive-based compensation may exceed the target amount for senior executive officers (significant risk-takers) at covered BDs and IAs adequately described in the analysis? Are there alternatives to be considered? What would be the economic effect of such alternatives?

14. Are the economic effects regarding the prohibition of the sole use of industry peer performance benchmarks for incentive-based compensation performance measurement adequately described in the analysis? The SEC also requests data on relative performance measures used by covered BDs and IAs and/or related analysis that may further inform this policy choice.

15. The SEC requests any relevant data or analysis regarding the potential effect of the proposed rule on the ability of covered BDs and IAs to attract and retain managerial talent.

16. In general, are there alternative courses of action to be considered that would enhance accountability and limit the potential for inappropriate risk-taking by covered persons at BDs and IAs? What would be the economic effects of such alternatives? Are there specific circumstances, such as certain types of shareholders and other stakeholders, that would make these alternative approaches more or less

effective? For example, should such alternative approaches distinguish between the effects on short-term shareholders and the effects on long-term shareholders?

17. In recent years, several foreign regulators have implemented regulations concerning incentive-based compensation similar to those in the proposed rule. The SEC requests data or analysis regarding the economic effects of those regulations and whether they are similar to or different from the likely economic effects of the proposed rule.

#### *J. Small Business Regulatory Enforcement Fairness Act*

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”) <sup>458</sup> the SEC must advise the OMB whether the proposed regulation constitutes a “major” rule. Under SBREFA, a rule is considered “major” where, if adopted, it results or is likely to result in: (1) An annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers or individual industries; or (3) significant adverse effect on competition, investment or innovation.

The SEC requests comment on the potential impact of the proposed amendment on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

#### **List of Subjects**

##### *12 CFR Part 42*

Banks, banking, Compensation, National banks, Reporting and recordkeeping requirements.

##### *12 CFR Part 236*

Banks, Bank holding companies, Compensation, Foreign banking organizations, Reporting and recordkeeping requirements, Savings and loan holding companies.

##### *12 CFR Part 372*

Banks, banking, Compensation, Foreign banking.

##### *12 CFR Parts 741 and 751*

Compensation, Credit unions, Reporting and recording requirements.

##### *12 CFR Part 1232*

Administrative practice and procedure, Banks, Compensation, Confidential business information, Government-sponsored enterprises,

<sup>458</sup> Public Law 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. and 15 U.S.C. and as a note to 5 U.S.C. 601).

Reporting and recordkeeping requirements.

##### *17 CFR Part 240*

Reporting and recordkeeping requirements, Securities.

##### *17 CFR Part 275*

Reporting and recordkeeping requirements, Securities.

##### *17 CFR Part 303*

Incentive-based compensation arrangements, Reporting and recordkeeping requirements, Securities.

#### **Department of the Treasury: Office of the Comptroller of the Currency**

##### **12 CFR Chapter I**

##### **Authority and Issuance**

For the reasons set forth in the joint preamble, the OCC proposes to amend 12 CFR chapter I of the Code of Federal Regulations as follows:

■ 1. Add part 42 to read as follows:

#### **PART 42—INCENTIVE-BASED COMPENSATION ARRANGEMENTS**

Sec.

- 42.1 Authority, scope, and initial applicability.
- 42.2 Definitions.
- 42.3 Applicability.
- 42.4 Requirements and prohibitions applicable to all covered institutions.
- 42.5 Additional disclosure and recordkeeping requirements for Level 1 and Level 2 covered institutions.
- 42.6 Reservation of authority for Level 3 covered institutions.
- 42.7 Deferral, forfeiture and downward adjustment, and clawback requirements for Level 1 and Level 2 covered institutions.
- 42.8 Additional prohibitions for Level 1 and Level 2 covered institutions.
- 42.9 Risk management and controls requirements for Level 1 and Level 2 covered institutions.
- 42.10 Governance requirements for Level 1 and Level 2 covered institutions.
- 42.11 Policies and procedures requirements for Level 1 and Level 2 covered institutions.
- 42.12 Indirect actions.
- 42.13 Enforcement.

**Authority:** 12 U.S.C. 1 *et seq.* 1, 93a, 1462a, 1463, 1464, 1818, 1831p–1, and 5641.

##### **§ 42.1 Authority, scope, and initial applicability.**

(a) *Authority.* This part is issued pursuant to section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5641), sections 8 and 39 of the Federal Deposit Insurance Act (12 U.S.C. 1818 and 1831p–1), sections 3, 4, and 5 of the Home Owners’ Loan Act (12 U.S.C. 1462a, 1463, and 1464), and section

5239A of the Revised Statutes (12 U.S.C. 93a).

(b) *Scope*. This part applies to a covered institution with average total consolidated assets greater than or equal to \$1 billion that offers incentive-based compensation to covered persons.

(c) *Initial applicability*—(1)

*Compliance date*. A covered institution must meet the requirements of this part no later than [Date of the beginning of the first calendar quarter that begins at least 540 days after a final rule is published in the **Federal Register**]. Whether a covered institution is a Level 1, Level 2, or Level 3 covered institution at that time will be determined based on average total consolidated assets as of [Date of the beginning of the first calendar quarter that begins after a final rule is published in the **Federal Register**].

(2) *Grandfathered plans*. A covered institution is not required to comply with the requirements of this part with respect to any incentive-based compensation plan with a performance period that begins before [Compliance Date as described in § 42.1(c)(1)].

(d) *Preservation of authority*. Nothing in this part in any way limits the authority of the OCC under other provisions of applicable law and regulations.

## § 42.2 Definitions.

For purposes of this part only, the following definitions apply unless otherwise specified:

(a) *Affiliate* means any company that controls, is controlled by, or is under common control with another company.

(b) *Average total consolidated assets* means the average of the total consolidated assets of a national bank; a Federal savings association; a Federal branch or agency of a foreign bank; a subsidiary of a national bank, Federal savings association, or Federal branch or agency; or a depository institution holding company, as reported on the national bank's, Federal savings association's, Federal branch or agency's, subsidiary's, or depository institution holding company's regulatory reports, for the four most recent consecutive quarters. If a national bank, Federal savings association, Federal branch or agency, subsidiary, or depository institution holding company has not filed a regulatory report for each of the four most recent consecutive quarters, the national bank, Federal savings association, Federal branch or agency, subsidiary, or depository institution holding company's average total consolidated assets means the average of its total consolidated assets, as reported on its regulatory reports, for

the most recent quarter or consecutive quarters, as applicable. Average total consolidated assets are measured on the as-of date of the most recent regulatory report used in the calculation of the average.

(c) *To award incentive-based compensation* means to make a final determination, conveyed to a covered person, of the amount of incentive-based compensation payable to the covered person for performance over a performance period.

(d) *Board of directors* means the governing body of a covered institution that oversees the activities of the covered institution, often referred to as the board of directors or board of managers. For a Federal branch or agency of a foreign bank, "board of directors" refers to the relevant oversight body for the Federal branch or agency, consistent with its overall corporate and management structure.

(e) *Clawback* means a mechanism by which a covered institution can recover vested incentive-based compensation from a covered person.

(f) *Compensation, fees, or benefits* means all direct and indirect payments, both cash and non-cash, awarded to, granted to, or earned by or for the benefit of, any covered person in exchange for services rendered to a covered institution.

(g) *Control* means that any company has control over a bank or over any company if—

(1) The company directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 percent or more of any class of voting securities of the bank or company;

(2) The company controls in any manner the election of a majority of the directors or trustees of the bank or company; or

(3) The OCC determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company.

(h) *Control function* means a compliance, risk management, internal audit, legal, human resources, accounting, financial reporting, or finance role responsible for identifying, measuring, monitoring, or controlling risk-taking.

(i) *Covered institution* means:

(1) A national bank, Federal savings association, or Federal branch or agency of a foreign bank with average total consolidated assets greater than or equal to \$1 billion; and

(2) A subsidiary of a national bank, Federal savings association, or Federal branch or agency of a foreign bank that:

(i) Is not a broker, dealer, person providing insurance, investment company, or investment adviser; and  
(ii) Has average total consolidated assets greater than or equal to \$1 billion.

(j) *Covered person* means any executive officer, employee, director, or principal shareholder who receives incentive-based compensation at a covered institution.

(k) *Deferral* means the delay of vesting of incentive-based compensation beyond the date on which the incentive-based compensation is awarded.

(l) *Deferral period* means the period of time between the date a performance period ends and the last date on which the incentive-based compensation awarded for such performance period vests.

(m) *Depository institution holding company* means a top-tier depository institution holding company, where "depository institution holding company" has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(n) *Director* of a covered institution means a member of the board of directors.

(o) *Downward adjustment* means a reduction of the amount of a covered person's incentive-based compensation not yet awarded for any performance period that has already begun, including amounts payable under long-term incentive plans, in accordance with a forfeiture and downward adjustment review under § 42.7(b).

(p) *Equity-like instrument* means:

(1) Equity in the covered institution or of any affiliate of the covered institution; or

(2) A form of compensation:

(i) Payable at least in part based on the price of the shares or other equity instruments of the covered institution or of any affiliate of the covered institution; or

(ii) That requires, or may require, settlement in the shares of the covered institution or of any affiliate of the covered institution.

(q) *Forfeiture* means a reduction of the amount of deferred incentive-based compensation awarded to a covered person that has not vested.

(r) *Incentive-based compensation* means any variable compensation, fees, or benefits that serve as an incentive or reward for performance.

(s) *Incentive-based compensation arrangement* means an agreement between a covered institution and a covered person, under which the covered institution provides incentive-

based compensation to the covered person, including incentive-based compensation delivered through one or more incentive-based compensation plans.

(t) *Incentive-based compensation plan* means a document setting forth terms and conditions governing the opportunity for and the payment of incentive-based compensation payments to one or more covered persons.

(u) *Incentive-based compensation program* means a covered institution's framework for incentive-based compensation that governs incentive-based compensation practices and establishes related controls.

(v) *Level 1 covered institution* means:

(1) A covered institution that is a subsidiary of a depository institution holding company with average total consolidated assets greater than or equal to \$250 billion;

(2) A covered institution with average total consolidated assets greater than or equal to \$250 billion that is not a subsidiary of a covered institution or of a depository institution holding company; and

(3) A covered institution that is a subsidiary of a covered institution with average total consolidated assets greater than or equal to \$250 billion.

(w) *Level 2 covered institution* means:

(1) A covered institution that is a subsidiary of a depository institution holding company with average total consolidated assets greater than or equal to \$50 billion but less than \$250 billion;

(2) A covered institution with average total consolidated assets greater than or equal to \$50 billion but less than \$250 billion that is not a subsidiary of a covered institution or of a depository institution holding company; and

(3) A covered institution that is a subsidiary of a covered institution with average total consolidated assets greater than or equal to \$50 billion but less than \$250 billion.

(x) *Level 3 covered institution* means:

(1) A covered institution with average total consolidated assets greater than or equal to \$1 billion but less than \$50 billion; and

(2) A covered institution that is a subsidiary of a covered institution with average total consolidated assets greater than or equal to \$1 billion but less than \$50 billion.

(y) *Long-term incentive plan* means a plan to provide incentive-based compensation that is based on a performance period of at least three years.

(z) *Option* means an instrument through which a covered institution provides a covered person the right, but not the obligation, to buy a specified

number of shares representing an ownership stake in a company at a predetermined price within a set time period or on a date certain, or any similar instrument, such as a stock appreciation right.

(aa) *Performance period* means the period during which the performance of a covered person is assessed for purposes of determining incentive-based compensation.

(bb) *Principal shareholder* means a natural person who, directly or indirectly, or acting through or in concert with one or more persons, owns, controls, or has the power to vote 10 percent or more of any class of voting securities of a covered institution.

(cc) *Qualifying incentive-based compensation* means the amount of incentive-based compensation awarded to a covered person for a particular performance period, excluding amounts awarded to the covered person for that particular performance period under a long-term incentive plan.

(dd) [Reserved].

(ee) *Regulatory report* means:

(1) For a national bank or Federal savings association, the consolidated Reports of Condition and Income ("Call Report");

(2) For a Federal branch or agency of a foreign bank, the Reports of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks—FFIEC 002;

(3) For a depository institution holding company—

(i) The Consolidated Financial Statements for Bank Holding Companies ("FR Y-9C");

(ii) In the case of a savings and loan holding company that is not required to file an FR Y-9C, the Quarterly Savings and Loan Holding Company Report ("FR 2320"), if the savings and loan holding company reports consolidated assets on the FR 2320, as applicable; or

(iii) In the case of a savings and loan holding company that does not file an FRY-9C or report consolidated assets on the FR2320, a report submitted to the Board of Governors of the Federal Reserve System pursuant to 12 CFR 236.2(ee); and

(4) For a covered institution that is a subsidiary of a national bank, Federal savings association, or Federal branch or agency of a foreign bank, a report of the subsidiary's total consolidated assets prepared by the subsidiary, national bank, Federal savings association, or Federal branch or agency in a form that is acceptable to the OCC.

(ff) *Section 956 affiliate* means an affiliate that is an institution described in § 42.2(i), 12 CFR 236.2(i), 12 CFR 372.2(i), 12 CFR 741.2(i), 12 CFR 1232.2(i), or 17 CFR 303.2(i).

(gg) *Senior executive officer* means a covered person who holds the title or, without regard to title, salary, or compensation, performs the function of one or more of the following positions at a covered institution for any period of time in the relevant performance period: President, chief executive officer, executive chairman, chief operating officer, chief financial officer, chief investment officer, chief legal officer, chief lending officer, chief risk officer, chief compliance officer, chief audit executive, chief credit officer, chief accounting officer, or head of a major business line or control function.

(hh) *Significant risk-taker* means:

(1) Any covered person at a Level 1 or Level 2 covered institution, other than a senior executive officer, who received annual base salary and incentive-based compensation for the last calendar year that ended at least 180 days before the beginning of the performance period of which at least one-third is incentive-based compensation and is—

(i) A covered person of a Level 1 covered institution who received annual base salary and incentive-based compensation for the last calendar year that ended at least 180 days before the beginning of the performance period that placed the covered person among the highest 5 percent in annual base salary and incentive-based compensation among all covered persons (excluding senior executive officers) of the Level 1 covered institution together with all individuals who receive incentive-based compensation at any section 956 affiliate of the Level 1 covered institution;

(ii) A covered person of a Level 2 covered institution who received annual base salary and incentive-based compensation for the last calendar year that ended at least 180 days before the beginning of the performance period that placed the covered person among the highest 2 percent in annual base salary and incentive-based compensation among all covered persons (excluding senior executive officers) of the Level 2 covered institution together with all individuals who receive incentive-based compensation at any section 956 affiliate of the Level 2 covered institution; or

(iii) A covered person of a covered institution who may commit or expose 0.5 percent or more of the common equity tier 1 capital, or in the case of a registered securities broker or dealer, 0.5 percent or more of the tentative net capital, of the covered institution or of any section 956 affiliate of the covered

institution, whether or not the individual is a covered person of that specific legal entity; and

(2) Any covered person at a Level 1 or Level 2 covered institution, other than a senior executive officer, who is designated as a “significant risk-taker” by the OCC because of that person’s ability to expose a covered institution to risks that could lead to material financial loss in relation to the covered institution’s size, capital, or overall risk tolerance, in accordance with procedures established by the OCC, or by the covered institution.

(3) For purposes of this part, an individual who is an employee, director, senior executive officer, or principal shareholder of an affiliate of a Level 1 or Level 2 covered institution, where such affiliate has less than \$1 billion in total consolidated assets, and who otherwise would meet the requirements for being a significant risk-taker under paragraph (hh)(1)(iii) of this section, shall be considered to be a significant risk-taker with respect to the Level 1 or Level 2 covered institution for which the individual may commit or expose 0.5 percent or more of common equity tier 1 capital or tentative net capital. The Level 1 or Level 2 covered institution for which the individual commits or exposes 0.5 percent or more of common equity tier 1 capital or tentative net capital shall ensure that the individual’s incentive compensation arrangement complies with the requirements of this part.

(4) If the OCC determines, in accordance with procedures established by the OCC, that a Level 1 covered institution’s activities, complexity of operations, risk profile, and compensation practices are similar to those of a Level 2 covered institution, the Level 1 covered institution may apply paragraph (hh)(1)(i) of this section to covered persons of the Level 1 covered institution by substituting “2 percent” for “5 percent”.

(ii) *Subsidiary* means any company that is owned or controlled directly or indirectly by another company

(jj) *Vesting of incentive-based compensation* means the transfer of ownership of the incentive-based compensation to the covered person to whom the incentive-based compensation was awarded, such that the covered person’s right to the incentive-based compensation is no longer contingent on the occurrence of any event.

#### **§ 42.3 Applicability.**

(a) *When average total consolidated assets increase—(1) In general—(A) Covered institution subsidiaries of*

*depository institution holding companies.* A national bank or Federal savings association that is a subsidiary of a depository institution holding company shall become a Level 1, Level 2, or Level 3 covered institution when the depository institution holding company’s average total consolidated assets increase to an amount that equals or exceeds \$250 billion, \$50 billion, or \$1 billion, respectively.

(B) *Covered institutions that are not subsidiaries of a depository institution holding company.* A national bank, Federal savings association, or Federal branch or agency of a foreign bank that is not a subsidiary of a national bank, Federal savings association, Federal branch or agency, or depository institution holding company shall become a Level 1, Level 2, or Level 3 covered institution when the national bank, Federal savings association, or Federal branch or agency’s average total consolidated assets increase to an amount that equals or exceeds \$250 billion, \$50 billion, or \$1 billion, respectively.

(C) *Subsidiaries of covered institutions.* A subsidiary of a national bank, Federal savings association, or Federal branch or agency of a foreign bank that is not a broker, dealer, person providing insurance, investment company, or investment adviser shall become a Level 1, Level 2, or Level 3 covered institution when the national bank, Federal savings association, or Federal branch or agency becomes a Level 1, Level 2, or Level 3 covered institution, respectively, pursuant to paragraph (a)(1)(A) or (B) of this section.

(2) *Compliance date.* A national bank, Federal savings association, Federal branch or agency of a foreign bank, or a subsidiary thereof, that becomes a Level 1, Level 2, or Level 3 covered institution pursuant to paragraph (a)(1) of this section shall comply with the requirements of this part for a Level 1, Level 2, or Level 3 covered institution, respectively, not later than the first day of the first calendar quarter that begins not later than 540 days after the date on which the national bank, Federal savings association, Federal branch or agency, or subsidiary becomes a Level 1, Level 2, or Level 3 covered institution, respectively. Until that day, the Level 1, Level 2, or Level 3 covered institution will remain subject to the requirements of this part, if any, that applied to the institution on the day before the date on which it became a Level 1, Level 2, or Level 3 covered institution.

(3) *Grandfathered plans.* A national bank, Federal savings association, Federal branch or agency of a foreign bank, or a subsidiary thereof, that

becomes a Level 1, Level 2, or Level 3 covered institution under paragraph (a)(1) of this section is not required to comply with requirements of this part applicable to a Level 1, Level 2, or Level 3 covered institution, respectively, with respect to any incentive-based compensation plan with a performance period that begins before the date described in paragraph (a)(2) of this section. Any such incentive-based compensation plan shall remain subject to the requirements under this part, if any, that applied to the national bank, Federal savings association, Federal branch or agency of a foreign bank, or subsidiary at the beginning of the performance period.

(b) *When total consolidated assets decrease—(1) Covered institutions that are subsidiaries of depository institution holding companies.* A Level 1, Level 2, or Level 3 covered institution that is a subsidiary of a depository institution holding company will remain subject to the requirements applicable to such covered institution at that level under this part unless and until the total consolidated assets of the depository institution holding company, as reported on the depository institution holding company’s regulatory reports, fall below \$250 billion, \$50 billion, or \$1 billion, respectively, for each of four consecutive quarters.

(2) *Covered institutions that are not subsidiaries of depository institution holding companies.* A Level 1, Level 2, or Level 3 covered institution that is a not subsidiary of a depository institution holding company will remain subject to the requirements applicable to such covered institution at that level under this part unless and until the total consolidated assets of the covered institution, as reported on the covered institution’s regulatory reports, fall below \$250 billion, \$50 billion, or \$1 billion, respectively, for each of four consecutive quarters.

(3) *Subsidiaries of covered institutions.* A Level 1, Level 2, or Level 3 covered institution that is a subsidiary of a national bank, Federal savings association, or Federal branch or agency of a foreign bank that is a covered institution will remain subject to the requirements applicable to such national bank, Federal savings association, or Federal branch or agency at that level under this part unless and until the total consolidated assets of the national bank, Federal savings association, Federal branch or agency, or depository institution holding company of the national bank, Federal savings association, or Federal branch or agency, as reported on its regulatory reports, fall below \$250 billion, \$50

billion, or \$1 billion, respectively, for each of four consecutive quarters.

(4) *Calculations.* The calculations under this paragraph (b) of this section will be effective on the as-of date of the fourth consecutive regulatory report.

(c) *Compliance of covered institutions that are subsidiaries of covered institutions.* A covered institution that is a subsidiary of another covered institution may meet any requirement of this part if the parent covered institution complies with that requirement in a way that causes the relevant portion of the incentive-based compensation program of the subsidiary covered institution to comply with that requirement.

#### **§ 42.4 Requirements and prohibitions applicable to all covered institutions.**

(a) *In general.* A covered institution must not establish or maintain any type of incentive-based compensation arrangement, or any feature of any such arrangement, that encourages inappropriate risks by the covered institution:

(1) By providing a covered person with excessive compensation, fees, or benefits; or

(2) That could lead to material financial loss to the covered institution.

(b) *Excessive compensation.* Compensation, fees, and benefits are considered excessive for purposes of paragraph (a)(1) of this section when amounts paid are unreasonable or disproportionate to the value of the services performed by a covered person, taking into consideration all relevant factors, including, but not limited to:

(1) The combined value of all compensation, fees, or benefits provided to the covered person;

(2) The compensation history of the covered person and other individuals with comparable expertise at the covered institution;

(3) The financial condition of the covered institution;

(4) Compensation practices at comparable institutions, based upon such factors as asset size, geographic location, and the complexity of the covered institution's operations and assets;

(5) For post-employment benefits, the projected total cost and benefit to the covered institution; and

(6) Any connection between the covered person and any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the covered institution.

(c) *Material financial loss.* An incentive-based compensation arrangement at a covered institution encourages inappropriate risks that

could lead to material financial loss to the covered institution, unless the arrangement:

(1) Appropriately balances risk and reward;

(2) Is compatible with effective risk management and controls; and

(3) Is supported by effective governance.

(d) *Performance measures.* An incentive-based compensation arrangement will not be considered to appropriately balance risk and reward for purposes of paragraph (c)(1) of this section unless:

(1) The arrangement includes financial and non-financial measures of performance, including considerations of risk-taking, that are relevant to a covered person's role within a covered institution and to the type of business in which the covered person is engaged and that are appropriately weighted to reflect risk-taking;

(2) The arrangement is designed to allow non-financial measures of performance to override financial measures of performance when appropriate in determining incentive-based compensation; and

(3) Any amounts to be awarded under the arrangement are subject to adjustment to reflect actual losses, inappropriate risks taken, compliance deficiencies, or other measures or aspects of financial and non-financial performance.

(e) *Board of directors.* A covered institution's board of directors, or a committee thereof, must:

(1) Conduct oversight of the covered institution's incentive-based compensation program;

(2) Approve incentive-based compensation arrangements for senior executive officers, including the amounts of all awards and, at the time of vesting, payouts under such arrangements; and

(3) Approve any material exceptions or adjustments to incentive-based compensation policies or arrangements for senior executive officers.

(f) *Disclosure and recordkeeping requirements.* A covered institution must create annually and maintain for a period of at least seven years records that document the structure of all its incentive-based compensation arrangements and demonstrate compliance with this part. A covered institution must disclose the records to the OCC upon request. At a minimum, the records must include copies of all incentive-based compensation plans, a record of who is subject to each plan, and a description of how the incentive-based compensation program is

compatible with effective risk management and controls.

(g) *Rule of construction.* A covered institution is not required to report the actual amount of compensation, fees, or benefits of individual covered persons as part of the disclosure and recordkeeping requirements under this part.

#### **§ 42.5 Additional disclosure and recordkeeping requirements for Level 1 and Level 2 covered institutions.**

(a) A Level 1 or Level 2 covered institution must create annually and maintain for a period of at least seven years records that document:

(1) The covered institution's senior executive officers and significant risk-takers, listed by legal entity, job function, organizational hierarchy, and line of business;

(2) The incentive-based compensation arrangements for senior executive officers and significant risk-takers, including information on percentage of incentive-based compensation deferred and form of award;

(3) Any forfeiture and downward adjustment or clawback reviews and decisions for senior executive officers and significant risk-takers; and

(4) Any material changes to the covered institution's incentive-based compensation arrangements and policies.

(b) A Level 1 or Level 2 covered institution must create and maintain records in a manner that allows for an independent audit of incentive-based compensation arrangements, policies, and procedures, including, those required under § 42.11.

(c) A Level 1 or Level 2 covered institution must provide the records described in paragraph (a) of this section to the OCC in such form and with such frequency as requested by the OCC.

#### **§ 42.6 Reservation of authority for Level 3 covered institutions.**

(a) *In general.* The OCC may require a Level 3 covered institution with average total consolidated assets greater than or equal to \$10 billion and less than \$50 billion to comply with some or all of the provisions of §§ 42.5 and 42.7 through 42.11 if the OCC determines that the Level 3 covered institution's complexity of operations or compensation practices are consistent with those of a Level 1 or Level 2 covered institution.

(b) *Factors considered.* Any exercise of authority under this section will be in writing by the OCC in accordance with procedures established by the OCC and will consider the activities,

complexity of operations, risk profile, and compensation practices of the Level 3 covered institution, in addition to any other relevant factors.

**§ 42.7 Deferral, forfeiture and downward adjustment, and clawback requirements for Level 1 and Level 2 covered institutions.**

An incentive-based compensation arrangement at a Level 1 or Level 2 covered institution will not be considered to appropriately balance risk and reward, for purposes of § 42.4(c)(1), unless the following requirements are met.

(a) *Deferral.* (1) Qualifying incentive-based compensation must be deferred as follows:

(i) *Minimum required deferral amount.* (A) A Level 1 covered institution must defer at least 60 percent of a senior executive officer's qualifying incentive-based compensation awarded for each performance period.

(B) A Level 1 covered institution must defer at least 50 percent of a significant risk-taker's qualifying incentive-based compensation awarded for each performance period.

(C) A Level 2 covered institution must defer at least 50 percent of a senior executive officer's qualifying incentive-based compensation awarded for each performance period.

(D) A Level 2 covered institution must defer at least 40 percent of a significant risk-taker's qualifying incentive-based compensation awarded for each performance period.

(ii) *Minimum required deferral period.* (A) For a senior executive officer or significant risk-taker of a Level 1 covered institution, the deferral period for deferred qualifying incentive-based compensation must be at least 4 years.

(B) For a senior executive officer or significant risk-taker of a Level 2 covered institution, the deferral period for deferred qualifying incentive-based compensation must be at least 3 years.

(iii) *Vesting of amounts during deferral period.*—(A) *Pro rata vesting.* During a deferral period, deferred qualifying incentive-based compensation may not vest faster than on a pro rata annual basis beginning no earlier than the first anniversary of the end of the performance period for which the amounts were awarded.

(B) *Acceleration of vesting.* A Level 1 or Level 2 covered institution must not accelerate the vesting of a covered person's deferred qualifying incentive-based compensation that is required to be deferred under this part, except in the case of death or disability of such covered person.

(2) Incentive-based compensation awarded under a long-term incentive plan must be deferred as follows:

(i) *Minimum required deferral amount.* (A) A Level 1 covered institution must defer at least 60 percent of a senior executive officer's incentive-based compensation awarded under a long-term incentive plan for each performance period.

(B) A Level 1 covered institution must defer at least 50 percent of a significant risk-taker's incentive-based compensation awarded under a long-term incentive plan for each performance period.

(C) A Level 2 covered institution must defer at least 50 percent of a senior executive officer's incentive-based compensation awarded under a long-term incentive plan for each performance period.

(D) A Level 2 covered institution must defer at least 40 percent of a significant risk-taker's incentive-based compensation awarded under a long-term incentive plan for each performance period.

(ii) *Minimum required deferral period.* (A) For a senior executive officer or significant risk-taker of a Level 1 covered institution, the deferral period for deferred long-term incentive plan amounts must be at least 2 years.

(B) For a senior executive officer or significant risk-taker of a Level 2 covered institution, the deferral period for deferred long-term incentive plan amounts must be at least 1 year.

(iii) *Vesting of amounts during deferral period.*—(A) *Pro rata vesting.* During a deferral period, deferred long-term incentive plan amounts may not vest faster than on a pro rata annual basis beginning no earlier than the first anniversary of the end of the performance period for which the amounts were awarded.

(B) *Acceleration of vesting.* A Level 1 or Level 2 covered institution must not accelerate the vesting of a covered person's deferred long-term incentive plan amounts that is required to be deferred under this part, except in the case of death or disability of such covered person.

(3) *Adjustments of deferred qualifying incentive-based compensation and deferred long-term incentive plan compensation amounts.* A Level 1 or Level 2 covered institution may not increase deferred qualifying incentive-based compensation or deferred long-term incentive plan amounts for a senior executive officer or significant risk-taker during the deferral period. For purposes of this paragraph, an increase in value attributable solely to a change in share value, a change in interest rates, or the payment of interest according to terms set out at the time of the award is not

considered an increase in incentive-based compensation amounts.

(4) *Composition of deferred qualifying incentive-based compensation and deferred long-term incentive plan compensation for Level 1 and Level 2 covered institutions.*—(i) *Cash and equity-like instruments.* For a senior executive officer or significant risk-taker of a Level 1 or Level 2 covered institution that issues equity or is an affiliate of a covered institution that issues equity, any deferred qualifying incentive-based compensation or deferred long-term incentive plan amounts must include substantial portions of both deferred cash and equity-like instruments throughout the deferral period.

(ii) *Options.* If a senior executive officer or significant risk-taker of a Level 1 or Level 2 covered institution receives incentive-based compensation for a performance period in the form of options, the total amount of such options that may be used to meet the minimum deferral amount requirements of paragraph (a)(1)(i) or (a)(2)(i) of this section is limited to no more than 15 percent of the amount of total incentive-based compensation awarded to the senior executive officer or significant risk-taker for that performance period.

(b) *Forfeiture and downward adjustment.*—(1) *Compensation at risk.*—(i) A Level 1 or Level 2 covered institution must place at risk of forfeiture all unvested deferred incentive-based compensation of any senior executive officer or significant risk-taker, including unvested deferred amounts awarded under long-term incentive plans.

(ii) A Level 1 or Level 2 covered institution must place at risk of downward adjustment all of a senior executive officer's or significant risk-taker's incentive-based compensation amounts not yet awarded for the current performance period, including amounts payable under long-term incentive plans.

(2) *Events triggering forfeiture and downward adjustment review.* At a minimum, a Level 1 or Level 2 covered institution must consider forfeiture and downward adjustment of incentive-based compensation of senior executive officers and significant risk-takers described in paragraph (b)(3) of this section due to any of the following adverse outcomes at the covered institution:

(i) Poor financial performance attributable to a significant deviation from the risk parameters set forth in the covered institution's policies and procedures;

(ii) Inappropriate risk taking, regardless of the impact on financial performance;

(iii) Material risk management or control failures;

(iv) Non-compliance with statutory, regulatory, or supervisory standards that results in:

(A) Enforcement or legal action against the covered institution brought by a federal or state regulator or agency; or

(B) A requirement that the covered institution report a restatement of a financial statement to correct a material error; and

(v) Other aspects of conduct or poor performance as defined by the covered institution.

(3) *Senior executive officers and significant risk-takers affected by forfeiture and downward adjustment.* A Level 1 or Level 2 covered institution must consider forfeiture and downward adjustment for a senior executive officer or significant risk-taker with direct responsibility, or responsibility due to the senior executive officer's or significant risk-taker's role or position in the covered institution's organizational structure, for the events related to the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section.

(4) *Determining forfeiture and downward adjustment amounts.* A Level 1 or Level 2 covered institution must consider, at a minimum, the following factors when determining the amount or portion of a senior executive officer's or significant risk-taker's incentive-based compensation that should be forfeited or adjusted downward:

(i) The intent of the senior executive officer or significant risk-taker to operate outside the risk governance framework approved by the covered institution's board of directors or to depart from the covered institution's policies and procedures;

(ii) The senior executive officer's or significant risk-taker's level of participation in, awareness of, and responsibility for, the events triggering the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section;

(iii) Any actions the senior executive officer or significant risk-taker took or could have taken to prevent the events triggering the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section;

(iv) The financial and reputational impact of the events triggering the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section to the covered institution, the line or sub-line of business, and

individuals involved, as applicable, including the magnitude of any financial loss and the cost of known or potential subsequent fines, settlements, and litigation;

(v) The causes of the events triggering the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section, including any decision-making by other individuals; and

(vi) Any other relevant information, including past behavior and past risk outcomes attributable to the senior executive officer or significant risk-taker.

(c) *Clawback.* A Level 1 or Level 2 covered institution must include clawback provisions in incentive-based compensation arrangements for senior executive officers and significant risk-takers that, at a minimum, allow the covered institution to recover incentive-based compensation from a current or former senior executive officer or significant risk-taker for seven years following the date on which such compensation vests, if the covered institution determines that the senior executive officer or significant risk-taker engaged in:

(1) Misconduct that resulted in significant financial or reputational harm to the covered institution;

(2) Fraud; or

(3) Intentional misrepresentation of information used to determine the senior executive officer or significant risk-taker's incentive-based compensation.

#### **§ 42.8 Additional prohibitions for Level 1 and Level 2 covered institutions.**

An incentive-based compensation arrangement at a Level 1 or Level 2 covered institution will be considered to provide incentives that appropriately balance risk and reward for purposes of § 42.4(c)(1) only if such institution complies with the following prohibitions.

(a) *Hedging.* A Level 1 or Level 2 covered institution must not purchase a hedging instrument or similar instrument on behalf of a covered person to hedge or offset any decrease in the value of the covered person's incentive-based compensation.

(b) *Maximum incentive-based compensation opportunity.* A Level 1 or Level 2 covered institution must not award incentive-based compensation to:

(1) A senior executive officer in excess of 125 percent of the target amount for that incentive-based compensation; or

(2) A significant risk-taker in excess of 150 percent of the target amount for that incentive-based compensation.

(c) *Relative performance measures.* A Level 1 or Level 2 covered institution

must not use incentive-based compensation performance measures that are based solely on industry peer performance comparisons.

(d) *Volume driven incentive-based compensation.* A Level 1 or Level 2 covered institution must not provide incentive-based compensation to a covered person that is based solely on transaction revenue or volume without regard to transaction quality or compliance of the covered person with sound risk management.

#### **§ 42.9 Risk management and controls requirements for Level 1 and Level 2 covered institutions.**

An incentive-based compensation arrangement at a Level 1 or Level 2 covered institution will be considered to be compatible with effective risk management and controls for purposes of § 42.4(c)(2) only if such institution meets the following requirements.

(a) A Level 1 or Level 2 covered institution must have a risk management framework for its incentive-based compensation program that:

(1) Is independent of any lines of business;

(2) Includes an independent compliance program that provides for internal controls, testing, monitoring, and training with written policies and procedures consistent with § 42.11; and

(3) Is commensurate with the size and complexity of the covered institution's operations.

(b) A Level 1 or Level 2 covered institution must:

(1) Provide individuals engaged in control functions with the authority to influence the risk-taking of the business areas they monitor; and

(2) Ensure that covered persons engaged in control functions are compensated in accordance with the achievement of performance objectives linked to their control functions and independent of the performance of those business areas.

(c) A Level 1 or Level 2 covered institution must provide for the independent monitoring of:

(1) All incentive-based compensation plans in order to identify whether those plans provide incentives that appropriately balance risk and reward;

(2) Events related to forfeiture and downward adjustment reviews and decisions of forfeiture and downward adjustment reviews in order to determine consistency with § 42.7(b); and

(3) Compliance of the incentive-based compensation program with the covered institution's policies and procedures.

#### § 42.10 Governance requirements for Level 1 and Level 2 covered institutions.

An incentive-based compensation arrangement at a Level 1 or Level 2 covered institution will not be considered to be supported by effective governance for purposes of § 42.4(c)(3), unless:

(a) The covered institution establishes a compensation committee composed solely of directors who are not senior executive officers to assist the board of directors in carrying out its responsibilities under § 42.4(e); and

(b) The compensation committee established pursuant to paragraph (a) of this section obtains:

(1) Input from the risk and audit committees of the covered institution's board of directors, or groups performing similar functions, and risk management function on the effectiveness of risk measures and adjustments used to balance risk and reward in incentive-based compensation arrangements;

(2) A written assessment of the effectiveness of the covered institution's incentive-based compensation program and related compliance and control processes in providing risk-taking incentives that are consistent with the risk profile of the covered institution, submitted on an annual or more frequent basis by the management of the covered institution and developed with input from the risk and audit committees of its board of directors, or groups performing similar functions, and from the covered institution's risk management and audit functions; and

(3) An independent written assessment of the effectiveness of the covered institution's incentive-based compensation program and related compliance and control processes in providing risk-taking incentives that are consistent with the risk profile of the covered institution, submitted on an annual or more frequent basis by the internal audit or risk management function of the covered institution, developed independently of the covered institution's management.

#### § 42.11 Policies and procedures requirements for Level 1 and Level 2 covered institutions.

A Level 1 or Level 2 covered institution must develop and implement policies and procedures for its incentive-based compensation program that, at a minimum:

(a) Are consistent with the prohibitions and requirements of this part;

(b) Specify the substantive and procedural criteria for the application of forfeiture and clawback, including the process for determining the amount of

incentive-based compensation to be clawed back;

(c) Require that the covered institution maintain documentation of final forfeiture, downward adjustment, and clawback decisions;

(d) Specify the substantive and procedural criteria for the acceleration of payments of deferred incentive-based compensation to a covered person, consistent with § 42.7(a)(1)(iii)(B) and (a)(2)(iii)(B));

(e) Identify and describe the role of any employees, committees, or groups authorized to make incentive-based compensation decisions, including when discretion is authorized;

(f) Describe how discretion is expected to be exercised to appropriately balance risk and reward;

(g) Require that the covered institution maintain documentation of the establishment, implementation, modification, and monitoring of incentive-based compensation arrangements, sufficient to support the covered institution's decisions;

(h) Describe how incentive-based compensation arrangements will be monitored;

(i) Specify the substantive and procedural requirements of the independent compliance program consistent with § 42.9(a)(2); and

(j) Ensure appropriate roles for risk management, risk oversight, and other control function personnel in the covered institution's processes for:

(1) Designing incentive-based compensation arrangements and determining awards, deferral amounts, deferral periods, forfeiture, downward adjustment, clawback, and vesting; and

(2) Assessing the effectiveness of incentive-based compensation arrangements in restraining inappropriate risk-taking.

#### § 42.12 Indirect actions.

A covered institution must not indirectly, or through or by any other person, do anything that would be unlawful for such covered institution to do directly under this part.

#### § 42.13 Enforcement.

The provisions of this part shall be enforced under section 505 of the Gramm-Leach-Bliley Act and, for purposes of such section, a violation of this part shall be treated as a violation of subtitle A of title V of such Act.

#### Federal Reserve Board

##### 12 CFR Chapter II

##### Authority and Issuance

For the reasons set forth in the joint preamble, the Board proposes to amend 12 CFR chapter II as follows:

- 2. Add part 236 to read as follows:

#### PART 236—INCENTIVE-BASED COMPENSATION ARRANGEMENTS (REGULATION JJ)

Sec.

236.1 Authority, scope, and initial applicability.

236.2 Definitions.

236.3 Applicability.

236.4 Requirements and prohibitions applicable to all covered institutions.

236.5 Additional disclosure and recordkeeping requirements for Level 1 and Level 2 covered institutions.

236.6 Reservation of authority for Level 3 covered institutions.

236.7 Deferral, forfeiture and downward adjustment, and clawback requirements for Level 1 and Level 2 covered institutions.

236.8 Additional prohibitions for Level 1 and Level 2 covered institutions.

236.9 Risk management and controls requirements for Level 1 and Level 2 covered institutions.

236.10 Governance requirements for Level 1 and Level 2 covered institutions.

236.11 Policies and procedures requirements for Level 1 and Level 2 covered institutions.

236.12 Indirect actions.

236.13 Enforcement.

**Authority:** 12 U.S.C. 24, 321–338a, 1462a, 1467a, 1818, 1844(b), 3108, and 5641.

#### § 236.1 Authority, scope, and initial applicability.

(a) *Authority.* This part is issued pursuant to section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5641), section 5136 of the Revised Statutes (12 U.S.C. 24), the Federal Reserve Act (12 U.S.C. 321–338a), section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818), section 5 of the Bank Holding Company Act of 1956 (12 U.S.C. 1844(b)), sections 3 and 10 of the Home Owners' Loan Act of 1933 (12 U.S.C. 1462a and 1467a), and section 13 of the International Banking Act of 1978 (12 U.S.C. 3108).

(b) *Scope.* This part applies to a covered institution with average total consolidated assets greater than or equal to \$1 billion that offers incentive-based compensation to covered persons.

(c) *Initial applicability*—(1) *Compliance date.* A covered institution must meet the requirements of this part no later than [Date of the beginning of the first calendar quarter that begins at least 540 days after a final rule is published in the **Federal Register**]. Whether a covered institution is a Level 1, Level 2, or Level 3 covered institution at that time will be determined based on average total consolidated assets as of [Date of the beginning of the first calendar quarter that begins after a final

rule is published in the **Federal Register**].

(2) *Grandfathered plans*. A covered institution is not required to comply with the requirements of this part with respect to any incentive-based compensation plan with a performance period that begins before [Compliance Date as described in § 236.1(c)(1)].

(d) *Preservation of authority*. Nothing in this part in any way limits the authority of the Board under other provisions of applicable law and regulations.

### § 236.2 Definitions.

For purposes of this part only, the following definitions apply unless otherwise specified:

(a) *Affiliate* means any company that controls, is controlled by, or is under common control with another company.

(b) *Average total consolidated assets* means the average of a regulated institution's total consolidated assets, as reported on the regulated institution's regulatory reports, for the four most recent consecutive quarters. If a regulated institution has not filed a regulatory report for each of the four most recent consecutive quarters, the regulated institution's average total consolidated assets means the average of its total consolidated assets, as reported on its regulatory reports, for the most recent quarter or consecutive quarters, as applicable. Average total consolidated assets are measured on the as-of date of the most recent regulatory report used in the calculation of the average.

(c) *To award incentive-based compensation* means to make a final determination, conveyed to a covered person, of the amount of incentive-based compensation payable to the covered person for performance over a performance period.

(d) *Board of directors* means the governing body of a covered institution that oversees the activities of the covered institution, often referred to as the board of directors or board of managers. For a foreign banking organization, "board of directors" refers to the relevant oversight body for the firm's U.S. branch, agency or operations, consistent with the foreign banking organization's overall corporate and management structure.

(e) *Clawback* means a mechanism by which a covered institution can recover vested incentive-based compensation from a covered person.

(f) *Compensation, fees, or benefits* means all direct and indirect payments, both cash and non-cash, awarded to, granted to, or earned by or for the benefit of, any covered person in

exchange for services rendered to a covered institution.

(g) *Control* means that any company has control over a bank or over any company if—

(1) The company directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 percent or more of any class of voting securities of the bank or company;

(2) The company controls in any manner the election of a majority of the directors or trustees of the bank or company; or

(3) The Board determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company.

(h) *Control function* means a compliance, risk management, internal audit, legal, human resources, accounting, financial reporting, or finance role responsible for identifying, measuring, monitoring, or controlling risk-taking.

(i) *Covered institution* means a regulated institution with average total consolidated assets greater than or equal to \$1 billion.

(j) *Covered person* means any executive officer, employee, director, or principal shareholder who receives incentive-based compensation at a covered institution.

(k) *Deferral* means the delay of vesting of incentive-based compensation beyond the date on which the incentive-based compensation is awarded.

(l) *Deferral period* means the period of time between the date a performance period ends and the last date on which the incentive-based compensation awarded for such performance period vests.

(m) [Reserved].

(n) *Director* of a covered institution means a member of the board of directors.

(o) *Downward adjustment* means a reduction of the amount of a covered person's incentive-based compensation not yet awarded for any performance period that has already begun, including amounts payable under long-term incentive plans, in accordance with a forfeiture and downward adjustment review under § 236.7(b).

(p) *Equity-like instrument* means:

(1) Equity in the covered institution or of any affiliate of the covered institution; or

(2) A form of compensation:

(i) Payable at least in part based on the price of the shares or other equity instruments of the covered institution or of any affiliate of the covered institution; or

(ii) That requires, or may require, settlement in the shares of the covered institution or of any affiliate of the covered institution.

(q) *Forfeiture* means a reduction of the amount of deferred incentive-based compensation awarded to a covered person that has not vested.

(r) *Incentive-based compensation* means any variable compensation, fees, or benefits that serve as an incentive or reward for performance.

(s) *Incentive-based compensation arrangement* means an agreement between a covered institution and a covered person, under which the covered institution provides incentive-based compensation to the covered person, including incentive-based compensation delivered through one or more incentive-based compensation plans.

(t) *Incentive-based compensation plan* means a document setting forth terms and conditions governing the opportunity for and the payment of incentive-based compensation payments to one or more covered persons.

(u) *Incentive-based compensation program* means a covered institution's framework for incentive-based compensation that governs incentive-based compensation practices and establishes related controls.

(v) *Level 1 covered institution* means a covered institution with average total consolidated assets greater than or equal to \$250 billion and any subsidiary of a Level 1 covered institution that would itself be a covered institution.

(w) *Level 2 covered institution* means a covered institution with average total consolidated assets greater than or equal to \$50 billion that is not a Level 1 covered institution and any subsidiary of a Level 2 covered institution that would itself be a covered institution.

(x) *Level 3 covered institution* means a covered institution with average total consolidated assets greater than or equal to \$1 billion that is not a Level 1 covered institution or Level 2 covered institution.

(y) *Long-term incentive plan* means a plan to provide incentive-based compensation that is based on a performance period of at least three years.

(z) *Option* means an instrument through which a covered institution provides a covered person the right, but not the obligation, to buy a specified number of shares representing an ownership stake in a company at a predetermined price within a set time period or on a date certain, or any similar instrument, such as a stock appreciation right.

(aa) *Performance period* means the period during which the performance of a covered person is assessed for purposes of determining incentive-based compensation.

(bb) *Principal shareholder* means a natural person who, directly or indirectly, or acting through or in concert with one or more persons, owns, controls, or has the power to vote 10 percent or more of any class of voting securities of a covered institution.

(cc) *Qualifying incentive-based compensation* means the amount of incentive-based compensation awarded to a covered person for a particular performance period, excluding amounts awarded to the covered person for that particular performance period under a long-term incentive plan.

(dd) *Regulated institution* means:

(1) A state member bank, as defined in 12 CFR 208.2(g);

(2) A bank holding company, as defined in 12 CFR 225.2(c), that is not a foreign banking organization, as defined in 12 CFR 211.21(o), and a subsidiary of such a bank holding company that is not a depository institution, broker-dealer, or investment adviser;

(3) A savings and loan holding company, as defined in 12 CFR 238.2(m), and a subsidiary of a savings and loan holding company that is not a depository institution, broker-dealer, or investment adviser;

(4) An organization operating under section 25 or 25A of the Federal Reserve Act ("Edge or Agreement Corporation");

(5) A state-licensed uninsured branch or agency of a foreign bank, as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813); and

(6) The U.S. operations of a foreign banking organization, as defined in 12 CFR 211.21(o), excluding any Federal branch or agency and any state insured branch of the foreign banking organization, and a U.S. subsidiary of such foreign banking organization that is not a depository institution, broker-dealer, or investment adviser.

(ee) *Regulatory report* means:

(1) For a state member bank, Consolidated Reports of Condition and Income ("Call Report");

(2) For a bank holding company that is not a foreign banking organization, Consolidated Financial Statements for Bank Holding Companies ("FR Y-9C");

(3) For a savings and loan holding company, FR Y-9C; if a savings and loan holding company is not required to file an FR Y-9C, Quarterly Savings and Loan Holding Company Report ("FR 2320"), if the savings and loan holding company reports consolidated assets on the FR 2320;

(4) For a savings and loan holding company that does not file a regulatory report within the meaning of § 236.2(ee)(3), a report of average total consolidated assets filed with the Board on a quarterly basis.

(5) For an Edge or Agreement Corporation, Consolidated Report of Condition and Income for Edge and Agreement Corporations ("FR 2886b");

(6) For a state-licensed uninsured branch or agency of a foreign bank, Reports of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks—FFIEC 002;

(7) For the U.S. operations of a foreign banking organization, a report of average total consolidated U.S. assets filed with the Board on a quarterly basis; and

(8) For a regulated institution that is a subsidiary of a bank holding company, savings and loan holding company, or a foreign banking organization, a report of the subsidiary's total consolidated assets prepared by the bank holding company, savings and loan holding company, or subsidiary in a form that is acceptable to the Board.

(ff) *Section 956 affiliate* means an affiliate that is an institution described in § 236.2(i), 12 CFR 42.2(i), 12 CFR 372.2(i), 12 CFR 741.2(i), 12 CFR 1232.2(i), or 17 CFR 303.2(i).

(gg) *Senior executive officer* means a covered person who holds the title or, without regard to title, salary, or compensation, performs the function of one or more of the following positions at a covered institution for any period of time in the relevant performance period: President, chief executive officer, executive chairman, chief operating officer, chief financial officer, chief investment officer, chief legal officer, chief lending officer, chief risk officer, chief compliance officer, chief audit executive, chief credit officer, chief accounting officer, or head of a major business line or control function.

(hh) *Significant risk-taker* means:

(1) Any covered person at a Level 1 or Level 2 covered institution, other than a senior executive officer, who received annual base salary and incentive-based compensation for the last calendar year that ended at least 180 days before the beginning of the performance period of which at least one-third is incentive-based compensation and is—

(i) A covered person of a Level 1 covered institution who received annual base salary and incentive-based compensation for the last calendar year that ended at least 180 days before the beginning of the performance period that placed the covered person among the highest 5 percent in annual base salary and incentive-based

compensation among all covered persons (excluding senior executive officers) of the Level 1 covered institution together with all individuals who receive incentive-based compensation at any section 956 affiliate of the Level 1 covered institution;

(ii) A covered person of a Level 2 covered institution who received annual base salary and incentive-based compensation for the last calendar year that ended at least 180 days before the beginning of the performance period that placed the covered person among the highest 2 percent in annual base salary and incentive-based compensation among all covered persons (excluding senior executive officers) of the Level 2 covered institution together with all individuals who receive incentive-based compensation at any section 956 affiliate of the Level 2 covered institution; or

(iii) A covered person of a covered institution who may commit or expose 0.5 percent or more of the common equity tier 1 capital, or in the case of a registered securities broker or dealer, 0.5 percent or more of the tentative net capital, of the covered institution or of any section 956 affiliate of the covered institution, whether or not the individual is a covered person of that specific legal entity; and

(2) Any covered person at a Level 1 or Level 2 covered institution, other than a senior executive officer, who is designated as a "significant risk-taker" by the Board because of that person's ability to expose a covered institution to risks that could lead to material financial loss in relation to the covered institution's size, capital, or overall risk tolerance, in accordance with procedures established by the Board, or by the covered institution.

(3) For purposes of this part, an individual who is an employee, director, senior executive officer, or principal shareholder of an affiliate of a Level 1 or Level 2 covered institution, where such affiliate has less than \$1 billion in total consolidated assets, and who otherwise would meet the requirements for being a significant risk-taker under paragraph (hh)(1)(iii) of this section, shall be considered to be a significant risk-taker with respect to the Level 1 or Level 2 covered institution for which the individual may commit or expose 0.5 percent or more of common equity tier 1 capital or tentative net capital. The Level 1 or Level 2 covered institution for which the individual commits or exposes 0.5 percent or more of common equity tier 1 capital or tentative net capital shall ensure that

the individual's incentive compensation arrangement complies with the requirements of this part.

(4) If the Board determines, in accordance with procedures established by the Board, that a Level 1 covered institution's activities, complexity of operations, risk profile, and compensation practices are similar to those of a Level 2 covered institution, the Level 1 covered institution may apply paragraph (hh)(1)(i) of this section to covered persons of the Level 1 covered institution by substituting "2 percent" for "5 percent".

(ii) *Subsidiary* means any company that is owned or controlled directly or indirectly by another company; provided that the following are not subsidiaries for purposes of this part:

(1) Any merchant banking investment that is owned or controlled pursuant to 12 U.S.C. 1843(k)(4)(H) and subpart J of the Board's Regulation Y (12 CFR part 225); and

(2) Any company with respect to which the covered institution acquired ownership or control in the ordinary course of collecting a debt previously contracted in good faith.

(jj) *Vesting of incentive-based compensation* means the transfer of ownership of the incentive-based compensation to the covered person to whom the incentive-based compensation was awarded, such that the covered person's right to the incentive-based compensation is no longer contingent on the occurrence of any event.

### **§ 236.3 Applicability.**

(a) *When average total consolidated assets increase*—(1) *In general.* A regulated institution shall become a Level 1, Level 2, or Level 3 covered institution when its average total consolidated assets or the average total consolidated assets of any affiliate of the regulated institution equals or exceeds \$250 billion, \$50 billion, or \$1 billion, respectively.

(2) *Compliance date.* A regulated institution that becomes a Level 1, Level 2, or Level 3 covered institution pursuant to paragraph (a)(1) of this section shall comply with the requirements of this part for a Level 1, Level 2, or Level 3 covered institution, respectively, not later than the first day of the first calendar quarter that begins at least 540 days after the date on which the regulated institution becomes a Level 1, Level 2, or Level 3 covered institution, respectively. Until that day, the Level 1, Level 2, or Level 3 covered institution will remain subject to the requirements of this part, if any, that applied to the regulated institution on

the day before the date on which it became a Level 1, Level 2, or Level 3 covered institution.

(3) *Grandfathered plans.* A regulated institution that becomes a Level 1, Level 2, or Level 3 covered institution under paragraph (a)(1) of this section is not required to comply with requirements of this part applicable to a Level 1, Level 2, or Level 3 covered institution, respectively, with respect to any incentive-based compensation plan with a performance period that begins before the date described in paragraph (a)(2) of this section. Any such incentive-based compensation plan shall remain subject to the requirements under this part, if any, that applied to the regulated institution at the beginning of the performance period.

(b) *When total consolidated assets decrease.* A Level 1, Level 2, or Level 3 covered institution will remain subject to the requirements applicable to such covered institution under this part unless and until the total consolidated assets of such covered institution, or the total consolidated assets of another Level 1, Level 2, or Level 3 covered institution of which the first covered institution is a subsidiary, as reported on the covered institution's regulatory reports, fall below \$250 billion, \$50 billion, or \$1 billion, respectively, for each of four consecutive quarters. The calculation will be effective on the as-of date of the fourth consecutive regulatory report.

(c) *Compliance of covered institutions that are subsidiaries of covered institutions.* A covered institution that is a subsidiary of another covered institution may meet any requirement of this part if the parent covered institution complies with that requirement in such a way that causes the relevant portion of the incentive-based compensation program of the subsidiary covered institution to comply with that requirement.

### **§ 236.4 Requirements and prohibitions applicable to all covered institutions.**

(a) *In general.* A covered institution must not establish or maintain any type of incentive-based compensation arrangement, or any feature of any such arrangement, that encourages inappropriate risks by the covered institution:

(1) By providing a covered person with excessive compensation, fees, or benefits; or

(2) That could lead to material financial loss to the covered institution.

(b) *Excessive compensation.* Compensation, fees, and benefits are considered excessive for purposes of paragraph (a)(1) of this section when

amounts paid are unreasonable or disproportionate to the value of the services performed by a covered person, taking into consideration all relevant factors, including, but not limited to:

(1) The combined value of all compensation, fees, or benefits provided to the covered person;

(2) The compensation history of the covered person and other individuals with comparable expertise at the covered institution;

(3) The financial condition of the covered institution;

(4) Compensation practices at comparable institutions, based upon such factors as asset size, geographic location, and the complexity of the covered institution's operations and assets;

(5) For post-employment benefits, the projected total cost and benefit to the covered institution; and

(6) Any connection between the covered person and any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the covered institution.

(c) *Material financial loss.* An incentive-based compensation arrangement at a covered institution encourages inappropriate risks that could lead to material financial loss to the covered institution, unless the arrangement:

(1) Appropriately balances risk and reward;

(2) Is compatible with effective risk management and controls; and

(3) Is supported by effective governance.

(d) *Performance measures.* An incentive-based compensation arrangement will not be considered to appropriately balance risk and reward for purposes of paragraph (c)(1) of this section unless:

(1) The arrangement includes financial and non-financial measures of performance, including considerations of risk-taking, that are relevant to a covered person's role within a covered institution and to the type of business in which the covered person is engaged and that are appropriately weighted to reflect risk-taking;

(2) The arrangement is designed to allow non-financial measures of performance to override financial measures of performance when appropriate in determining incentive-based compensation; and

(3) Any amounts to be awarded under the arrangement are subject to adjustment to reflect actual losses, inappropriate risks taken, compliance deficiencies, or other measures or aspects of financial and non-financial performance.

(e) *Board of directors.* A covered institution's board of directors, or a committee thereof, must:

(1) Conduct oversight of the covered institution's incentive-based compensation program;

(2) Approve incentive-based compensation arrangements for senior executive officers, including the amounts of all awards and, at the time of vesting, payouts under such arrangements; and

(3) Approve any material exceptions or adjustments to incentive-based compensation policies or arrangements for senior executive officers.

(f) *Disclosure and recordkeeping requirements.* A covered institution must create annually and maintain for a period of at least seven years records that document the structure of all its incentive-based compensation arrangements and demonstrate compliance with this part. A covered institution must disclose the records to the Board upon request. At a minimum, the records must include copies of all incentive-based compensation plans, a record of who is subject to each plan, and a description of how the incentive-based compensation program is compatible with effective risk management and controls.

(g) *Rule of construction.* A covered institution is not required to report the actual amount of compensation, fees, or benefits of individual covered persons as part of the disclosure and recordkeeping requirements under this part.

**§ 236.5 Additional disclosure and recordkeeping requirements for Level 1 and Level 2 covered institutions.**

(a) A Level 1 or Level 2 covered institution must create annually and maintain for a period of at least seven years records that document:

(1) The covered institution's senior executive officers and significant risk-takers, listed by legal entity, job function, organizational hierarchy, and line of business;

(2) The incentive-based compensation arrangements for senior executive officers and significant risk-takers, including information on percentage of incentive-based compensation deferred and form of award;

(3) Any forfeiture and downward adjustment or clawback reviews and decisions for senior executive officers and significant risk-takers; and

(4) Any material changes to the covered institution's incentive-based compensation arrangements and policies.

(b) A Level 1 or Level 2 covered institution must create and maintain

records in a manner that allows for an independent audit of incentive-based compensation arrangements, policies, and procedures, including, those required under § 236.11.

(c) A Level 1 or Level 2 covered institution must provide the records described in paragraph (a) of this section to the Board in such form and with such frequency as requested by the Board.

**§ 236.6 Reservation of authority for Level 3 covered institutions.**

(a) *In general.* The Board may require a Level 3 covered institution with average total consolidated assets greater than or equal to \$10 billion and less than \$50 billion to comply with some or all of the provisions of §§ 236.5 and 236.7 through 236.11 if the Board determines that the Level 3 covered institution's complexity of operations or compensation practices are consistent with those of a Level 1 or Level 2 covered institution.

(b) *Factors considered.* Any exercise of authority under this section will be in writing by the Board in accordance with procedures established by the Board and will consider the activities, complexity of operations, risk profile, and compensation practices of the Level 3 covered institution, in addition to any other relevant factors.

**§ 236.7 Deferral, forfeiture and downward adjustment, and clawback requirements for Level 1 and Level 2 covered institutions.**

An incentive-based compensation arrangement at a Level 1 or Level 2 covered institution will not be considered to appropriately balance risk and reward, for purposes of § 236.4(c)(1), unless the following requirements are met.

(a) *Deferral.* (1) Qualifying incentive-based compensation must be deferred as follows:

(i) *Minimum required deferral amount.* (A) A Level 1 covered institution must defer at least 60 percent of a senior executive officer's qualifying incentive-based compensation awarded for each performance period.

(B) A Level 1 covered institution must defer at least 50 percent of a significant risk-taker's qualifying incentive-based compensation awarded for each performance period.

(C) A Level 2 covered institution must defer at least 50 percent of a senior executive officer's qualifying incentive-based compensation awarded for each performance period.

(D) A Level 2 covered institution must defer at least 40 percent of a significant risk-taker's qualifying incentive-based compensation awarded for each performance period.

(ii) *Minimum required deferral period.* (A) For a senior executive officer or significant risk-taker of a Level 1 covered institution, the deferral period for deferred qualifying incentive-based compensation must be at least 4 years.

(B) For a senior executive officer or significant risk-taker of a Level 2 covered institution, the deferral period for deferred qualifying incentive-based compensation must be at least 3 years.

(iii) *Vesting of amounts during deferral period.*—(A) *Pro rata vesting.* During a deferral period, deferred qualifying incentive-based compensation may not vest faster than on a pro rata annual basis beginning no earlier than the first anniversary of the end of the performance period for which the amounts were awarded.

(B) *Acceleration of vesting.* A Level 1 or Level 2 covered institution must not accelerate the vesting of a covered person's deferred qualifying incentive-based compensation that is required to be deferred under this part, except in the case of death or disability of such covered person.

(2) Incentive-based compensation awarded under a long-term incentive plan must be deferred as follows:

(i) *Minimum required deferral amount.* (A) A Level 1 covered institution must defer at least 60 percent of a senior executive officer's incentive-based compensation awarded under a long-term incentive plan for each performance period.

(B) A Level 1 covered institution must defer at least 50 percent of a significant risk-taker's incentive-based compensation awarded under a long-term incentive plan for each performance period.

(C) A Level 2 covered institution must defer at least 50 percent of a senior executive officer's incentive-based compensation awarded under a long-term incentive plan for each performance period.

(D) A Level 2 covered institution must defer at least 40 percent of a significant risk-taker's incentive-based compensation awarded under a long-term incentive plan for each performance period.

(ii) *Minimum required deferral period.* (A) For a senior executive officer or significant risk-taker of a Level 1 covered institution, the deferral period for deferred long-term incentive plan amounts must be at least 2 years.

(B) For a senior executive officer or significant risk-taker of a Level 2 covered institution, the deferral period for deferred long-term incentive plan amounts must be at least 1 year.

(iii) *Vesting of amounts during deferral period.*—(A) *Pro rata vesting.*

During a deferral period, deferred long-term incentive plan amounts may not vest faster than on a pro rata annual basis beginning no earlier than the first anniversary of the end of the performance period for which the amounts were awarded.

(B) *Acceleration of vesting.* A Level 1 or Level 2 covered institution must not accelerate the vesting of a covered person's deferred long-term incentive plan amounts that is required to be deferred under this part, except in the case of death or disability of such covered person.

(3) *Adjustments of deferred qualifying incentive-based compensation and deferred long-term incentive plan compensation amounts.* A Level 1 or Level 2 covered institution may not increase deferred qualifying incentive-based compensation or deferred long-term incentive plan amounts for a senior executive officer or significant risk-taker during the deferral period. For purposes of this paragraph, an increase in value attributable solely to a change in share value, a change in interest rates, or the payment of interest according to terms set out at the time of the award is not considered an increase in incentive-based compensation amounts.

(4) *Composition of deferred qualifying incentive-based compensation and deferred long-term incentive plan compensation for Level 1 and Level 2 covered institutions—(i) Cash and equity-like instruments.* For a senior executive officer or significant risk-taker of a Level 1 or Level 2 covered institution that issues equity or is an affiliate of a covered institution that issues equity, any deferred qualifying incentive-based compensation or deferred long-term incentive plan amounts must include substantial portions of both deferred cash and equity-like instruments throughout the deferral period.

(ii) *Options.* If a senior executive officer or significant risk-taker of a Level 1 or Level 2 covered institution receives incentive-based compensation for a performance period in the form of options, the total amount of such options that may be used to meet the minimum deferral amount requirements of paragraph (a)(1)(i) or (a)(2)(i) of this section is limited to no more than 15 percent of the amount of total incentive-based compensation awarded to the senior executive officer or significant risk-taker for that performance period.

(b) *Forfeiture and downward adjustment—(1) Compensation at risk.* (i) A Level 1 or Level 2 covered institution must place at risk of forfeiture all unvested deferred incentive-based compensation of any

senior executive officer or significant risk-taker, including unvested deferred amounts awarded under long-term incentive plans.

(ii) A Level 1 or Level 2 covered institution must place at risk of downward adjustment all of a senior executive officer's or significant risk-taker's incentive-based compensation amounts not yet awarded for the current performance period, including amounts payable under long-term incentive plans.

(2) *Events triggering forfeiture and downward adjustment review.* At a minimum, a Level 1 or Level 2 covered institution must consider forfeiture and downward adjustment of incentive-based compensation of senior executive officers and significant risk-takers described in paragraph (b)(3) of this section due to any of the following adverse outcomes at the covered institution:

(i) Poor financial performance attributable to a significant deviation from the risk parameters set forth in the covered institution's policies and procedures;

(ii) Inappropriate risk taking, regardless of the impact on financial performance;

(iii) Material risk management or control failures;

(iv) Non-compliance with statutory, regulatory, or supervisory standards that results in:

(A) Enforcement or legal action against the covered institution brought by a federal or state regulator or agency; or

(B) A requirement that the covered institution report a restatement of a financial statement to correct a material error; and

(v) Other aspects of conduct or poor performance as defined by the covered institution.

(3) *Senior executive officers and significant risk-takers affected by forfeiture and downward adjustment.* A Level 1 or Level 2 covered institution must consider forfeiture and downward adjustment for a senior executive officer or significant risk-taker with direct responsibility, or responsibility due to the senior executive officer's or significant risk-taker's role or position in the covered institution's organizational structure, for the events related to the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section.

(4) *Determining forfeiture and downward adjustment amounts.* A Level 1 or Level 2 covered institution must consider, at a minimum, the following factors when determining the amount or portion of a senior executive officer's or

significant risk-taker's incentive-based compensation that should be forfeited or adjusted downward:

(i) The intent of the senior executive officer or significant risk-taker to operate outside the risk governance framework approved by the covered institution's board of directors or to depart from the covered institution's policies and procedures;

(ii) The senior executive officer's or significant risk-taker's level of participation in, awareness of, and responsibility for, the events triggering the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section;

(iii) Any actions the senior executive officer or significant risk-taker took or could have taken to prevent the events triggering the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section;

(iv) The financial and reputational impact of the events triggering the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section to the covered institution, the line or sub-line of business, and individuals involved, as applicable, including the magnitude of any financial loss and the cost of known or potential subsequent fines, settlements, and litigation;

(v) The causes of the events triggering the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section, including any decision-making by other individuals; and

(vi) Any other relevant information, including past behavior and past risk outcomes attributable to the senior executive officer or significant risk-taker.

(c) *Clawback.* A Level 1 or Level 2 covered institution must include clawback provisions in incentive-based compensation arrangements for senior executive officers and significant risk-takers that, at a minimum, allow the covered institution to recover incentive-based compensation from a current or former senior executive officer or significant risk-taker for seven years following the date on which such compensation vests, if the covered institution determines that the senior executive officer or significant risk-taker engaged in:

(1) Misconduct that resulted in significant financial or reputational harm to the covered institution;

(2) Fraud; or

(3) Intentional misrepresentation of information used to determine the senior executive officer or significant risk-taker's incentive-based compensation.

**§ 236.8 Additional prohibitions for Level 1 and Level 2 covered institutions.**

An incentive-based compensation arrangement at a Level 1 or Level 2 covered institution will be considered to provide incentives that appropriately balance risk and reward for purposes of § 236.4(c)(1) only if such institution complies with the following prohibitions.

(a) *Hedging.* A Level 1 or Level 2 covered institution must not purchase a hedging instrument or similar instrument on behalf of a covered person to hedge or offset any decrease in the value of the covered person's incentive-based compensation.

(b) *Maximum incentive-based compensation opportunity.* A Level 1 or Level 2 covered institution must not award incentive-based compensation to:

(1) A senior executive officer in excess of 125 percent of the target amount for that incentive-based compensation; or

(2) A significant risk-taker in excess of 150 percent of the target amount for that incentive-based compensation.

(c) *Relative performance measures.* A Level 1 or Level 2 covered institution must not use incentive-based compensation performance measures that are based solely on industry peer performance comparisons.

(d) *Volume driven incentive-based compensation.* A Level 1 or Level 2 covered institution must not provide incentive-based compensation to a covered person that is based solely on transaction revenue or volume without regard to transaction quality or compliance of the covered person with sound risk management.

**§ 236.9 Risk management and controls requirements for Level 1 and Level 2 covered institutions.**

An incentive-based compensation arrangement at a Level 1 or Level 2 covered institution will be considered to be compatible with effective risk management and controls for purposes of § 236.4(c)(2) only if such institution meets the following requirements.

(a) A Level 1 or Level 2 covered institution must have a risk management framework for its incentive-based compensation program that:

(1) Is independent of any lines of business;

(2) Includes an independent compliance program that provides for internal controls, testing, monitoring, and training with written policies and procedures consistent with § 236.11; and

(3) Is commensurate with the size and complexity of the covered institution's operations.

(b) A Level 1 or Level 2 covered institution must:

(1) Provide individuals engaged in control functions with the authority to influence the risk-taking of the business areas they monitor; and

(2) Ensure that covered persons engaged in control functions are compensated in accordance with the achievement of performance objectives linked to their control functions and independent of the performance of those business areas.

(c) A Level 1 or Level 2 covered institution must provide for the independent monitoring of:

(1) All incentive-based compensation plans in order to identify whether those plans provide incentives that appropriately balance risk and reward;

(2) Events related to forfeiture and downward adjustment reviews and decisions of forfeiture and downward adjustment reviews in order to determine consistency with § 236.7(b); and

(3) Compliance of the incentive-based compensation program with the covered institution's policies and procedures.

**§ 236.10 Governance requirements for Level 1 and Level 2 covered institutions.**

An incentive-based compensation arrangement at a Level 1 or Level 2 covered institution will not be considered to be supported by effective governance for purposes of § 236.4(c)(3), unless:

(a) The covered institution establishes a compensation committee composed solely of directors who are not senior executive officers to assist the board of directors in carrying out its responsibilities under § 236.4(e); and

(b) The compensation committee established pursuant to paragraph (a) of this section obtains:

(1) Input from the risk and audit committees of the covered institution's board of directors, or groups performing similar functions, and risk management function on the effectiveness of risk measures and adjustments used to balance risk and reward in incentive-based compensation arrangements;

(2) A written assessment of the effectiveness of the covered institution's incentive-based compensation program and related compliance and control processes in providing risk-taking incentives that are consistent with the risk profile of the covered institution, submitted on an annual or more frequent basis by the management of the covered institution and developed with input from the risk and audit committees of its board of directors, or groups performing similar functions,

and from the covered institution's risk management and audit functions; and

(3) An independent written assessment of the effectiveness of the covered institution's incentive-based compensation program and related compliance and control processes in providing risk-taking incentives that are consistent with the risk profile of the covered institution, submitted on an annual or more frequent basis by the internal audit or risk management function of the covered institution, developed independently of the covered institution's management.

**§ 236.11 Policies and procedures requirements for Level 1 and Level 2 covered institutions.**

A Level 1 or Level 2 covered institution must develop and implement policies and procedures for its incentive-based compensation program that, at a minimum:

(a) Are consistent with the prohibitions and requirements of this part;

(b) Specify the substantive and procedural criteria for the application of forfeiture and clawback, including the process for determining the amount of incentive-based compensation to be clawed back;

(c) Require that the covered institution maintain documentation of final forfeiture, downward adjustment, and clawback decisions;

(d) Specify the substantive and procedural criteria for the acceleration of payments of deferred incentive-based compensation to a covered person, consistent with § 236.7(a)(1)(iii)(B) and (a)(2)(iii)(B);

(e) Identify and describe the role of any employees, committees, or groups authorized to make incentive-based compensation decisions, including when discretion is authorized;

(f) Describe how discretion is expected to be exercised to appropriately balance risk and reward;

(g) Require that the covered institution maintain documentation of the establishment, implementation, modification, and monitoring of incentive-based compensation arrangements, sufficient to support the covered institution's decisions;

(h) Describe how incentive-based compensation arrangements will be monitored;

(i) Specify the substantive and procedural requirements of the independent compliance program consistent with § 236.9(a)(2); and

(j) Ensure appropriate roles for risk management, risk oversight, and other control function personnel in the covered institution's processes for:

(1) Designing incentive-based compensation arrangements and determining awards, deferral amounts, deferral periods, forfeiture, downward adjustment, clawback, and vesting; and

(2) Assessing the effectiveness of incentive-based compensation arrangements in restraining inappropriate risk-taking.

#### **§ 236.12 Indirect actions.**

A covered institution must not indirectly, or through or by any other person, do anything that would be unlawful for such covered institution to do directly under this part.

#### **§ 236.13 Enforcement.**

The provisions of this part shall be enforced under section 505 of the Gramm-Leach-Bliley Act and, for purposes of such section, a violation of this part shall be treated as a violation of subtitle A of title V of such Act.

### **Federal Deposit Insurance Corporation**

#### **12 CFR Chapter III**

#### **Authority and Issuance**

For the reasons set forth in the joint preamble, the Federal Deposit Insurance Corporation proposes to amend chapter III of title 12 of the Code of Federal Regulations as follows:

#### **■ 3. Add part 372 to read as follows:**

### **PART 372—INCENTIVE-BASED COMPENSATION ARRANGEMENTS**

#### **Sec.**

372.1 Authority, scope, and initial applicability.

372.2 Definitions.

372.3 Applicability.

372.4 Requirements and prohibitions applicable to all covered institutions.

372.5 Additional disclosure and recordkeeping requirements for Level 1 and Level 2 covered institutions.

372.6 Reservation of authority for Level 3 covered institutions.

372.7 Deferral, forfeiture and downward adjustment, and clawback requirements for Level 1 and Level 2 covered institutions.

372.8 Additional prohibitions for Level 1 and Level 2 covered institutions.

372.9 Risk management and controls requirements for Level 1 and Level 2 covered institutions.

372.10 Governance requirements for Level 1 and Level 2 covered institutions.

372.11 Policies and procedures requirements for Level 1 and Level 2 covered institutions.

372.12 Indirect actions.

372.13 Enforcement.

**Authority:** 12 U.S.C. 5641, 12 U.S.C. 1818, 12 U.S.C. 1819 Tenth, 12 U.S.C. 1831p–1.

#### **§ 372.1 Authority, scope, and initial applicability.**

(a) *Authority.* This part is issued pursuant to section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5641), and sections 8 (12 U.S.C. 1818), 9 (12 U.S.C. 1819 Tenth), and 39 (12 U.S.C. 1831p–1) of the Federal Deposit Insurance Act.

(b) *Scope.* This part applies to a covered institution with average total consolidated assets greater than or equal to \$1 billion that offers incentive-based compensation to covered persons.

(c) *Initial applicability—(1) Compliance date.* A covered institution must meet the requirements of this part no later than [Date of the beginning of the first calendar quarter that begins at least 540 days after a final rule is published in the **Federal Register**]. Whether a covered institution is a Level 1, Level 2, or Level 3 covered institution at that time will be determined based on average total consolidated assets as of [Date of the beginning of the first calendar quarter that begins after a final rule is published in the **Federal Register**].

(2) *Grandfathered plans.* A covered institution is not required to comply with the requirements of this part with respect to any incentive-based compensation plan with a performance period that begins before [Compliance Date as described in § 372.1(c)(1)].

(d) *Preservation of authority.* Nothing in this part in any way limits the authority of the Corporation under other provisions of applicable law and regulations.

#### **§ 372.2 Definitions.**

For purposes of this part only, the following definitions apply unless otherwise specified:

(a) *Affiliate* means any company that controls, is controlled by, or is under common control with another company.

(b) *Average total consolidated assets* means the average of the total consolidated assets of a state nonmember bank; state savings association; state insured branch of a foreign bank; a subsidiary of a state nonmember bank, state savings association, or state insured branch of a foreign bank; or a depository institution holding company, as reported on the state nonmember bank's, state savings association's, state insured branch of a foreign bank's, subsidiary's, or depository institution holding company's regulatory reports, for the four most recent consecutive quarters. If a state nonmember bank, state savings association, state insured branch of a foreign bank, subsidiary, or depository institution holding company has not

filed a regulatory report for each of the four most recent consecutive quarters, the state nonmember bank, state savings association, state insured branch of a foreign bank, subsidiary, or depository institution holding company's average total consolidated assets means the average of its total consolidated assets, as reported on its regulatory reports, for the most recent quarter or consecutive quarters, as applicable. Average total consolidated assets are measured on the as-of date of the most recent regulatory report used in the calculation of the average.

(c) *To award* incentive-based compensation means to make a final determination, conveyed to a covered person, of the amount of incentive-based compensation payable to the covered person for performance over a performance period.

(d) *Board of directors* means the governing body of a covered institution that oversees the activities of the covered institution, often referred to as the board of directors or board of managers. For a state insured branch of a foreign bank, "board of directors" refers to the relevant oversight body for the state insured branch consistent with the foreign bank's overall corporate and management structure.

(e) *Clawback* means a mechanism by which a covered institution can recover vested incentive-based compensation from a covered person.

(f) *Compensation, fees, or benefits* means all direct and indirect payments, both cash and non-cash, awarded to, granted to, or earned by or for the benefit of, any covered person in exchange for services rendered to a covered institution.

(g) *Control* means that any company has control over a bank or over any company if—

(1) The company directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 percent or more of any class of voting securities of the bank or company;

(2) The company controls in any manner the election of a majority of the directors or trustees of the bank or company; or

(3) The Corporation determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company.

(h) *Control function* means a compliance, risk management, internal audit, legal, human resources, accounting, financial reporting, or finance role responsible for identifying,

measuring, monitoring, or controlling risk-taking.

(i) *Covered institution* means

(1) A state nonmember bank, state savings association, or a state insured branch of a foreign bank, as such terms are defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813, with average total consolidated assets greater than or equal to \$1 billion; and

(2) A subsidiary of a state nonmember bank, state savings association, or a state insured branch of a foreign bank, as such terms are defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813, that:

(i) Is not a broker, dealer, person providing insurance, investment company, or investment adviser; and

(ii) Has average total consolidated assets greater than or equal to \$1 billion.

(j) *Covered person* means any executive officer, employee, director, or principal shareholder who receives incentive-based compensation at a covered institution.

(k) *Deferral* means the delay of vesting of incentive-based compensation beyond the date on which the incentive-based compensation is awarded.

(l) *Deferral period* means the period of time between the date a performance period ends and the last date on which the incentive-based compensation awarded for such performance period vests.

(m) *Depository institution holding company* means a top-tier depository institution holding company, where “depository institution holding company” has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(n) *Director* of a covered institution means a member of the board of directors.

(o) *Downward adjustment* means a reduction of the amount of a covered person’s incentive-based compensation not yet awarded for any performance period that has already begun, including amounts payable under long-term incentive plans, in accordance with a forfeiture and downward adjustment review under § 372.7(b).

(p) *Equity-like instrument* means:

(1) Equity in the covered institution or of any affiliate of the covered institution; or

(2) A form of compensation:

(i) Payable at least in part based on the price of the shares or other equity instruments of the covered institution or of any affiliate of the covered institution; or

(ii) That requires, or may require, settlement in the shares of the covered institution or of any affiliate of the covered institution.

(q) *Forfeiture* means a reduction of the amount of deferred incentive-based compensation awarded to a covered person that has not vested.

(r) *Incentive-based compensation* means any variable compensation, fees, or benefits that serve as an incentive or reward for performance.

(s) *Incentive-based compensation arrangement* means an agreement between a covered institution and a covered person, under which the covered institution provides incentive-based compensation to the covered person, including incentive-based compensation delivered through one or more incentive-based compensation plans.

(t) *Incentive-based compensation plan* means a document setting forth terms and conditions governing the opportunity for and the payment of incentive-based compensation payments to one or more covered persons.

(u) *Incentive-based compensation program* means a covered institution’s framework for incentive-based compensation that governs incentive-based compensation practices and establishes related controls.

(v) *Level 1 covered institution* means

(1) A covered institution that is a subsidiary of a depository institution holding company with average total consolidated assets greater than or equal to \$250 billion;

(2) A covered institution with average total consolidated assets greater than or equal to \$250 billion that is not a subsidiary of a covered institution or of a depository institution holding company; and

(3) A covered institution that is a subsidiary of a covered institution with average total consolidated assets greater than or equal to \$250 billion.

(w) *Level 2 covered institution* means

(1) A covered institution that is a subsidiary of a depository institution holding company with average total consolidated assets greater than or equal to \$50 billion but less than \$250 billion;

(2) A covered institution with average total consolidated assets greater than or equal to \$50 billion but less than \$250 billion that is not a subsidiary of a covered institution or of a depository institution holding company; and

(3) A covered institution that is a subsidiary of a covered institution with average total consolidated assets greater than or equal to \$50 billion but less than \$250 billion.

(x) *Level 3 covered institution* means

(1) A covered institution that is a subsidiary of a depository institution holding company with average total consolidated assets greater than or equal to \$1 billion but less than \$50 billion;

(2) A covered institution with average total consolidated assets greater than or equal to \$1 billion but less than \$50 billion that is not a subsidiary of a covered institution or of a depository institution holding company; and

(3) A covered institution that is a subsidiary of a covered institution with average total consolidated assets greater than or equal to \$1 billion but less than \$50 billion.

(y) *Long-term incentive plan* means a plan to provide incentive-based compensation that is based on a performance period of at least three years.

(z) *Option* means an instrument through which a covered institution provides a covered person the right, but not the obligation, to buy a specified number of shares representing an ownership stake in a company at a predetermined price within a set time period or on a date certain, or any similar instrument, such as a stock appreciation right.

(aa) *Performance period* means the period during which the performance of a covered person is assessed for purposes of determining incentive-based compensation.

(bb) *Principal shareholder* means a natural person who, directly or indirectly, or acting through or in concert with one or more persons, owns, controls, or has the power to vote 10 percent or more of any class of voting securities of a covered institution.

(cc) *Qualifying incentive-based compensation* means the amount of incentive-based compensation awarded to a covered person for a particular performance period, excluding amounts awarded to the covered person for that particular performance period under a long-term incentive plan.

(dd) [Reserved].

(ee) *Regulatory report* means

(1) For a state nonmember bank and state savings association, Consolidated Reports of Condition and Income;

(2) For an state insured branch of a foreign bank, the Reports of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks—FFIEC 002; and

(3) For a depository institution holding company:

(i) The Consolidated Financial Statements for Bank Holding Companies (“FR Y–9C”);

(ii) In the case of a savings and loan holding company that is not required to file an FR Y–9C, the Quarterly Savings and Loan Holding Company Report (“FR 2320”), if the savings and loan holding company reports consolidated assets on the FR 2320, as applicable; and

(iii) In the case of a savings and loan holding company that does not file an FRY-9C or report consolidated assets on the FR2320, a report submitted to the Board of Governors of the Federal Reserve System pursuant to 12 CFR 236.2(ee).

(ff) *Section 956 affiliate* means an affiliate that is an institution described in § 372.2(i), 12 CFR 42.2(i), 12 CFR 236.2(i), 12 CFR 741.2(i), 12 CFR 1232.2(i), or 17 CFR 303.2(i).

(gg) *Senior executive officer* means a covered person who holds the title or, without regard to title, salary, or compensation, performs the function of one or more of the following positions at a covered institution for any period of time in the relevant performance period: President, chief executive officer, executive chairman, chief operating officer, chief financial officer, chief investment officer, chief legal officer, chief lending officer, chief risk officer, chief compliance officer, chief audit executive, chief credit officer, chief accounting officer, or head of a major business line or control function.

(hh) *Significant risk-taker* means:

(1) Any covered person at a Level 1 or Level 2 covered institution, other than a senior executive officer, who received annual base salary and incentive-based compensation for the last calendar year that ended at least 180 days before the beginning of the performance period of which at least one-third is incentive-based compensation and is—

(i) A covered person of a Level 1 covered institution who received annual base salary and incentive-based compensation for the last calendar year that ended at least 180 days before the beginning of the performance period that placed the covered person among the highest 5 percent in annual base salary and incentive-based compensation among all covered persons (excluding senior executive officers) of the Level 1 covered institution together with all individuals who receive incentive-based compensation at any section 956 affiliate of the Level 1 covered institution;

(ii) A covered person of a Level 2 covered institution who received annual base salary and incentive-based compensation for the last calendar year that ended at least 180 days before the beginning of the performance period that placed the covered person among the highest 2 percent in annual base salary and incentive-based compensation among all covered persons (excluding senior executive officers) of the Level 2 covered institution together with all individuals

who receive incentive-based compensation at any section 956 affiliate of the Level 2 covered institution; or

(iii) A covered person of a covered institution who may commit or expose 0.5 percent or more of the common equity tier 1 capital, or in the case of a registered securities broker or dealer, 0.5 percent or more of the tentative net capital, of the covered institution or of any section 956 affiliate of the covered institution, whether or not the individual is a covered person of that specific legal entity; and

(2) Any covered person at a Level 1 or Level 2 covered institution, other than a senior executive officer, who is designated as a “significant risk-taker” by the Corporation because of that person’s ability to expose a covered institution to risks that could lead to material financial loss in relation to the covered institution’s size, capital, or overall risk tolerance, in accordance with procedures established by the Corporation, or by the covered institution.

(3) For purposes of this part, an individual who is an employee, director, senior executive officer, or principal shareholder of an affiliate of a Level 1 or Level 2 covered institution, where such affiliate has less than \$1 billion in total consolidated assets, and who otherwise would meet the requirements for being a significant risk-taker under paragraph (hh)(1)(iii) of this section, shall be considered to be a significant risk-taker with respect to the Level 1 or Level 2 covered institution for which the individual may commit or expose 0.5 percent or more of common equity tier 1 capital or tentative net capital. The Level 1 or Level 2 covered institution for which the individual commits or exposes 0.5 percent or more of common equity tier 1 capital or tentative net capital shall ensure that the individual’s incentive compensation arrangement complies with the requirements of this part.

(4) If the Corporation determines, in accordance with procedures established by the Corporation, that a Level 1 covered institution’s activities, complexity of operations, risk profile, and compensation practices are similar to those of a Level 2 covered institution, the Level 1 covered institution may apply paragraph (hh)(1)(i) of this section to covered persons of the Level 1 covered institution by substituting “2 percent” for “5 percent”.

(ii) *Subsidiary* means any company that is owned or controlled directly or indirectly by another company.

(jj) *Vesting* of incentive-based compensation means the transfer of

ownership of the incentive-based compensation to the covered person to whom the incentive-based compensation was awarded, such that the covered person’s right to the incentive-based compensation is no longer contingent on the occurrence of any event.

### § 372.3 Applicability.

(a) *When average total consolidated assets increase—(1) In general—(i) Covered institution subsidiaries of depository institution holding companies.* A state nonmember bank or state savings association that is a subsidiary of a depository institution holding company shall become a Level 1, Level 2, or Level 3 covered institution when the depository institution holding company’s average total consolidated assets increase to an amount that equals or exceeds \$250 billion, \$50 billion, or \$1 billion, respectively.

(ii) *Covered institutions that are not subsidiaries of a depository institution holding company.* A state nonmember bank, state savings association, or state insured branch of a foreign bank that is not a subsidiary of a state nonmember bank, state savings association, or state insured branch of a foreign bank, or depository institution holding company shall become a Level 1, Level 2, or Level 3 covered institution when such state nonmember bank, state savings association, or state insured branch of a foreign bank’s average total consolidated assets increase to an amount that equals or exceeds \$250 billion, \$50 billion, or \$1 billion, respectively.

(iii) *Subsidiaries of covered institutions.* A subsidiary of a state nonmember bank, state savings association, or state insured branch of a foreign bank, as described under § 372.2(i)(2), shall become a Level 1, Level 2, or Level 3 covered institution when the state nonmember bank, state savings association, or state insured branch of a foreign bank becomes a Level 1, Level 2, or Level 3 covered institution, respectively, under paragraph (a)(1)(i) or (ii) of this section.

(2) *Compliance date.* A state nonmember bank, state savings association, state insured branch of a foreign bank, or subsidiary thereof, that becomes a Level 1, Level 2, or Level 3 covered institution pursuant to paragraph (a)(1) of this section shall comply with the requirements of this part for a Level 1, Level 2, or Level 3 covered institution, respectively, not later than the first day of the first calendar quarter that begins at least 540 days after the date on which such state nonmember bank, state savings association, state insured branch of a

foreign bank, or subsidiary thereof becomes a Level 1, Level 2, or Level 3 covered institution, respectively. Until that day, the Level 1, Level 2, or Level 3 covered institution will remain subject to the requirements of this part, if any, that applied to the institution on the day before the date on which it became a Level 1, Level 2, or Level 3 covered institution.

(3) *Grandfathered plans.* A state nonmember bank, state savings association, state insured branch of a foreign bank, or subsidiary thereof, that becomes a Level 1, Level 2, or Level 3 covered institution under paragraph (a)(1) of this section is not required to comply with requirements of this part applicable to a Level 1, Level 2, or Level 3 covered institution, respectively, with respect to any incentive-based compensation plan with a performance period that begins before the date described in paragraph (a)(2) of this section. Any such incentive-based compensation plan shall remain subject to the requirements under this part, if any, that applied to such state nonmember bank, state savings association, state insured branch of a foreign bank, or subsidiary thereof at the beginning of the performance period.

(b) *When total consolidated assets decrease—*(1) *Covered institutions that are subsidiaries of depository institution holding companies.* A Level 1, Level 2, or Level 3 covered institution that is a subsidiary of a depository institution holding company will remain subject to the requirements applicable to such covered institution at that level under this part unless and until the total consolidated assets of the depository institution holding company, as reported on the depository institution holding company's regulatory reports, fall below \$250 billion, \$50 billion, or \$1 billion, respectively, for each of four consecutive quarters.

(2) *Covered institutions that are not subsidiaries of depository institution holding companies.* A Level 1, Level 2, or Level 3 covered institution that is not a subsidiary of a depository institution holding company will remain subject to the requirements applicable to such covered institution at that level under this part unless and until the total consolidated assets of the covered institution, as reported on the covered institution's regulatory reports, fall below \$250 billion, \$50 billion, or \$1 billion, respectively, for each of four consecutive quarters.

(3) *Subsidiaries of covered institutions.* A Level 1, Level 2, or Level 3 covered institution that is a subsidiary of a state nonmember bank, state savings association, or state insured branch of a

foreign bank that is a covered institution will remain subject to the requirements applicable to such state nonmember bank, state savings association, or state insured branch of a foreign bank at that level under this part unless and until the total consolidated assets of the state nonmember bank, state savings association, state insured branch of a foreign bank, or depository holding company of the state nonmember bank or state savings association, as reported on its regulatory reports, fall below \$250 billion, \$50 billion, or \$1 billion, respectively, for each of four consecutive quarters.

(4) The calculations under this paragraph (b) of this section will be effective on the as-of date of the fourth consecutive regulatory report.

(c) *Compliance of covered institutions that are subsidiaries of covered institutions.* A covered institution that is a subsidiary of another covered institution may meet any requirement of this part if the parent covered institution complies with that requirement in a way that causes the relevant portion of the incentive-based compensation program of the subsidiary covered institution to comply with that requirement.

#### **§ 372.4 Requirements and prohibitions applicable to all covered institutions.**

(a) *In general.* A covered institution must not establish or maintain any type of incentive-based compensation arrangement, or any feature of any such arrangement, that encourages inappropriate risks by the covered institution:

(1) By providing a covered person with excessive compensation, fees, or benefits; or

(2) That could lead to material financial loss to the covered institution.

(b) *Excessive compensation.*

Compensation, fees, and benefits are considered excessive for purposes of paragraph (a)(1) of this section when amounts paid are unreasonable or disproportionate to the value of the services performed by a covered person, taking into consideration all relevant factors, including, but not limited to:

(1) The combined value of all compensation, fees, or benefits provided to the covered person;

(2) The compensation history of the covered person and other individuals with comparable expertise at the covered institution;

(3) The financial condition of the covered institution;

(4) Compensation practices at comparable institutions, based upon such factors as asset size, geographic location, and the complexity of the

covered institution's operations and assets;

(5) For post-employment benefits, the projected total cost and benefit to the covered institution; and

(6) Any connection between the covered person and any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the covered institution.

(c) *Material financial loss.* An incentive-based compensation arrangement at a covered institution encourages inappropriate risks that could lead to material financial loss to the covered institution, unless the arrangement:

(1) Appropriately balances risk and reward;

(2) Is compatible with effective risk management and controls; and

(3) Is supported by effective governance.

(d) *Performance measures.* An incentive-based compensation arrangement will not be considered to appropriately balance risk and reward for purposes of paragraph (c)(1) of this section unless:

(1) The arrangement includes financial and non-financial measures of performance, including considerations of risk-taking, that are relevant to a covered person's role within a covered institution and to the type of business in which the covered person is engaged and that are appropriately weighted to reflect risk-taking;

(2) The arrangement is designed to allow non-financial measures of performance to override financial measures of performance when appropriate in determining incentive-based compensation; and

(3) Any amounts to be awarded under the arrangement are subject to adjustment to reflect actual losses, inappropriate risks taken, compliance deficiencies, or other measures or aspects of financial and non-financial performance.

(e) *Board of directors.* A covered institution's board of directors, or a committee thereof, must:

(1) Conduct oversight of the covered institution's incentive-based compensation program;

(2) Approve incentive-based compensation arrangements for senior executive officers, including the amounts of all awards and, at the time of vesting, payouts under such arrangements; and

(3) Approve any material exceptions or adjustments to incentive-based compensation policies or arrangements for senior executive officers.

(f) *Disclosure and recordkeeping requirements.* A covered institution

must create annually and maintain for a period of at least seven years records that document the structure of all its incentive-based compensation arrangements and demonstrate compliance with this part. A covered institution must disclose the records to the Corporation upon request. At a minimum, the records must include copies of all incentive-based compensation plans, a record of who is subject to each plan, and a description of how the incentive-based compensation program is compatible with effective risk management and controls.

(g) *Rule of construction.* A covered institution is not required to report the actual amount of compensation, fees, or benefits of individual covered persons as part of the disclosure and recordkeeping requirements under this part.

**§ 372.5 Additional disclosure and recordkeeping requirements for Level 1 and Level 2 covered institutions.**

(a) A Level 1 or Level 2 covered institution must create annually and maintain for a period of at least seven years records that document:

(1) The covered institution's senior executive officers and significant risk-takers, listed by legal entity, job function, organizational hierarchy, and line of business;

(2) The incentive-based compensation arrangements for senior executive officers and significant risk-takers, including information on percentage of incentive-based compensation deferred and form of award;

(3) Any forfeiture and downward adjustment or clawback reviews and decisions for senior executive officers and significant risk-takers; and

(4) Any material changes to the covered institution's incentive-based compensation arrangements and policies.

(b) A Level 1 or Level 2 covered institution must create and maintain records in a manner that allows for an independent audit of incentive-based compensation arrangements, policies, and procedures, including, those required under § 372.11.

(c) A Level 1 or Level 2 covered institution must provide the records described in paragraph (a) of this section to the Corporation in such form and with such frequency as requested by the Corporation.

**§ 372.6 Reservation of authority for Level 3 covered institutions.**

(a) *In general.* The Corporation may require a Level 3 covered institution with average total consolidated assets

greater than or equal to \$10 billion and less than \$50 billion to comply with some or all of the provisions of §§ 372.5 and 372.7 through 372.11 if the Corporation determines that the Level 3 covered institution's complexity of operations or compensation practices are consistent with those of a Level 1 or Level 2 covered institution.

(b) *Factors considered.* Any exercise of authority under this section will be in writing by the Corporation in accordance with procedures established by the Corporation and will consider the activities, complexity of operations, risk profile, and compensation practices of the Level 3 covered institution, in addition to any other relevant factors.

**§ 372.7 Deferral, forfeiture and downward adjustment, and clawback requirements for Level 1 and Level 2 covered institutions.**

An incentive-based compensation arrangement at a Level 1 or Level 2 covered institution will not be considered to appropriately balance risk and reward, for purposes of § 372.4(c)(1), unless the following requirements are met.

(a) *Deferral.* (1) Qualifying incentive-based compensation must be deferred as follows:

(i) *Minimum required deferral amount.*

(A) A Level 1 covered institution must defer at least 60 percent of a senior executive officer's qualifying incentive-based compensation awarded for each performance period.

(B) A Level 1 covered institution must defer at least 50 percent of a significant risk-taker's qualifying incentive-based compensation awarded for each performance period.

(C) A Level 2 covered institution must defer at least 50 percent of a senior executive officer's qualifying incentive-based compensation awarded for each performance period.

(D) A Level 2 covered institution must defer at least 40 percent of a significant risk-taker's qualifying incentive-based compensation awarded for each performance period.

(ii) *Minimum required deferral period.* (A) For a senior executive officer or significant risk-taker of a Level 1 covered institution, the deferral period for deferred qualifying incentive-based compensation must be at least 4 years.

(B) For a senior executive officer or significant risk-taker of a Level 2 covered institution, the deferral period for deferred qualifying incentive-based compensation must be at least 3 years.

(iii) *Vesting of amounts during deferral period.*—(A) *Pro rata vesting.* During a deferral period, deferred qualifying incentive-based

compensation may not vest faster than on a pro rata annual basis beginning no earlier than the first anniversary of the end of the performance period for which the amounts were awarded.

(B) *Acceleration of vesting.* A Level 1 or Level 2 covered institution must not accelerate the vesting of a covered person's deferred qualifying incentive-based compensation that is required to be deferred under this part, except in the case of death or disability of such covered person.

(2) Incentive-based compensation awarded under a long-term incentive plan must be deferred as follows:

(i) *Minimum required deferral amount.* (A) A Level 1 covered institution must defer at least 60 percent of a senior executive officer's incentive-based compensation awarded under a long-term incentive plan for each performance period.

(B) A Level 1 covered institution must defer at least 50 percent of a significant risk-taker's incentive-based compensation awarded under a long-term incentive plan for each performance period.

(C) A Level 2 covered institution must defer at least 50 percent of a senior executive officer's incentive-based compensation awarded under a long-term incentive plan for each performance period.

(D) A Level 2 covered institution must defer at least 40 percent of a significant risk-taker's incentive-based compensation awarded under a long-term incentive plan for each performance period.

(ii) *Minimum required deferral period.* (A) For a senior executive officer or significant risk-taker of a Level 1 covered institution, the deferral period for deferred long-term incentive plan amounts must be at least 2 years.

(B) For a senior executive officer or significant risk-taker of a Level 2 covered institution, the deferral period for deferred long-term incentive plan amounts must be at least 1 year.

(iii) *Vesting of amounts during deferral period.*—(A) *Pro rata vesting.* During a deferral period, deferred long-term incentive plan amounts may not vest faster than on a pro rata annual basis beginning no earlier than the first anniversary of the end of the performance period for which the amounts were awarded.

(B) *Acceleration of vesting.* A Level 1 or Level 2 covered institution must not accelerate the vesting of a covered person's deferred long-term incentive plan amounts that is required to be deferred under this part, except in the case of death or disability of such covered person.

(3) *Adjustments of deferred qualifying incentive-based compensation and deferred long-term incentive plan compensation amounts.* A Level 1 or Level 2 covered institution may not increase deferred qualifying incentive-based compensation or deferred long-term incentive plan amounts for a senior executive officer or significant risk-taker during the deferral period. For purposes of this paragraph, an increase in value attributable solely to a change in share value, a change in interest rates, or the payment of interest according to terms set out at the time of the award is not considered an increase in incentive-based compensation amounts.

(4) *Composition of deferred qualifying incentive-based compensation and deferred long-term incentive plan compensation for Level 1 and Level 2 covered institutions—(i) Cash and equity-like instruments.* For a senior executive officer or significant risk-taker of a Level 1 or Level 2 covered institution that issues equity or is an affiliate of a covered institution that issues equity, any deferred qualifying incentive-based compensation or deferred long-term incentive plan amounts must include substantial portions of both deferred cash and equity-like instruments throughout the deferral period.

(ii) *Options.* If a senior executive officer or significant risk-taker of a Level 1 or Level 2 covered institution receives incentive-based compensation for a performance period in the form of options, the total amount of such options that may be used to meet the minimum deferral amount requirements of paragraph (a)(1)(i) or (a)(2)(i) of this section is limited to no more than 15 percent of the amount of total incentive-based compensation awarded to the senior executive officer or significant risk-taker for that performance period.

(b) *Forfeiture and downward adjustment—(1) Compensation at risk.* (i) A Level 1 or Level 2 covered institution must place at risk of forfeiture all unvested deferred incentive-based compensation of any senior executive officer or significant risk-taker, including unvested deferred amounts awarded under long-term incentive plans.

(ii) A Level 1 or Level 2 covered institution must place at risk of downward adjustment all of a senior executive officer's or significant risk-taker's incentive-based compensation amounts not yet awarded for the current performance period, including amounts payable under long-term incentive plans.

(2) *Events triggering forfeiture and downward adjustment review.* At a

minimum, a Level 1 or Level 2 covered institution must consider forfeiture and downward adjustment of incentive-based compensation of senior executive officers and significant risk-takers described in paragraph (b)(3) of this section due to any of the following adverse outcomes at the covered institution:

(i) Poor financial performance attributable to a significant deviation from the risk parameters set forth in the covered institution's policies and procedures;

(ii) Inappropriate risk taking, regardless of the impact on financial performance;

(iii) Material risk management or control failures;

(iv) Non-compliance with statutory, regulatory, or supervisory standards that results in:

(A) Enforcement or legal action against the covered institution brought by a federal or state regulator or agency; or

(B) A requirement that the covered institution report a restatement of a financial statement to correct a material error; and

(v) Other aspects of conduct or poor performance as defined by the covered institution.

(3) *Senior executive officers and significant risk-takers affected by forfeiture and downward adjustment.* A Level 1 or Level 2 covered institution must consider forfeiture and downward adjustment for a senior executive officer or significant risk-taker with direct responsibility, or responsibility due to the senior executive officer's or significant risk-taker's role or position in the covered institution's organizational structure, for the events related to the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section.

(4) *Determining forfeiture and downward adjustment amounts.* A Level 1 or Level 2 covered institution must consider, at a minimum, the following factors when determining the amount or portion of a senior executive officer's or significant risk-taker's incentive-based compensation that should be forfeited or adjusted downward:

(i) The intent of the senior executive officer or significant risk-taker to operate outside the risk governance framework approved by the covered institution's board of directors or to depart from the covered institution's policies and procedures;

(ii) The senior executive officer's or significant risk-taker's level of participation in, awareness of, and responsibility for, the events triggering the forfeiture and downward adjustment

review set forth in paragraph (b)(2) of this section;

(iii) Any actions the senior executive officer or significant risk-taker took or could have taken to prevent the events triggering the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section;

(iv) The financial and reputational impact of the events triggering the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section to the covered institution, the line or sub-line of business, and individuals involved, as applicable, including the magnitude of any financial loss and the cost of known or potential subsequent fines, settlements, and litigation;

(v) The causes of the events triggering the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section, including any decision-making by other individuals; and

(vi) Any other relevant information, including past behavior and past risk outcomes attributable to the senior executive officer or significant risk-taker.

(c) *Clawback.* A Level 1 or Level 2 covered institution must include clawback provisions in incentive-based compensation arrangements for senior executive officers and significant risk-takers that, at a minimum, allow the covered institution to recover incentive-based compensation from a current or former senior executive officer or significant risk-taker for seven years following the date on which such compensation vests, if the covered institution determines that the senior executive officer or significant risk-taker engaged in:

(1) Misconduct that resulted in significant financial or reputational harm to the covered institution;

(2) Fraud; or

(3) Intentional misrepresentation of information used to determine the senior executive officer or significant risk-taker's incentive-based compensation.

#### **§ 372.8 Additional prohibitions for Level 1 and Level 2 covered institutions.**

An incentive-based compensation arrangement at a Level 1 or Level 2 covered institution will be considered to provide incentives that appropriately balance risk and reward for purposes of § 372.4(c)(1) only if such institution complies with the following prohibitions.

(a) *Hedging.* A Level 1 or Level 2 covered institution must not purchase a hedging instrument or similar instrument on behalf of a covered person to hedge or offset any decrease

in the value of the covered person's incentive-based compensation.

(b) *Maximum incentive-based compensation opportunity.* A Level 1 or Level 2 covered institution must not award incentive-based compensation to:

(1) A senior executive officer in excess of 125 percent of the target amount for that incentive-based compensation; or

(2) A significant risk-taker in excess of 150 percent of the target amount for that incentive-based compensation.

(c) *Relative performance measures.* A Level 1 or Level 2 covered institution must not use incentive-based compensation performance measures that are based solely on industry peer performance comparisons.

(d) *Volume driven incentive-based compensation.* A Level 1 or Level 2 covered institution must not provide incentive-based compensation to a covered person that is based solely on transaction revenue or volume without regard to transaction quality or compliance of the covered person with sound risk management.

**§ 372.9 Risk management and controls requirements for Level 1 and Level 2 covered institutions.**

An incentive-based compensation arrangement at a Level 1 or Level 2 covered institution will be considered to be compatible with effective risk management and controls for purposes of § 372.4(c)(2) only if such institution meets the following requirements.

(a) A Level 1 or Level 2 covered institution must have a risk management framework for its incentive-based compensation program that:

(1) Is independent of any lines of business;

(2) Includes an independent compliance program that provides for internal controls, testing, monitoring, and training with written policies and procedures consistent with § 372.11; and

(3) Is commensurate with the size and complexity of the covered institution's operations.

(b) A Level 1 or Level 2 covered institution must:

(1) Provide individuals engaged in control functions with the authority to influence the risk-taking of the business areas they monitor; and

(2) Ensure that covered persons engaged in control functions are compensated in accordance with the achievement of performance objectives linked to their control functions and independent of the performance of those business areas.

(c) A Level 1 or Level 2 covered institution must provide for the independent monitoring of:

(1) All incentive-based compensation plans in order to identify whether those plans provide incentives that appropriately balance risk and reward;

(2) Events related to forfeiture and downward adjustment reviews and decisions of forfeiture and downward adjustment reviews in order to determine consistency with § 372.7(b); and

(3) Compliance of the incentive-based compensation program with the covered institution's policies and procedures.

**§ 372.10 Governance requirements for Level 1 and Level 2 covered institutions.**

An incentive-based compensation arrangement at a Level 1 or Level 2 covered institution will not be considered to be supported by effective governance for purposes of § 372.4(c)(3), unless:

(a) The covered institution establishes a compensation committee composed solely of directors who are not senior executive officers to assist the board of directors in carrying out its responsibilities under § 372.4(e); and

(b) The compensation committee established pursuant to paragraph (a) of this section obtains:

(1) Input from the risk and audit committees of the covered institution's board of directors, or groups performing similar functions, and risk management function on the effectiveness of risk measures and adjustments used to balance risk and reward in incentive-based compensation arrangements;

(2) A written assessment of the effectiveness of the covered institution's incentive-based compensation program and related compliance and control processes in providing risk-taking incentives that are consistent with the risk profile of the covered institution, submitted on an annual or more frequent basis by the management of the covered institution and developed with input from the risk and audit committees of its board of directors, or groups performing similar functions, and from the covered institution's risk management and audit functions; and

(3) An independent written assessment of the effectiveness of the covered institution's incentive-based compensation program and related compliance and control processes in providing risk-taking incentives that are consistent with the risk profile of the covered institution, submitted on an annual or more frequent basis by the internal audit or risk management function of the covered institution,

developed independently of the covered institution's management.

**§ 372.11 Policies and procedures requirements for Level 1 and Level 2 covered institutions.**

A Level 1 or Level 2 covered institution must develop and implement policies and procedures for its incentive-based compensation program that, at a minimum:

(a) Are consistent with the prohibitions and requirements of this part;

(b) Specify the substantive and procedural criteria for the application of forfeiture and clawback, including the process for determining the amount of incentive-based compensation to be clawed back;

(c) Require that the covered institution maintain documentation of final forfeiture, downward adjustment, and clawback decisions;

(d) Specify the substantive and procedural criteria for the acceleration of payments of deferred incentive-based compensation to a covered person, consistent with § 372.7(a)(1)(iii)(B) and (a)(2)(iii)(B));

(e) Identify and describe the role of any employees, committees, or groups authorized to make incentive-based compensation decisions, including when discretion is authorized;

(f) Describe how discretion is expected to be exercised to appropriately balance risk and reward;

(g) Require that the covered institution maintain documentation of the establishment, implementation, modification, and monitoring of incentive-based compensation arrangements, sufficient to support the covered institution's decisions;

(h) Describe how incentive-based compensation arrangements will be monitored;

(i) Specify the substantive and procedural requirements of the independent compliance program consistent with § 372.9(a)(2); and

(j) Ensure appropriate roles for risk management, risk oversight, and other control function personnel in the covered institution's processes for:

(1) Designing incentive-based compensation arrangements and determining awards, deferral amounts, deferral periods, forfeiture, downward adjustment, clawback, and vesting; and

(2) Assessing the effectiveness of incentive-based compensation arrangements in restraining inappropriate risk-taking.

**§ 372.12 Indirect actions.**

A covered institution must not indirectly, or through or by any other

person, do anything that would be unlawful for such covered institution to do directly under this part.

### § 372.13 Enforcement.

The provisions of this part shall be enforced under section 505 of the Gramm-Leach-Bliley Act and, for purposes of such section, a violation of this part shall be treated as a violation of subtitle A of title V of such Act.

## National Credit Union Administration

### 12 CFR Chapter VII

#### Authority and Issuance

For the reasons stated in the joint preamble, the National Credit Union Administration proposes to amend chapter VII of title 12 of the Code of Federal Regulations as follows:

### PART 741—REQUIREMENTS FOR INSURANCE

- 4. The authority citation for part 741 continues to read as follows:

**Authority:** 12 U.S.C. 1757, 1766, 1781–1790, and 1790d; 31 U.S.C. 3717.

- 5. Add § 741.226 to read as follows:

#### § 741.226 Incentive-based compensation arrangements.

Any credit union which is insured pursuant to Title II of the Act must adhere to the requirements stated in part 751 of this chapter.

- 6. Add part 751 to subchapter A to read as follows.

### PART 751—INCENTIVE-BASED COMPENSATION ARRANGEMENTS

Sec.

- 751.1 Authority, scope, and initial applicability.
- 751.2 Definitions.
- 751.3 Applicability.
- 751.4 Requirements and prohibitions applicable to all credit unions subject to this part.
- 751.5 Additional disclosure and recordkeeping requirements for Level 1 and Level 2 credit unions.
- 751.6 Reservation of authority for Level 3 credit unions.
- 751.7 Deferral, forfeiture and downward adjustment, and clawback requirements for Level 1 and Level 2 credit unions.
- 751.8 Additional prohibitions for Level 1 and Level 2 credit unions.
- 751.9 Risk management and controls requirements for Level 1 and Level 2 credit unions.
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- 751.12 Indirect actions.
- 751.13 Enforcement.
- 751.14 Credit unions in conservatorship or liquidation.

**Authority:** 12 U.S.C. 1751 *et seq.* and 5641.

#### § 751.1 Authority, scope, and initial applicability.

(a) *Authority.* This part is issued pursuant to section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5641) and the Federal Credit Union Act (12 U.S.C. 1751 *et seq.*)

(b) *Scope.* This part applies to any federally insured credit union, or any credit union eligible to make application to become an insured credit union under 12 U.S.C. 1781, with average total consolidated assets greater than or equal to \$1 billion that offers incentive-based compensation to covered persons.

(c) *Initial applicability*—(1) *Compliance date.* A credit union must meet the requirements of this part no later than [Date of the beginning of the first calendar quarter that begins at least 540 days after a final rule is published in the **Federal Register**]. Whether a credit union is a Level 1, Level 2, or Level 3 credit union at that time will be determined based on average total consolidated assets as of [Date of the beginning of the first calendar quarter that begins after a final rule is published in the **Federal Register**].

(2) *Grandfathered plans.* A credit union is not required to comply with the requirements of this part with respect to any incentive-based compensation plan with a performance period that begins before [Compliance Date as described in paragraph (c)(1) of this section].

(d) *Preservation of authority.* Nothing in this part in any way limits the authority of NCUA under other provisions of applicable law and regulations.

#### § 751.2 Definitions.

For purposes of this part only, the following definitions apply unless otherwise specified:

- (a) [Reserved].
- (b) *Average total consolidated assets* means the average of a credit union's total consolidated assets, as reported on the credit union's regulatory reports, for the four most recent consecutive quarters. If a credit union has not filed a regulatory report for each of the four most recent consecutive quarters, the credit union's average total consolidated assets means the average of its total consolidated assets, as reported on its regulatory reports, for the most recent quarter or consecutive quarters, as applicable. Average total consolidated assets are measured on the as-of date of the most recent regulatory report used in the calculation of the average.

(c) *To award incentive-based compensation* means to make a final determination, conveyed to a covered person, of the amount of incentive-based compensation payable to the covered person for performance over a performance period.

(d) *Board of directors* means the governing body of a credit union that oversees the activities of the credit union.

(e) *Clawback* means a mechanism by which a credit union can recover vested incentive-based compensation from a covered person.

(f) *Compensation, fees, or benefits* means all direct and indirect payments, both cash and non-cash, awarded to, granted to, or earned by or for the benefit of, any covered person in exchange for services rendered to a credit union.

(g) [Reserved].

(h) *Control function* means a compliance, risk management, internal audit, legal, human resources, accounting, financial reporting, or finance role responsible for identifying, measuring, monitoring, or controlling risk-taking.

(i) [Reserved].

(j) *Covered person* means any executive officer, employee, or director who receives incentive-based compensation at a credit union.

(k) *Deferral* means the delay of vesting of incentive-based compensation beyond the date on which the incentive-based compensation is awarded.

(l) *Deferral period* means the period of time between the date a performance period ends and the last date on which the incentive-based compensation awarded for such performance period vests.

(m) [Reserved].

(n) *Director* of a credit union means a member of the board of directors.

(o) *Downward adjustment* means a reduction of the amount of a covered person's incentive-based compensation not yet awarded for any performance period that has already begun, including amounts payable under long-term incentive plans, in accordance with a forfeiture and downward adjustment review under § 751.7(b).

(p) [Reserved].

(q) *Forfeiture* means a reduction of the amount of deferred incentive-based compensation awarded to a covered person that has not vested.

(r) *Incentive-based compensation* means any variable compensation, fees, or benefits that serve as an incentive or reward for performance.

(s) *Incentive-based compensation arrangement* means an agreement between a credit union and a covered

person, under which the credit union provides incentive-based compensation to the covered person, including incentive-based compensation delivered through one or more incentive-based compensation plans.

(t) *Incentive-based compensation plan* means a document setting forth terms and conditions governing the opportunity for and the payment of incentive-based compensation payments to one or more covered persons.

(u) *Incentive-based compensation program* means a credit union's framework for incentive-based compensation that governs incentive-based compensation practices and establishes related controls.

(v) *Level 1 credit union* means a credit union with average total consolidated assets greater than or equal to \$250 billion.

(w) *Level 2 credit union* means a credit union with average total consolidated assets greater than or equal to \$50 billion that is not a Level 1 credit union.

(x) *Level 3 credit union* means a credit union with average total consolidated assets greater than or equal to \$1 billion that is not a Level 1 credit union or Level 2 credit union.

(y) *Long-term incentive plan* means a plan to provide incentive-based compensation that is based on a performance period of at least three years.

(z) [Reserved].

(aa) *Performance period* means the period during which the performance of a covered person is assessed for purposes of determining incentive-based compensation.

(bb) [Reserved].

(cc) *Qualifying incentive-based compensation* means the amount of incentive-based compensation awarded to a covered person for a particular performance period, excluding amounts awarded to the covered person for that particular performance period under a long-term incentive plan.

(dd) [Reserved].

(ee) *Regulatory report* means NCUA form 5300 or 5310 call report.

(ff) [Reserved].

(gg) *Senior executive officer* means a covered person who holds the title or, without regard to title, salary, or compensation, performs the function of one or more of the following positions at a credit union for any period of time in the relevant performance period: President, chief executive officer, executive chairman, chief operating officer, chief financial officer, chief investment officer, chief legal officer, chief lending officer, chief risk officer, chief compliance officer, chief audit

executive, chief credit officer, chief accounting officer, or head of a major business line or control function.

(hh) *Significant risk-taker* means:

(1) Any covered person at a Level 1 or Level 2 credit union, other than a senior executive officer, who received annual base salary and incentive-based compensation for the last calendar year that ended at least 180 days before the beginning of the performance period of which at least one-third is incentive-based compensation and is—

(i) A covered person of a Level 1 credit union who received annual base salary and incentive-based compensation for the last calendar year that ended at least 180 days before the beginning of the performance period that placed the covered person among the highest 5 percent in annual base salary and incentive-based compensation among all covered persons (excluding senior executive officers) of the Level 1 credit union;

(ii) A covered person of a Level 2 credit union who received annual base salary and incentive-based compensation for the last calendar year that ended at least 180 days before the beginning of the performance period that placed the covered person among the highest 2 percent in annual base salary and incentive-based compensation among all covered persons (excluding senior executive officers) of the Level 2 credit union; or

(iii) A covered person of a credit union who may commit or expose 0.5 percent or more of the net worth or total capital of the credit union; and

(2) Any covered person at a Level 1 or Level 2 credit union, other than a senior executive officer, who is designated as a “significant risk-taker” by NCUA because of that person's ability to expose a credit union to risks that could lead to material financial loss in relation to the credit union's size, capital, or overall risk tolerance, in accordance with procedures established by NCUA, or by the credit union.

(3) [Reserved]

(4) If NCUA determines, in accordance with procedures established by NCUA, that a Level 1 credit union's activities, complexity of operations, risk profile, and compensation practices are similar to those of a Level 2 credit union, the Level 1 credit union may apply paragraph (hh)(1)(i) of this section to covered persons of the Level 1 credit union by substituting “2 percent” for “5 percent”.

(ii) [Reserved]

(jj) *Vesting of incentive-based compensation* means the transfer of ownership of the incentive-based compensation to the covered person to

whom the incentive-based compensation was awarded, such that the covered person's right to the incentive-based compensation is no longer contingent on the occurrence of any event.

### 751.3 Applicability.

(a) *When average total consolidated assets increase*—(1) *In general.* A credit union shall become a Level 1, Level 2, or Level 3 credit union when its average total consolidated assets increase to an amount that equals or exceeds \$250 billion, \$50 billion, or \$1 billion, respectively.

(2) *Compliance date.* A credit union that becomes a Level 1, Level 2, or Level 3 credit union pursuant to paragraph (a)(1) of this section shall comply with the requirements of this part for a Level 1, Level 2, or Level 3 credit union, respectively, not later than the first day of the first calendar quarter that begins at least 540 days after the date on which the credit union becomes a Level 1, Level 2, or Level 3 credit union, respectively. Until that day, the Level 1, Level 2, or Level 3 credit union will remain subject to the requirements of this part, if any, that applied to the credit union on the day before the date on which it became a Level 1, Level 2, or Level 3 credit union.

(3) *Grandfathered plans.* A credit union that becomes a Level 1, Level 2, or Level 3 credit union under paragraph (a)(1) of this section is not required to comply with requirements of this part applicable to a Level 1, Level 2, or Level 3 credit union, respectively, with respect to any incentive-based compensation plan with a performance period that begins before the date described in paragraph (a)(2) of this section.

(b) *When total consolidated assets decrease.* A Level 1, Level 2, or Level 3 credit union will remain subject to the requirements applicable to such credit union under this part unless and until the total consolidated assets of the credit union, as reported on the credit union's regulatory reports, fall below \$250 billion, \$50 billion, or \$1 billion, respectively, for each of four consecutive quarters. The calculation will be effective on the as-of date of the fourth consecutive regulatory report.

### 751.4 Requirements and prohibitions applicable to all credit unions subject to this part.

(a) *In general.* A credit union must not establish or maintain any type of incentive-based compensation arrangement, or any feature of any such arrangement, that encourages inappropriate risks by the credit union:

(1) By providing a covered person with excessive compensation, fees, or benefits; or

(2) That could lead to material financial loss to the credit union.

(b) *Excessive compensation.*

Compensation, fees, and benefits are considered excessive for purposes of paragraph (a)(1) of this section when amounts paid are unreasonable or disproportionate to the value of the services performed by a covered person, taking into consideration all relevant factors, including, but not limited to:

(1) The combined value of all compensation, fees, or benefits provided to the covered person;

(2) The compensation history of the covered person and other individuals with comparable expertise at the credit union;

(3) The financial condition of the credit union;

(4) Compensation practices at comparable credit unions, based upon such factors as asset size, geographic location, and the complexity of the credit union's operations and assets;

(5) For post-employment benefits, the projected total cost and benefit to the credit union; and

(6) Any connection between the covered person and any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the credit union.

(c) *Material financial loss.* An incentive-based compensation arrangement at a credit union encourages inappropriate risks that could lead to material financial loss to the credit union, unless the arrangement:

(1) Appropriately balances risk and reward;

(2) Is compatible with effective risk management and controls; and

(3) Is supported by effective governance.

(d) *Performance measures.* An incentive-based compensation arrangement will not be considered to appropriately balance risk and reward for purposes of paragraph (c)(1) of this section unless:

(1) The arrangement includes financial and non-financial measures of performance, including considerations of risk-taking, that are relevant to a covered person's role within a credit union and to the type of business in which the covered person is engaged and that are appropriately weighted to reflect risk-taking;

(2) The arrangement is designed to allow non-financial measures of performance to override financial measures of performance when

appropriate in determining incentive-based compensation; and

(3) Any amounts to be awarded under the arrangement are subject to adjustment to reflect actual losses, inappropriate risks taken, compliance deficiencies, or other measures or aspects of financial and non-financial performance.

(e) *Board of directors.* A credit union's board of directors, or a committee thereof, must:

(1) Conduct oversight of the credit union's incentive-based compensation program;

(2) Approve incentive-based compensation arrangements for senior executive officers, including the amounts of all awards and, at the time of vesting, payouts under such arrangements; and

(3) Approve any material exceptions or adjustments to incentive-based compensation policies or arrangements for senior executive officers.

(f) *Disclosure and recordkeeping requirements.* A credit union must create annually and maintain for a period of at least seven years records that document the structure of all its incentive-based compensation arrangements and demonstrate compliance with this part. A credit union must disclose the records to NCUA upon request. At a minimum, the records must include copies of all incentive-based compensation plans, a record of who is subject to each plan, and a description of how the incentive-based compensation program is compatible with effective risk management and controls.

(g) *Rule of construction.* A credit union is not required to report the actual amount of compensation, fees, or benefits of individual covered persons as part of the disclosure and recordkeeping requirements under this part.

**§ 751.5 Additional disclosure and recordkeeping requirements for Level 1 and Level 2 credit unions.**

(a) A Level 1 or Level 2 credit union must create annually and maintain for a period of at least seven years records that document:

(1) The credit union's senior executive officers and significant risk-takers, listed by legal entity, job function, organizational hierarchy, and line of business;

(2) The incentive-based compensation arrangements for senior executive officers and significant risk-takers, including information on percentage of incentive-based compensation deferred and form of award;

(3) Any forfeiture and downward adjustment or clawback reviews and

decisions for senior executive officers and significant risk-takers; and

(4) Any material changes to the credit union's incentive-based compensation arrangements and policies.

(b) A Level 1 or Level 2 credit union must create and maintain records in a manner that allows for an independent audit of incentive-based compensation arrangements, policies, and procedures, including, those required under § 751.11.

(c) A Level 1 or Level 2 credit union must provide the records described in paragraph (a) of this section to NCUA in such form and with such frequency as requested by NCUA.

**§ 751.6 Reservation of authority for Level 3 credit unions.**

(a) *In general.* NCUA may require a Level 3 credit union with average total consolidated assets greater than or equal to \$10 billion and less than \$50 billion to comply with some or all of the provisions of §§ 751.5 and 751.7 through 751.11 if NCUA determines that the Level 3 credit union's complexity of operations or compensation practices are consistent with those of a Level 1 or Level 2 credit union.

(b) *Factors considered.* Any exercise of authority under this section will be in writing by the NCUA Board in accordance with procedures established by the NCUA Board and will consider the activities, complexity of operations, risk profile, and compensation practices of the Level 3 credit union, in addition to any other relevant factors.

**§ 751.7 Deferral, forfeiture and downward adjustment, and clawback requirements for Level 1 and Level 2 credit unions.**

An incentive-based compensation arrangement at a Level 1 or Level 2 credit union will not be considered to appropriately balance risk and reward, for purposes of § 751.4(c)(1), unless the following requirements are met.

(a) *Deferral.* (1) Qualifying incentive-based compensation must be deferred as follows:

(i) *Minimum required deferral amount.* (A) A Level 1 credit union must defer at least 60 percent of a senior executive officer's qualifying incentive-based compensation awarded for each performance period.

(B) A Level 1 credit union must defer at least 50 percent of a significant risk-taker's qualifying incentive-based compensation awarded for each performance period.

(C) A Level 2 credit union must defer at least 50 percent of a senior executive officer's qualifying incentive-based compensation awarded for each performance period.

(D) A Level 2 credit union must defer at least 40 percent of a significant risk-taker's qualifying incentive-based compensation awarded for each performance period.

(ii) *Minimum required deferral period.*

(A) For a senior executive officer or significant risk-taker of a Level 1 credit union, the deferral period for deferred qualifying incentive-based compensation must be at least 4 years.

(B) For a senior executive officer or significant risk-taker of a Level 2 credit union, the deferral period for deferred qualifying incentive-based compensation must be at least 3 years.

(iii) *Vesting of amounts during deferral period—(A) Pro rata vesting.*

During a deferral period, deferred qualifying incentive-based compensation may not vest faster than on a pro rata annual basis beginning no earlier than the first anniversary of the end of the performance period for which the amounts were awarded.

(B) *Acceleration of vesting.* A Level 1 or Level 2 credit union must not accelerate the vesting of a covered person's deferred qualifying incentive-based compensation that is required to be deferred under this part, except in the case of:

(1) Death or disability of such covered person; or

(2) The payment of income taxes that become due on deferred amounts before the covered person is vested in the deferred amount. For purposes of this paragraph, any accelerated vesting must be deducted from the scheduled deferred amounts proportionally to the deferral schedule.

(2) Incentive-based compensation awarded under a long-term incentive plan must be deferred as follows:

(i) *Minimum required deferral amount.* (A) A Level 1 credit union must defer at least 60 percent of a senior executive officer's incentive-based compensation awarded under a long-term incentive plan for each performance period.

(B) A Level 1 credit union must defer at least 50 percent of a significant risk-taker's incentive-based compensation awarded under a long-term incentive plan for each performance period.

(C) A Level 2 credit union must defer at least 50 percent of a senior executive officer's incentive-based compensation awarded under a long-term incentive plan for each performance period.

(D) A Level 2 credit union must defer at least 40 percent of a significant risk-taker's incentive-based compensation awarded under a long-term incentive plan for each performance period.

(ii) *Minimum required deferral period.*

(A) For a senior executive officer or

significant risk-taker of a Level 1 credit union, the deferral period for deferred long-term incentive plan amounts must be at least 2 years.

(B) For a senior executive officer or significant risk-taker of a Level 2 credit union, the deferral period for deferred long-term incentive plan amounts must be at least 1 year.

(iii) *Vesting of amounts during deferral period—(A) Pro rata vesting.* During a deferral period, deferred long-term incentive plan amounts may not vest faster than on a pro rata annual basis beginning no earlier than the first anniversary of the end of the performance period for which the amounts were awarded.

(B) *Acceleration of vesting.* A Level 1 or Level 2 credit union must not accelerate the vesting of a covered person's deferred long-term incentive plan amounts that is required to be deferred under this part, except in the case of:

(1) Death or disability of such covered person; or

(2) The payment of income taxes that become due on deferred amounts before the covered person is vested in the deferred amount. For purposes of this paragraph, any accelerated vesting must be deducted from the scheduled deferred amounts proportionally to the deferral schedule.

(3) *Adjustments of deferred qualifying incentive-based compensation and deferred long-term incentive plan compensation amounts.* A Level 1 or Level 2 credit union may not increase deferred qualifying incentive-based compensation or deferred long-term incentive plan amounts for a senior executive officer or significant risk-taker during the deferral period. For purposes of this paragraph, an increase in value attributable solely to a change in share value, a change in interest rates, or the payment of interest according to terms set out at the time of the award is not considered an increase in incentive-based compensation amounts.

(4) [Reserved].

(b) *Forfeiture and downward adjustment—(1) Compensation at risk.*

(i) A Level 1 or Level 2 credit union must place at risk of forfeiture all unvested deferred incentive-based compensation of any senior executive officer or significant risk-taker, including unvested deferred amounts awarded under long-term incentive plans.

(ii) A Level 1 or Level 2 credit union must place at risk of downward adjustment all of a senior executive officer's or significant risk-taker's incentive-based compensation amounts not yet awarded for the current

performance period, including amounts payable under long-term incentive plans.

(2) *Events triggering forfeiture and downward adjustment review.* At a minimum, a Level 1 or Level 2 credit union must consider forfeiture and downward adjustment of incentive-based compensation of senior executive officers and significant risk-takers described in paragraph (b)(3) of this section due to any of the following adverse outcomes at the credit union:

(i) Poor financial performance attributable to a significant deviation from the risk parameters set forth in the credit union's policies and procedures;

(ii) Inappropriate risk taking, regardless of the impact on financial performance;

(iii) Material risk management or control failures;

(iv) Non-compliance with statutory, regulatory, or supervisory standards that results in:

(A) Enforcement or legal action against the credit union brought by a federal or state regulator or agency; or

(B) A requirement that the credit union report a restatement of a financial statement to correct a material error; and

(v) Other aspects of conduct or poor performance as defined by the credit union.

(3) *Senior executive officers and significant risk-takers affected by forfeiture and downward adjustment.* A Level 1 or Level 2 credit union must consider forfeiture and downward adjustment for a senior executive officer or significant risk-taker with direct responsibility, or responsibility due to the senior executive officer's or significant risk-taker's role or position in the credit union's organizational structure, for the events related to the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section.

(4) *Determining forfeiture and downward adjustment amounts.* A Level 1 or Level 2 credit union must consider, at a minimum, the following factors when determining the amount or portion of a senior executive officer's or significant risk-taker's incentive-based compensation that should be forfeited or adjusted downward:

(i) The intent of the senior executive officer or significant risk-taker to operate outside the risk governance framework approved by the credit union's board of directors or to depart from the credit union's policies and procedures;

(ii) The senior executive officer's or significant risk-taker's level of participation in, awareness of, and responsibility for, the events triggering

the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section;

(iii) Any actions the senior executive officer or significant risk-taker took or could have taken to prevent the events triggering the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section;

(iv) The financial and reputational impact of the events triggering the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section to the credit union, the line or sub-line of business, and individuals involved, as applicable, including the magnitude of any financial loss and the cost of known or potential subsequent fines, settlements, and litigation;

(v) The causes of the events triggering the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section, including any decision-making by other individuals; and

(vi) Any other relevant information, including past behavior and past risk outcomes attributable to the senior executive officer or significant risk-taker.

(c) *Clawback.* A Level 1 or Level 2 credit union must include clawback provisions in incentive-based compensation arrangements for senior executive officers and significant risk-takers that, at a minimum, allow the credit union to recover incentive-based compensation from a current or former senior executive officer or significant risk-taker for seven years following the date on which such compensation vests, if the credit union determines that the senior executive officer or significant risk-taker engaged in:

(1) Misconduct that resulted in significant financial or reputational harm to the credit union;

(2) Fraud; or

(3) Intentional misrepresentation of information used to determine the senior executive officer or significant risk-taker's incentive-based compensation.

#### **§ 751.8 Additional prohibitions for Level 1 and Level 2 credit unions.**

An incentive-based compensation arrangement at a Level 1 or Level 2 credit union will be considered to provide incentives that appropriately balance risk and reward for purposes of § 751.4(c)(1) only if such credit union complies with the following prohibitions.

(a) *Hedging.* A Level 1 or Level 2 credit union must not purchase a hedging instrument or similar instrument on behalf of a covered person to hedge or offset any decrease

in the value of the covered person's incentive-based compensation.

(b) *Maximum incentive-based compensation opportunity.* A Level 1 or Level 2 credit union must not award incentive-based compensation to:

(1) A senior executive officer in excess of 125 percent of the target amount for that incentive-based compensation; or

(2) A significant risk-taker in excess of 150 percent of the target amount for that incentive-based compensation.

(c) *Relative performance measures.* A Level 1 or Level 2 credit union must not use incentive-based compensation performance measures that are based solely on industry peer performance comparisons.

(d) *Volume driven incentive-based compensation.* A Level 1 or Level 2 credit union must not provide incentive-based compensation to a covered person that is based solely on transaction revenue or volume without regard to transaction quality or compliance of the covered person with sound risk management.

#### **§ 751.9 Risk management and controls requirements for Level 1 and Level 2 credit unions.**

An incentive-based compensation arrangement at a Level 1 or Level 2 credit union will be considered to be compatible with effective risk management and controls for purposes of § 751.4(c)(2) only if such credit union meets the following requirements.

(a) A Level 1 or Level 2 credit union must have a risk management framework for its incentive-based compensation program that:

(1) Is independent of any lines of business;

(2) Includes an independent compliance program that provides for internal controls, testing, monitoring, and training with written policies and procedures consistent with § 751.11; and

(3) Is commensurate with the size and complexity of the credit union's operations.

(b) A Level 1 or Level 2 credit union must:

(1) Provide individuals engaged in control functions with the authority to influence the risk-taking of the business areas they monitor; and

(2) Ensure that covered persons engaged in control functions are compensated in accordance with the achievement of performance objectives linked to their control functions and independent of the performance of those business areas.

(c) A Level 1 or Level 2 credit union must provide for the independent monitoring of:

(1) All incentive-based compensation plans in order to identify whether those plans provide incentives that appropriately balance risk and reward;

(2) Events related to forfeiture and downward adjustment reviews and decisions of forfeiture and downward adjustment reviews in order to determine consistency with § 751.7(b); and

(3) Compliance of the incentive-based compensation program with the credit union's policies and procedures.

#### **§ 751.10 Governance requirements for Level 1 and Level 2 credit unions.**

An incentive-based compensation arrangement at a Level 1 or Level 2 credit union will not be considered to be supported by effective governance for purposes of § 751.4(c)(3), unless:

(a) The credit union establishes a compensation committee composed solely of directors who are not senior executive officers to assist the board of directors in carrying out its responsibilities under § 751.4(e); and

(b) The compensation committee established pursuant to paragraph (a) of this section obtains:

(1) Input from the risk and audit committees of the credit union's board of directors, or groups performing similar functions, and risk management function on the effectiveness of risk measures and adjustments used to balance risk and reward in incentive-based compensation arrangements;

(2) A written assessment of the effectiveness of the credit union's incentive-based compensation program and related compliance and control processes in providing risk-taking incentives that are consistent with the risk profile of the credit union, submitted on an annual or more frequent basis by the management of the credit union and developed with input from the risk and audit committees of its board of directors, or groups performing similar functions, and from the credit union's risk management and audit functions; and

(3) An independent written assessment of the effectiveness of the credit union's incentive-based compensation program and related compliance and control processes in providing risk-taking incentives that are consistent with the risk profile of the credit union, submitted on an annual or more frequent basis by the internal audit or risk management function of the credit union, developed independently of the credit union's management.

### **§ 751.11 Policies and procedures requirements for Level 1 and Level 2 credit unions.**

A Level 1 or Level 2 credit union must develop and implement policies and procedures for its incentive-based compensation program that, at a minimum:

- (a) Are consistent with the prohibitions and requirements of this part;
- (b) Specify the substantive and procedural criteria for the application of forfeiture and clawback, including the process for determining the amount of incentive-based compensation to be clawed back;
- (c) Require that the credit union maintain documentation of final forfeiture, downward adjustment, and clawback decisions;
- (d) Specify the substantive and procedural criteria for the acceleration of payments of deferred incentive-based compensation to a covered person, consistent with § 751.7(a)(1)(iii)(B) and (a)(2)(iii)(B);
- (e) Identify and describe the role of any employees, committees, or groups authorized to make incentive-based compensation decisions, including when discretion is authorized;
- (f) Describe how discretion is expected to be exercised to appropriately balance risk and reward;
- (g) Require that the credit union maintain documentation of the establishment, implementation, modification, and monitoring of incentive-based compensation arrangements, sufficient to support the credit union's decisions;
- (h) Describe how incentive-based compensation arrangements will be monitored;
- (i) Specify the substantive and procedural requirements of the independent compliance program consistent with § 751.9(a)(2); and
- (j) Ensure appropriate roles for risk management, risk oversight, and other control function personnel in the credit union's processes for:

- (1) Designing incentive-based compensation arrangements and determining awards, deferral amounts, deferral periods, forfeiture, downward adjustment, clawback, and vesting; and
- (2) Assessing the effectiveness of incentive-based compensation arrangements in restraining inappropriate risk-taking.

### **§ 751.12 Indirect actions.**

A credit union must not indirectly, or through or by any other person, do anything that would be unlawful for such credit union to do directly under this part. The term "any other person"

includes a credit union service organization described in 12 U.S.C. 1757(7)(I) or established under similar state law.

### **§ 751.13 Enforcement.**

The provisions of this part shall be enforced under section 505 of the Gramm-Leach-Bliley Act and, for purposes of such section, a violation of this part shall be treated as a violation of subtitle A of title V of such Act.

### **§ 751.14 Credit unions in conservatorship or liquidation.**

(a) *Scope.* This section applies to federally insured credit unions for which any one or more of the following parties are acting as conservator or liquidating agent:

- (1) The National Credit Union Administration Board;
- (2) The appropriate state supervisory authority; or
- (3) Any party designated by the National Credit Union Administration Board or by the appropriate state supervisory authority.

(b) *Compensation requirements.* For a credit union subject to this section, the requirements of this part do not apply. Instead, the conservator or liquidating agent, in its discretion and according to the circumstances deemed relevant in the judgment of the conservator or liquidating agent, will determine the requirements that best fulfill the requirements and purposes of 12 U.S.C. 5641. The conservator or liquidating agent may determine appropriate transition terms and provisions in the event that the credit union ceases to be within the scope of this section.

### **Federal Housing Finance Agency**

#### **Authority and Issuance**

Accordingly, for the reasons stated in the joint preamble, under the authority of 12 U.S.C. 4526 and 5641, FHFA proposes to amend chapter XII of title 12 of the Code of Federal Regulation as follows:

■ 7. Add part 1232 to subchapter B to read as follows:

### **PART 1232—INCENTIVE-BASED COMPENSATION ARRANGEMENTS**

Sec.

- 1232.1 Authority, scope, and initial applicability.
- 1232.2 Definitions.
- 1232.3 Applicability.
- 1232.4 Requirements and prohibitions applicable to all covered institutions.
- 1232.5 Additional disclosure and recordkeeping requirements for Level 1 and Level 2 covered institutions.
- 1232.6 Reservation of authority for Level 3 covered institutions.

1232.7 Deferral, forfeiture and downward adjustment, and clawback requirements for Level 1 and Level 2 covered institutions.

1232.8 Additional prohibitions for Level 1 and Level 2 covered institutions.

1232.9 Risk management and controls requirements for Level 1 and Level 2 covered institutions.

1232.10 Governance requirements for Level 1 and Level 2 covered institutions.

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**Authority:** 12 U.S.C. 4511(b), 4513, 4518, 4526, ch. 46 subch. III, and 5641.

### **§ 1232.1 Authority, scope, and initial applicability.**

(a) *Authority.* This part is issued pursuant to section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5641) and sections 1311, 1313, 1314, 1318, and 1319G and Subtitle C of the Safety and Soundness Act (12 U.S.C. 4511(b), 4513, 4514, 4518, 4526, and ch. 46 subch. III).

(b) *Scope.* This part applies to a covered institution with average total consolidated assets greater than or equal to \$1 billion that offers incentive-based compensation to covered persons.

(c) *Initial applicability*—(1) *Compliance date.* A covered institution must meet the requirements of this part no later than [Date of the beginning of the first calendar quarter that begins at least 540 days after a final rule is published in the **Federal Register**]. Whether a covered institution other than a Federal Home Loan Bank is a Level 1, Level 2, or Level 3 covered institution at that time will be determined based on average total consolidated assets as of [Date of the beginning of the first calendar quarter that begins after a final rule is published in the **Federal Register**].

(2) *Grandfathered plans.* A covered institution is not required to comply with the requirements of this part with respect to any incentive-based compensation plan with a performance period that begins before [Compliance Date as described in paragraph (c)(1) of this section].

(d) *Preservation of authority.* Nothing in this part in any way limits the authority of the Federal Housing Finance Agency under other provisions of applicable law and regulations.

### **§ 1232.2 Definitions.**

For purposes of this part only, the following definitions apply unless otherwise specified:

- (a) [Reserved].

(b) *Average total consolidated assets* means the average of a regulated institution's total consolidated assets, as reported on the regulated institution's regulatory reports, for the four most recent consecutive quarters. If a regulated institution has not filed a regulatory report for each of the four most recent consecutive quarters, the regulated institution's average total consolidated assets means the average of its total consolidated assets, as reported on its regulatory reports, for the most recent quarter or consecutive quarters, as applicable. Average total consolidated assets are measured on the as-of date of the most recent regulatory report used in the calculation of the average.

(c) *To award incentive-based compensation* means to make a final determination, conveyed to a covered person, of the amount of incentive-based compensation payable to the covered person for performance over a performance period.

(d) *Board of directors* means the governing body of a covered institution that oversees the activities of the covered institution, often referred to as the board of directors or board of managers.

(e) *Clawback* means a mechanism by which a covered institution can recover vested incentive-based compensation from a covered person.

(f) *Compensation, fees, or benefits* means all direct and indirect payments, both cash and non-cash, awarded to, granted to, or earned by or for the benefit of, any covered person in exchange for services rendered to a covered institution.

(g) [Reserved].

(h) *Control function* means a compliance, risk management, internal audit, legal, human resources, accounting, financial reporting, or finance role responsible for identifying, measuring, monitoring, or controlling risk-taking.

(i) *Covered institution* means a regulated institution with average total consolidated assets greater than or equal to \$1 billion.

(j) *Covered person* means any executive officer, employee, director, or principal shareholder who receives incentive-based compensation at a covered institution.

(k) *Deferral* means the delay of vesting of incentive-based compensation beyond the date on which the incentive-based compensation is awarded.

(l) *Deferral period* means the period of time between the date a performance period ends and the last date on which the incentive-based compensation

awarded for such performance period vests.

(m) [Reserved].

(n) *Director* of a covered institution means a member of the board of directors.

(o) *Downward adjustment* means a reduction of the amount of a covered person's incentive-based compensation not yet awarded for any performance period that has already begun, including amounts payable under long-term incentive plans, in accordance with a forfeiture and downward adjustment review under § 1232.7(b).

(p) *Equity-like instrument* means:

(1) Equity in the covered institution or of any affiliate of the covered institution; or

(2) A form of compensation:

(i) Payable at least in part based on the price of the shares or other equity instruments of the covered institution or of any affiliate of the covered institution; or

(ii) That requires, or may require, settlement in the shares of the covered institution or of any affiliate of the covered institution.

(q) *Forfeiture* means a reduction of the amount of deferred incentive-based compensation awarded to a covered person that has not vested.

(r) *Incentive-based compensation* means any variable compensation, fees, or benefits that serve as an incentive or reward for performance.

(s) *Incentive-based compensation arrangement* means an agreement between a covered institution and a covered person, under which the covered institution provides incentive-based compensation to the covered person, including incentive-based compensation delivered through one or more incentive-based compensation plans.

(t) *Incentive-based compensation plan* means a document setting forth terms and conditions governing the opportunity for and the payment of incentive-based compensation payments to one or more covered persons.

(u) *Incentive-based compensation program* means a covered institution's framework for incentive-based compensation that governs incentive-based compensation practices and establishes related controls.

(v) *Level 1 covered institution* means a covered institution with average total consolidated assets greater than or equal to \$250 billion that is not a Federal Home Loan Bank.

(w) *Level 2 covered institution* means a covered institution with average total consolidated assets greater than or equal to \$50 billion that is not a Level 1 covered institution and any Federal

Home Loan Bank that is a covered institution.

(x) *Level 3 covered institution* means a covered institution with average total consolidated assets greater than or equal to \$1 billion that is not a Level 1 covered institution or Level 2 covered institution.

(y) *Long-term incentive plan* means a plan to provide incentive-based compensation that is based on a performance period of at least three years.

(z) *Option* means an instrument through which a covered institution provides a covered person the right, but not the obligation, to buy a specified number of shares representing an ownership stake in a company at a predetermined price within a set time period or on a date certain, or any similar instrument, such as a stock appreciation right.

(aa) *Performance period* means the period during which the performance of a covered person is assessed for purposes of determining incentive-based compensation.

(bb) *Principal shareholder* means a natural person who, directly or indirectly, or acting through or in concert with one or more persons, owns, controls, or has the power to vote 10 percent or more of any class of voting securities of a covered institution.

(cc) *Qualifying incentive-based compensation* means the amount of incentive-based compensation awarded to a covered person for a particular performance period, excluding amounts awarded to the covered person for that particular performance period under a long-term incentive plan.

(dd) *Regulated institution* means an Enterprise, as defined in 12 U.S.C. 4502(10), and a Federal Home Loan Bank.

(ee) *Regulatory report* means the Call Report Statement of Condition.

(ff) [Reserved].

(gg) *Senior executive officer* means a covered person who holds the title or, without regard to title, salary, or compensation, performs the function of one or more of the following positions at a covered institution for any period of time in the relevant performance period: President, chief executive officer, executive chairman, chief operating officer, chief financial officer, chief investment officer, chief legal officer, chief lending officer, chief risk officer, chief compliance officer, chief audit executive, chief credit officer, chief accounting officer, or head of a major business line or control function.

(hh) *Significant risk-taker* means:

(1) Any covered person at a Level 1 or Level 2 covered institution, other

than a senior executive officer, who received annual base salary and incentive-based compensation for the last calendar year that ended at least 180 days before the beginning of the performance period of which at least one-third is incentive-based compensation and is—

(i) A covered person of a Level 1 covered institution who received annual base salary and incentive-based compensation for the last calendar year that ended at least 180 days before the beginning of the performance period that placed the covered person among the highest 5 percent in annual base salary and incentive-based compensation among all covered persons (excluding senior executive officers) of the Level 1 covered institution;

(ii) A covered person of a Level 2 covered institution who received annual base salary and incentive-based compensation for the last calendar year that ended at least 180 days before the beginning of the performance period that placed the covered person among the highest 2 percent in annual base salary and incentive-based compensation among all covered persons (excluding senior executive officers) of the Level 2 covered institution; or

(iii) A covered person of a covered institution who may commit or expose 0.5 percent or more of the regulatory capital, in the case of a Federal Home Loan Bank, or the minimum capital, in the case of an Enterprise, of the covered institution; and

(2) Any covered person at a Level 1 or Level 2 covered institution, other than a senior executive officer, who is designated as a “significant risk-taker” by the Federal Housing Finance Agency because of that person’s ability to expose a covered institution to risks that could lead to material financial loss in relation to the covered institution’s size, capital, or overall risk tolerance, in accordance with procedures established by the Federal Housing Finance Agency, or by the covered institution.

(3) [Reserved].

(4) If the Federal Housing Finance Agency determines, in accordance with procedures established by the Federal Housing Finance Agency, that a Level 1 covered institution’s activities, complexity of operations, risk profile, and compensation practices are similar to those of a Level 2 covered institution, the Level 1 covered institution may apply paragraph (hh)(1)(i) of this section to covered persons of the Level 1 covered institution by substituting “2 percent” for “5 percent”.

(ii) [Reserved].

(jj) *Vesting* of incentive-based compensation means the transfer of ownership of the incentive-based compensation to the covered person to whom the incentive-based compensation was awarded, such that the covered person’s right to the incentive-based compensation is no longer contingent on the occurrence of any event.

#### § 1232.3 Applicability.

(a) *When average total consolidated assets increase—*(1) *In general.* A regulated institution other than a Federal Home Loan Bank shall become a Level 1, Level 2, or Level 3 covered institution when its average total consolidated assets increase to an amount that equals or exceeds \$250 billion, \$50 billion, or \$1 billion, respectively.

(2) *Compliance date.* A regulated institution that becomes a Level 1, Level 2, or Level 3 covered institution pursuant to paragraph (a)(1) of this section shall comply with the requirements of this part for a Level 1, Level 2, or Level 3 covered institution, respectively, not later than the first day of the first calendar quarter that begins at least 540 days after the date on which the regulated institution becomes a Level 1, Level 2, or Level 3 covered institution, respectively. Until that day, the Level 1, Level 2, or Level 3 covered institution will remain subject to the requirements of this part, if any, that applied to the regulated institution on the day before the date on which it became a Level 1, Level 2, or Level 3 covered institution.

(3) *Grandfathered plans.* A regulated institution that becomes a Level 1, Level 2, or Level 3 covered institution under paragraph (a)(1) of this section is not required to comply with requirements of this part applicable to a Level 1, Level 2, or Level 3 covered institution, respectively, with respect to any incentive-based compensation plan with a performance period that begins before the date described in paragraph (a)(2) of this section. Any such incentive-based compensation plan shall remain subject to the requirements under this part, if any, that applied to the regulated institution at the beginning of the performance period.

(b) *When total consolidated assets decrease.* A Level 1, Level 2, or Level 3 covered institution other than a Federal Home Loan Bank will remain subject to the requirements applicable to such covered institution under this part unless and until the total consolidated assets of the covered institution, as reported on the covered institution’s regulatory reports, fall below \$250

billion, \$50 billion, or \$1 billion, respectively, for each of four consecutive quarters. A Federal Home Loan Bank will remain subject to the requirements of a Level 2 covered institution under this part unless and until the total consolidated assets of the Federal Home Loan Bank, as reported on the Federal Home Loan Bank’s regulatory reports, fall below \$1 billion for each of four consecutive quarters. The calculation will be effective on the as-of date of the fourth consecutive regulatory report.

#### § 1232.4 Requirements and prohibitions applicable to all covered institutions.

(a) *In general.* A covered institution must not establish or maintain any type of incentive-based compensation arrangement, or any feature of any such arrangement, that encourages inappropriate risks by the covered institution:

(1) By providing a covered person with excessive compensation, fees, or benefits; or

(2) That could lead to material financial loss to the covered institution.

(b) *Excessive compensation.*

Compensation, fees, and benefits are considered excessive for purposes of paragraph (a)(1) of this section when amounts paid are unreasonable or disproportionate to the value of the services performed by a covered person, taking into consideration all relevant factors, including, but not limited to:

(1) The combined value of all compensation, fees, or benefits provided to the covered person;

(2) The compensation history of the covered person and other individuals with comparable expertise at the covered institution;

(3) The financial condition of the covered institution;

(4) Compensation practices at comparable institutions, based upon such factors as asset size, geographic location, and the complexity of the covered institution’s operations and assets;

(5) For post-employment benefits, the projected total cost and benefit to the covered institution; and

(6) Any connection between the covered person and any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the covered institution.

(c) *Material financial loss.* An incentive-based compensation arrangement at a covered institution encourages inappropriate risks that could lead to material financial loss to the covered institution, unless the arrangement:

(1) Appropriately balances risk and reward;

(2) Is compatible with effective risk management and controls; and  
 (3) Is supported by effective governance.

(d) *Performance measures.* An incentive-based compensation arrangement will not be considered to appropriately balance risk and reward for purposes of paragraph (c)(1) of this section unless:

(1) The arrangement includes financial and non-financial measures of performance, including considerations of risk-taking, that are relevant to a covered person's role within a covered institution and to the type of business in which the covered person is engaged and that are appropriately weighted to reflect risk-taking;

(2) The arrangement is designed to allow non-financial measures of performance to override financial measures of performance when appropriate in determining incentive-based compensation; and

(3) Any amounts to be awarded under the arrangement are subject to adjustment to reflect actual losses, inappropriate risks taken, compliance deficiencies, or other measures or aspects of financial and non-financial performance.

(e) *Board of directors.* A covered institution's board of directors, or a committee thereof, must:

(1) Conduct oversight of the covered institution's incentive-based compensation program;

(2) Approve incentive-based compensation arrangements for senior executive officers, including the amounts of all awards and, at the time of vesting, payouts under such arrangements; and

(3) Approve any material exceptions or adjustments to incentive-based compensation policies or arrangements for senior executive officers.

(f) *Disclosure and recordkeeping requirements.* A covered institution must create annually and maintain for a period of at least seven years records that document the structure of all its incentive-based compensation arrangements and demonstrate compliance with this part. A covered institution must disclose the records to the Federal Housing Finance Agency upon request. At a minimum, the records must include copies of all incentive-based compensation plans, a record of who is subject to each plan, and a description of how the incentive-based compensation program is compatible with effective risk management and controls.

(g) *Rule of construction.* A covered institution is not required to report the actual amount of compensation, fees, or

benefits of individual covered persons as part of the disclosure and recordkeeping requirements under this part, though it may be required to do so under other applicable regulations of the Federal Housing Finance Agency.

**§ 1232.5 Additional disclosure and recordkeeping requirements for Level 1 and Level 2 covered institutions.**

(a) A Level 1 or Level 2 covered institution must create annually and maintain for a period of at least seven years records that document:

(1) The covered institution's senior executive officers and significant risk-takers, listed by legal entity, job function, organizational hierarchy, and line of business;

(2) The incentive-based compensation arrangements for senior executive officers and significant risk-takers, including information on percentage of incentive-based compensation deferred and form of award;

(3) Any forfeiture and downward adjustment or clawback reviews and decisions for senior executive officers and significant risk-takers; and

(4) Any material changes to the covered institution's incentive-based compensation arrangements and policies.

(b) A Level 1 or Level 2 covered institution must create and maintain records in a manner that allows for an independent audit of incentive-based compensation arrangements, policies, and procedures, including those required under § 1232.11.

(c) A Level 1 or Level 2 covered institution must provide the records described in paragraph (a) of this section to the Federal Housing Finance Agency in such form and with such frequency as requested by the Federal Housing Finance Agency.

**§ 1232.6 Reservation of authority for Level 3 covered institutions.**

(a) *In general.* The Federal Housing Finance Agency may require a Level 3 covered institution with average total consolidated assets greater than or equal to \$10 billion and less than \$50 billion to comply with some or all of the provisions of §§ 1232.5 and 1232.7 through 1232.11 if the Federal Housing Finance Agency determines that the Level 3 covered institution's complexity of operations or compensation practices are consistent with those of a Level 1 or Level 2 covered institution.

(b) *Factors considered.* Any exercise of authority under this section will be in writing by the Federal Housing Finance Agency in accordance with procedures established by the Federal Housing Finance Agency and will

consider the activities, complexity of operations, risk profile, and compensation practices of the Level 3 covered institution, in addition to any other relevant factors.

**§ 1232.7 Deferral, forfeiture and downward adjustment, and clawback requirements for Level 1 and Level 2 covered institutions.**

An incentive-based compensation arrangement at a Level 1 or Level 2 covered institution will not be considered to appropriately balance risk and reward, for purposes of § 1232.4(c)(1), unless the following requirements are met.

(a) *Deferral.* (1) Qualifying incentive-based compensation must be deferred as follows:

(i) *Minimum required deferral amount.* (A) A Level 1 covered institution must defer at least 60 percent of a senior executive officer's qualifying incentive-based compensation awarded for each performance period.

(B) A Level 1 covered institution must defer at least 50 percent of a significant risk-taker's qualifying incentive-based compensation awarded for each performance period.

(C) A Level 2 covered institution must defer at least 50 percent of a senior executive officer's qualifying incentive-based compensation awarded for each performance period.

(D) A Level 2 covered institution must defer at least 40 percent of a significant risk-taker's qualifying incentive-based compensation awarded for each performance period.

(ii) *Minimum required deferral period.* (A) For a senior executive officer or significant risk-taker of a Level 1 covered institution, the deferral period for deferred qualifying incentive-based compensation must be at least 4 years.

(B) For a senior executive officer or significant risk-taker of a Level 2 covered institution, the deferral period for deferred qualifying incentive-based compensation must be at least 3 years.

(iii) *Vesting of amounts during deferral period.*—(A) *Pro rata vesting.* During a deferral period, deferred qualifying incentive-based compensation may not vest faster than on a pro rata annual basis beginning no earlier than the first anniversary of the end of the performance period for which the amounts were awarded.

(B) *Acceleration of vesting.* A Level 1 or Level 2 covered institution must not accelerate the vesting of a covered person's deferred qualifying incentive-based compensation that is required to be deferred under this part, except in the case of death or disability of such covered person.

(2) Incentive-based compensation awarded under a long-term incentive plan must be deferred as follows:

(i) *Minimum required deferral amount.*

(A) A Level 1 covered institution must defer at least 60 percent of a senior executive officer's incentive-based compensation awarded under a long-term incentive plan for each performance period.

(B) A Level 1 covered institution must defer at least 50 percent of a significant risk-taker's incentive-based compensation awarded under a long-term incentive plan for each performance period.

(C) A Level 2 covered institution must defer at least 50 percent of a senior executive officer's incentive-based compensation awarded under a long-term incentive plan for each performance period.

(D) A Level 2 covered institution must defer at least 40 percent of a significant risk-taker's incentive-based compensation awarded under a long-term incentive plan for each performance period.

(ii) *Minimum required deferral period.*

(A) For a senior executive officer or significant risk-taker of a Level 1 covered institution, the deferral period for deferred long-term incentive plan amounts must be at least 2 years.

(B) For a senior executive officer or significant risk-taker of a Level 2 covered institution, the deferral period for deferred long-term incentive plan amounts must be at least 1 year.

(iii) *Vesting of amounts during deferral period—(A) Pro rata vesting.* During a deferral period, deferred long-term incentive plan amounts may not vest faster than on a pro rata annual basis beginning no earlier than the first anniversary of the end of the performance period for which the amounts were awarded.

(B) *Acceleration of vesting.* A Level 1 or Level 2 covered institution must not accelerate the vesting of a covered person's deferred long-term incentive plan amounts that is required to be deferred under this part, except in the case of death or disability of such covered person.

(3) *Adjustments of deferred qualifying incentive-based compensation and deferred long-term incentive plan compensation amounts.* A Level 1 or Level 2 covered institution may not increase deferred qualifying incentive-based compensation or deferred long-term incentive plan amounts for a senior executive officer or significant risk-taker during the deferral period. For purposes of this paragraph, an increase in value attributable solely to a change in share

value, a change in interest rates, or the payment of interest according to terms set out at the time of the award is not considered an increase in incentive-based compensation amounts.

(4) *Composition of deferred qualifying incentive-based compensation and deferred long-term incentive plan compensation for Level 1 and Level 2 covered institutions—(i) Cash and equity-like instruments.* For a senior executive officer or significant risk-taker of a Level 1 or Level 2 covered institution, any deferred qualifying incentive-based compensation or deferred long-term incentive plan amounts must include substantial portions of both deferred cash and, in the case of a covered institution that issues equity instruments and is permitted by the Federal Housing Finance Agency to use equity-like instruments as compensation for senior executive officers and significant risk-takers, equity-like instruments throughout the deferral period.

(ii) *Options.* If a senior executive officer or significant risk-taker of a Level 1 or Level 2 covered institution receives incentive-based compensation for a performance period in the form of options, the total amount of such options that may be used to meet the minimum deferral amount requirements of paragraph (a)(1)(i) or (a)(2)(i) of this section is limited to no more than 15 percent of the amount of total incentive-based compensation awarded to the senior executive officer or significant risk-taker for that performance period.

(b) *Forfeiture and downward adjustment—(1) Compensation at risk.* (i) A Level 1 or Level 2 covered institution must place at risk of forfeiture all unvested deferred incentive-based compensation of any senior executive officer or significant risk-taker, including unvested deferred amounts awarded under long-term incentive plans.

(ii) A Level 1 or Level 2 covered institution must place at risk of downward adjustment all of a senior executive officer's or significant risk-taker's incentive-based compensation amounts not yet awarded for the current performance period, including amounts payable under long-term incentive plans.

(2) *Events triggering forfeiture and downward adjustment review.* At a minimum, a Level 1 or Level 2 covered institution must consider forfeiture and downward adjustment of incentive-based compensation of senior executive officers and significant risk-takers described in paragraph (b)(3) of this section due to any of the following

adverse outcomes at the covered institution:

(i) Poor financial performance attributable to a significant deviation from the risk parameters set forth in the covered institution's policies and procedures;

(ii) Inappropriate risk taking, regardless of the impact on financial performance;

(iii) Material risk management or control failures;

(iv) Non-compliance with statutory, regulatory, or supervisory standards that results in:

(A) Enforcement or legal action against the covered institution brought by a federal or state regulator or agency; or

(B) A requirement that the covered institution report a restatement of a financial statement to correct a material error; and

(v) Other aspects of conduct or poor performance as defined by the covered institution.

(3) *Senior executive officers and significant risk-takers affected by forfeiture and downward adjustment.* A Level 1 or Level 2 covered institution must consider forfeiture and downward adjustment for a senior executive officer or significant risk-taker with direct responsibility, or responsibility due to the senior executive officer's or significant risk-taker's role or position in the covered institution's organizational structure, for the events related to the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section.

(4) *Determining forfeiture and downward adjustment amounts.* A Level 1 or Level 2 covered institution must consider, at a minimum, the following factors when determining the amount or portion of a senior executive officer's or significant risk-taker's incentive-based compensation that should be forfeited or adjusted downward:

(i) The intent of the senior executive officer or significant risk-taker to operate outside the risk governance framework approved by the covered institution's board of directors or to depart from the covered institution's policies and procedures;

(ii) The senior executive officer's or significant risk-taker's level of participation in, awareness of, and responsibility for, the events triggering the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section;

(iii) Any actions the senior executive officer or significant risk-taker took or could have taken to prevent the events triggering the forfeiture and downward

adjustment review set forth in paragraph (b)(2) of this section;

(iv) The financial and reputational impact of the events triggering the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section to the covered institution, the line or sub-line of business, and individuals involved, as applicable, including the magnitude of any financial loss and the cost of known or potential subsequent fines, settlements, and litigation;

(v) The causes of the events triggering the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section, including any decision-making by other individuals; and

(vi) Any other relevant information, including past behavior and past risk outcomes attributable to the senior executive officer or significant risk-taker.

(c) *Clawback*. A Level 1 or Level 2 covered institution must include clawback provisions in incentive-based compensation arrangements for senior executive officers and significant risk-takers that, at a minimum, allow the covered institution to recover incentive-based compensation from a current or former senior executive officer or significant risk-taker for seven years following the date on which such compensation vests, if the covered institution determines that the senior executive officer or significant risk-taker engaged in:

- (1) Misconduct that resulted in significant financial or reputational harm to the covered institution;
- (2) Fraud; or
- (3) Intentional misrepresentation of information used to determine the senior executive officer or significant risk-taker's incentive-based compensation.

#### **§ 1232.8 Additional prohibitions for Level 1 and Level 2 covered institutions.**

An incentive-based compensation arrangement at a Level 1 or Level 2 covered institution will be considered to provide incentives that appropriately balance risk and reward for purposes of § 1232.4(c)(1) only if such institution complies with the following prohibitions.

(a) *Hedging*. A Level 1 or Level 2 covered institution must not purchase a hedging instrument or similar instrument on behalf of a covered person to hedge or offset any decrease in the value of the covered person's incentive-based compensation.

(b) *Maximum incentive-based compensation opportunity*. A Level 1 or Level 2 covered institution must not award incentive-based compensation to:

(1) A senior executive officer in excess of 125 percent of the target amount for that incentive-based compensation; or

(2) A significant risk-taker in excess of 150 percent of the target amount for that incentive-based compensation.

(c) *Relative performance measures*. A Level 1 or Level 2 covered institution must not use incentive-based compensation performance measures that are based solely on industry peer performance comparisons.

(d) *Volume driven incentive-based compensation*. A Level 1 or Level 2 covered institution must not provide incentive-based compensation to a covered person that is based solely on transaction revenue or volume without regard to transaction quality or compliance of the covered person with sound risk management.

#### **§ 1232.9 Risk management and controls requirements for Level 1 and Level 2 covered institutions.**

An incentive-based compensation arrangement at a Level 1 or Level 2 covered institution will be considered to be compatible with effective risk management and controls for purposes of § 1232.4(c)(2) only if such institution meets the following requirements.

(a) A Level 1 or Level 2 covered institution must have a risk management framework for its incentive-based compensation program that:

- (1) Is independent of any lines of business;
- (2) Includes an independent compliance program that provides for internal controls, testing, monitoring, and training with written policies and procedures consistent with § 1232.11; and
- (3) Is commensurate with the size and complexity of the covered institution's operations.

(b) A Level 1 or Level 2 covered institution must:

- (1) Provide individuals engaged in control functions with the authority to influence the risk-taking of the business areas they monitor; and
- (2) Ensure that covered persons engaged in control functions are compensated in accordance with the achievement of performance objectives linked to their control functions and independent of the performance of those business areas.

(c) A Level 1 or Level 2 covered institution must provide for the independent monitoring of:

- (1) All incentive-based compensation plans in order to identify whether those plans provide incentives that appropriately balance risk and reward;

(2) Events related to forfeiture and downward adjustment reviews and decisions of forfeiture and downward adjustment reviews in order to determine consistency with § 1232.7(b); and

(3) Compliance of the incentive-based compensation program with the covered institution's policies and procedures.

#### **§ 1232.10 Governance requirements for Level 1 and Level 2 covered institutions.**

An incentive-based compensation arrangement at a Level 1 or Level 2 covered institution will not be considered to be supported by effective governance for purposes of § 1232.4(c)(3), unless:

(a) The covered institution establishes a compensation committee composed solely of directors who are not senior executive officers to assist the board of directors in carrying out its responsibilities under § 1232.4(e); and

(b) The compensation committee established pursuant to paragraph (a) of this section obtains:

(1) Input from the risk and audit committees of the covered institution's board of directors, or groups performing similar functions, and risk management function on the effectiveness of risk measures and adjustments used to balance risk and reward in incentive-based compensation arrangements;

(2) A written assessment of the effectiveness of the covered institution's incentive-based compensation program and related compliance and control processes in providing risk-taking incentives that are consistent with the risk profile of the covered institution, submitted on an annual or more frequent basis by the management of the covered institution and developed with input from the risk and audit committees of its board of directors, or groups performing similar functions, and from the covered institution's risk management and audit functions; and

(3) An independent written assessment of the effectiveness of the covered institution's incentive-based compensation program and related compliance and control processes in providing risk-taking incentives that are consistent with the risk profile of the covered institution, submitted on an annual or more frequent basis by the internal audit or risk management function of the covered institution, developed independently of the covered institution's management.

#### **§ 1232.11 Policies and procedures requirements for Level 1 and Level 2 covered institutions.**

A Level 1 or Level 2 covered institution must develop and implement

policies and procedures for its incentive-based compensation program that, at a minimum:

(a) Are consistent with the prohibitions and requirements of this part;

(b) Specify the substantive and procedural criteria for the application of forfeiture and clawback, including the process for determining the amount of incentive-based compensation to be clawed back;

(c) Require that the covered institution maintain documentation of final forfeiture, downward adjustment, and clawback decisions;

(d) Specify the substantive and procedural criteria for the acceleration of payments of deferred incentive-based compensation to a covered person, consistent with § 1232.7(a)(1)(iii)(B) and (a)(2)(iii)(B));

(e) Identify and describe the role of any employees, committees, or groups authorized to make incentive-based compensation decisions, including when discretion is authorized;

(f) Describe how discretion is expected to be exercised to appropriately balance risk and reward;

(g) Require that the covered institution maintain documentation of the establishment, implementation, modification, and monitoring of incentive-based compensation arrangements, sufficient to support the covered institution's decisions;

(h) Describe how incentive-based compensation arrangements will be monitored;

(i) Specify the substantive and procedural requirements of the independent compliance program consistent with § 1232.9(a)(2); and

(j) Ensure appropriate roles for risk management, risk oversight, and other control function personnel in the covered institution's processes for:

(1) Designing incentive-based compensation arrangements and determining awards, deferral amounts, deferral periods, forfeiture, downward adjustment, clawback, and vesting; and

(2) Assessing the effectiveness of incentive-based compensation arrangements in restraining inappropriate risk-taking.

#### § 1232.12 Indirect actions.

A covered institution must not indirectly, or through or by any other person, do anything that would be unlawful for such covered institution to do directly under this part.

#### § 1232.13 Enforcement.

The provisions of this part shall be enforced under subtitle C of the Safety and Soundness Act (12 U.S.C. ch. 46 subch. III).

#### § 1232.14 Covered institutions in conservatorship or receivership.

(a) *Scope.* This section applies to covered institutions that are in conservatorship or receivership, or are limited-life regulated entities, under the Safety and Soundness Act.

(b) *Compensation requirements.* For a covered institution subject to this section, the requirements that would otherwise apply under this part shall be those that are determined by the Agency to best fulfill the requirements and purposes of 12 U.S.C. 5641, taking into consideration the possible duration of the covered institution's conservatorship or receivership, the nature of the institution's governance while under conservatorship or receivership, the need to attract and retain management and other talent to such an institution, the limitations on such an institution's ability to employ equity-like instruments as incentive-based compensation, and any other circumstances deemed relevant in the judgment of the Agency. The Agency may determine appropriate transition terms and provisions in the event that the covered institution ceases to be within the scope of this section.

#### Securities and Exchange Commission Authority and Issuance

For the reasons set forth in the joint preamble, the SEC proposes to amend title 17, chapter II of the Code of Federal Regulations as follows:

#### PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 8. The authority citation for part 240 continues to read in part as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78dd, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, 7201 *et seq.*, and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111-203, 939A, 124 Stat. 1376 (2010), unless otherwise noted.

\* \* \* \* \*

Section 240.17a-4 also issued under secs. 2, 17, 23(a), 48 Stat. 897, as amended; 15 U.S.C. 78a, 78d-1, 78d-2; sec. 14, Pub. L. 94-29, 89 Stat. 137 (15 U.S.C. 78a); sec. 18, Pub. L. 94-29, 89 Stat. 155 (15 U.S.C. 78w);

\* \* \* \* \*

■ 9. Section 240.17a-4 is amended by adding paragraph (e)(10). The addition reads as follows:

#### § 240.17a-4 Records to be preserved by certain exchange members, brokers and dealers.

\* \* \* \* \*

(e) \* \* \*

(10) The records required pursuant to §§ 303.4(f), 303.5, and 303.11 of this chapter.

\* \* \* \* \*

#### PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

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

**Authority:** 15 U.S.C. 80b-2(a)(11)(G), 80b-2(a)(11)(H), 80b-2(a)(17), 80b-3, 80b-4, 80b-4a, 80b-6(4), 80b-6a, and 80b-11, unless otherwise noted.

\* \* \* \* \*

Section 275.204-2 is also issued under 15 U.S.C. 80b-6.

\* \* \* \* \*

■ 11. Section 275.204-2 is amended by adding paragraph (a)(19) and by revising paragraph (e)(1). The additions and revisions read as follows:

#### § 275.204-2 Books and records to be maintained by investment advisers.

(a) \* \* \*

(19) The records required pursuant to, and for the periods specified in, §§ 303.4(f), 303.5, and 303.11 of this chapter.

\* \* \* \* \*

(e)(1) All books and records required to be made under the provisions of paragraphs (a) to (c)(1)(i), inclusive, and (c)(2) of this section (except for books and records required to be made under the provisions of paragraphs (a)(11), (a)(12)(i), (a)(12)(iii), (a)(13)(ii), (a)(13)(iii), (a)(16), (a)(17)(i), and (a)(19) of this section), shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in an appropriate office of the investment adviser.

\* \* \* \* \*

■ 12. Add part 303 to read as follows:

#### PART 303—INCENTIVE-BASED COMPENSATION ARRANGEMENTS

Sec.

303.1 Authority, scope, and initial applicability.

303.2 Definitions.

303.3 Applicability.

303.4 Requirements and prohibitions applicable to all covered institutions.

303.5 Additional disclosure and recordkeeping requirements for Level 1 and Level 2 covered institutions.

303.6 Reservation of authority for Level 3 covered institutions.

- 303.7 Deferral, forfeiture and downward adjustment, and clawback requirements for Level 1 and Level 2 covered institutions.
- 303.8 Additional prohibitions for Level 1 and Level 2 covered institutions.
- 303.9 Risk management and controls requirements for Level 1 and Level 2 covered institutions.
- 303.10 Governance requirements for Level 1 and Level 2 covered institutions.
- 303.11 Policies and procedures requirements for Level 1 and Level 2 covered institutions.
- 303.12 Indirect actions.
- 303.13 Enforcement.

**Authority:** 15 U.S.C. 78q, 78w, 80b–4, and 80b–11 and 12 U.S.C. 5641.

**§ 303.1 Authority, scope, and initial applicability.**

(a) *Authority.* This part is issued pursuant to section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5641), 15 U.S.C. 78q, 78w, 80b–4, and 80b–11.

(b) *Scope.* This part applies to a covered institution with average total consolidated assets greater than or equal to \$1 billion that offers incentive-based compensation to covered persons.

(c) *Initial applicability—(1) Compliance date.* A covered institution must meet the requirements of this part no later than [Date of the beginning of the first calendar quarter that begins at least 540 days after a final rule is published in the **Federal Register**]. Whether a covered institution is a Level 1, Level 2, or Level 3 covered institution at that time will be determined based on average total consolidated assets as of [Date of the beginning of the first calendar quarter that begins after a final rule is published in the **Federal Register**].

(2) *Grandfathered plans.* A covered institution is not required to comply with the requirements of this part with respect to any incentive-based compensation plan with a performance period that begins before [Compliance Date as described in paragraph (c)(1) of this section].

(d) *Preservation of authority.* Nothing in this part in any way limits the authority of the Commission under other provisions of applicable law and regulations.

**§ 303.2 Definitions.**

For purposes of this part only, the following definitions apply unless otherwise specified:

(a) *Affiliate* means any company that controls, is controlled by, or is under common control with another company.

(b) *Average total consolidated assets* means the average of a regulated institution's total consolidated assets, as reported on the regulated institution's

regulatory reports, for the four most recent consecutive quarters. If a regulated institution has not filed a regulatory report for each of the four most recent consecutive quarters, the regulated institution's average total consolidated assets means the average of its total consolidated assets, as reported on its regulatory reports, for the most recent quarter or consecutive quarters, as applicable. Average total consolidated assets are measured on the as-of date of the most recent regulatory report used in the calculation of the average. Average total consolidated assets for a regulated institution that is an investment adviser means the regulated institution's total assets (exclusive of non-proprietary assets) shown on the balance sheet for the regulated institution for the most recent fiscal year end.

(c) *To award* incentive-based compensation means to make a final determination, conveyed to a covered person, of the amount of incentive-based compensation payable to the covered person for performance over a performance period.

(d) *Board of directors* means the governing body of a covered institution that oversees the activities of the covered institution, often referred to as the board of directors or board of managers.

(e) *Clawback* means a mechanism by which a covered institution can recover vested incentive-based compensation from a covered person.

(f) *Compensation, fees, or benefits* means all direct and indirect payments, both cash and non-cash, awarded to, granted to, or earned by or for the benefit of, any covered person in exchange for services rendered to a covered institution.

(g) *Control* means that any company has control over any company if—

(1) The company directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 percent or more of any class of voting securities of the company;

(2) The company controls in any manner the election of a majority of the directors or trustees of the company; or

(3) The Commission determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the company.

(h) *Control function* means a compliance, risk management, internal audit, legal, human resources, accounting, financial reporting, or finance role responsible for identifying, measuring, monitoring, or controlling risk-taking.

(i) *Covered institution* means a regulated institution with average total consolidated assets greater than or equal to \$1 billion.

(j) *Covered person* means any executive officer, employee, director, or principal shareholder who receives incentive-based compensation at a covered institution.

(k) *Deferral* means the delay of vesting of incentive-based compensation beyond the date on which the incentive-based compensation is awarded.

(l) *Deferral period* means the period of time between the date a performance period ends and the last date on which the incentive-based compensation awarded for such performance period vests.

(m) *Depository institution holding company* means a top-tier depository institution holding company, where “depository institution holding company” has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(n) *Director* of a covered institution means a member of the board of directors.

(o) *Downward adjustment* means a reduction of the amount of a covered person's incentive-based compensation not yet awarded for any performance period that has already begun, including amounts payable under long-term incentive plans, in accordance with a forfeiture and downward adjustment review under § 303.7(b).

(p) *Equity-like instrument* means:

(1) Equity in the covered institution or any affiliate of the covered institution; or

(2) A form of compensation:

(i) Payable at least in part based on the price of the shares or other equity instruments of the covered institution or of any affiliate of the covered institution; or

(ii) That requires, or may require, settlement in the shares of the covered institution or of any affiliate of the covered institution.

(q) *Forfeiture* means a reduction of the amount of deferred incentive-based compensation awarded to a covered person that has not vested.

(r) *Incentive-based compensation* means any variable compensation, fees, or benefits that serve as an incentive or reward for performance.

(s) *Incentive-based compensation arrangement* means an agreement between a covered institution and a covered person, under which the covered institution provides incentive-based compensation to the covered person, including incentive-based compensation delivered through one or

more incentive-based compensation plans.

(t) *Incentive-based compensation plan* means a document setting forth terms and conditions governing the opportunity for and the payment of incentive-based compensation payments to one or more covered persons.

(u) *Incentive-based compensation program* means a covered institution's framework for incentive-based compensation that governs incentive-based compensation practices and establishes related controls.

(v) *Level 1 covered institution* means a:

(i) Covered institution with average total consolidated assets greater than or equal to \$250 billion; or

(ii) Covered institution that is a subsidiary of a depository institution holding company that is a Level 1 covered institution pursuant to 12 CFR 236.2.

(w) *Level 2 covered institution* means a:

(i) Covered institution with average total consolidated assets greater than or equal to \$50 billion that is not a Level 1 covered institution; or

(ii) Covered institution that is a subsidiary of a depository institution holding company that is a Level 2 covered institution pursuant to 12 CFR 236.2.

(x) *Level 3 covered institution* means a covered institution with average total consolidated assets greater than or equal to \$1 billion that is not a Level 1 covered institution or Level 2 covered institution.

(y) *Long-term incentive plan* means a plan to provide incentive-based compensation that is based on a performance period of at least three years.

(z) *Option* means an instrument through which a covered institution provides a covered person the right, but not the obligation, to buy a specified number of shares representing an ownership stake in a company at a predetermined price within a set time period or on a date certain, or any similar instrument, such as a stock appreciation right.

(aa) *Performance period* means the period during which the performance of a covered person is assessed for purposes of determining incentive-based compensation.

(bb) *Principal shareholder* means a natural person who, directly or indirectly, or acting through or in concert with one or more persons, owns, controls, or has the power to vote 10 percent or more of any class of voting securities of a covered institution.

(cc) *Qualifying incentive-based compensation* means the amount of incentive-based compensation awarded to a covered person for a particular performance period, excluding amounts awarded to the covered person for that particular performance period under a long-term incentive plan.

(dd) *Regulated institution* means a broker or dealer registered under section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o) and an investment adviser as such term is defined in section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(11)).

(ee) *Regulatory report* means, for a broker-dealer registered under section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o), the Financial and Operational Combined Uniform Single Report, Form X-17A-5, 17 CFR 249.617, or any successors thereto.

(ff) *Section 956 affiliate* means an affiliate that is an institution described in § 303.2(i), 12 CFR 42.2(i), 12 CFR 236.2(i), 12 CFR 372.2(i), 12 CFR 741.2(i), or 12 CFR 1232.2(i).

(gg) *Senior executive officer* means a covered person who holds the title or, without regard to title, salary, or compensation, performs the function of one or more of the following positions at a covered institution for any period of time in the relevant performance period: President, chief executive officer, executive chairman, chief operating officer, chief financial officer, chief investment officer, chief legal officer, chief lending officer, chief risk officer, chief compliance officer, chief audit executive, chief credit officer, chief accounting officer, or head of a major business line or control function.

(hh) *Significant risk-taker* means:

(1) Any covered person at a Level 1 or Level 2 covered institution, other than a senior executive officer, who received annual base salary and incentive-based compensation for the last calendar year that ended at least 180 days before the beginning of the performance period of which at least one-third is incentive-based compensation and is—

(i) A covered person of a Level 1 covered institution who received annual base salary and incentive-based compensation for the last calendar year that ended at least 180 days before the beginning of the performance period that placed the covered person among the highest 5 percent in annual base salary and incentive-based compensation among all covered persons (excluding senior executive officers) of the Level 1 covered institution together with all individuals who receive incentive-based

compensation at any section 956 affiliate of the Level 1 covered institution;

(ii) A covered person of a Level 2 covered institution who received annual base salary and incentive-based compensation for the last calendar year that ended at least 180 days before the beginning of the performance period that placed the covered person among the highest 2 percent in annual base salary and incentive-based compensation among all covered persons (excluding senior executive officers) of the Level 2 covered institution together with all individuals who receive incentive-based compensation at any section 956 affiliate of the Level 2 covered institution; or

(iii) A covered person of a covered institution who may commit or expose 0.5 percent or more of the common equity tier 1 capital, or in the case of a registered securities broker or dealer, 0.5 percent or more of the tentative net capital, of the covered institution or of any section 956 affiliate of the covered institution, whether or not the individual is a covered person of that specific legal entity; and

(2) Any covered person at a Level 1 or Level 2 covered institution, other than a senior executive officer, who is designated as a “significant risk-taker” by the Commission because of that person's ability to expose a covered institution to risks that could lead to material financial loss in relation to the covered institution's size, capital, or overall risk tolerance, in accordance with procedures established by the Commission, or by the covered institution.

(3) For purposes of this part, an individual who is an employee, director, senior executive officer, or principal shareholder of an affiliate of a Level 1 or Level 2 covered institution, where such affiliate has less than \$1 billion in total consolidated assets, and who otherwise would meet the requirements for being a significant risk-taker under paragraph (hh)(1)(iii) of this section, shall be considered to be a significant risk-taker with respect to the Level 1 or Level 2 covered institution for which the individual may commit or expose 0.5 percent or more of common equity tier 1 capital or tentative net capital. The Level 1 or Level 2 covered institution for which the individual commits or exposes 0.5 percent or more of common equity tier 1 capital or tentative net capital shall ensure that the individual's incentive compensation arrangement complies with the requirements of this part.

(4) If the Commission determines, in accordance with procedures established by the Commission, that a Level 1 covered institution's activities, complexity of operations, risk profile, and compensation practices are similar to those of a Level 2 covered institution, the Level 1 covered institution may apply paragraph (hh)(1)(i) of this section to covered persons of the Level 1 covered institution by substituting "2 percent" for "5 percent."

(ii) *Subsidiary* means any company that is owned or controlled directly or indirectly by another company.

(jj) *Vesting of incentive-based compensation* means the transfer of ownership of the incentive-based compensation to the covered person to whom the incentive-based compensation was awarded, such that the covered person's right to the incentive-based compensation is no longer contingent on the occurrence of any event.

### § 303.3 Applicability.

(a) *When average total consolidated assets increase*—(1) *In general.* (i) A regulated institution shall become a Level 1, Level 2, or Level 3 covered institution when its average total consolidated assets increase to an amount that equals or exceeds \$250 billion, \$50 billion, or \$1 billion, respectively.

(ii) A covered institution regardless of its average total consolidated assets (provided that, for the avoidance of doubt, such covered institution has average total consolidated assets greater than or equal to \$1 billion) that is a subsidiary of a depository institution holding company shall become a Level 1 or Level 2 covered institution when such depository institution holding company becomes a Level 1 or Level 2 covered institution, respectively, pursuant to 12 CFR 236.3.

(2) *Compliance date.* (i) A regulated institution that becomes a Level 1, Level 2, or Level 3 covered institution pursuant to paragraph (a)(1)(i) of this section shall comply with the requirements of this part for a Level 1, Level 2, or Level 3 covered institution, respectively, not later than the first day of the first calendar quarter that begins at least 540 days after the date on which the regulated institution becomes a Level 1, Level 2, or Level 3 covered institution, respectively. Until that day, the Level 1, Level 2, or Level 3 covered institution will remain subject to the requirements of this part, if any, that applied to the regulated institution on the day before the date on which it became a Level 1, Level 2, or Level 3 covered institution.

(b) A covered institution that becomes a Level 1 or Level 2 covered institution pursuant to paragraph (a)(1)(ii) of this section shall comply with the requirements of this part for a Level 1 or Level 2 covered institution, respectively, not later than the first day of the first calendar quarter that begins at least 540 days after the date on which the regulated institution becomes a Level 1 or Level 2 covered institution, respectively. Until that day, the Level 1 or Level 2 covered institution will remain subject to the requirements of this part, if any, that applied to the covered institution on the day before the date on which it became a Level 1 or Level 2 covered institution.

(3) *Grandfathered plans.* (i) A regulated institution that becomes a Level 1, Level 2, or Level 3 covered institution under paragraph (a)(1)(i) of this section is not required to comply with requirements of this part applicable to a Level 1, Level 2, or Level 3 covered institution, respectively, with respect to any incentive-based compensation plan with a performance period that begins before the date described in paragraph (a)(2)(i) of this section. Any such incentive-based compensation plan shall remain subject to the requirements under this part, if any, that applied to the regulated institution at the beginning of the performance period.

(b) A covered institution that becomes a Level 1 or Level 2 covered institution under paragraph (a)(1)(ii) of this section is not required to comply with requirements of this part applicable to a Level 1 or Level 2 covered institution, respectively, with respect to any incentive-based compensation plan with a performance period that begins before the date described in paragraph (a)(2)(ii) of this section. Any such incentive-based compensation plan shall remain subject to the requirements under this part, if any, that applied to the covered institution at the beginning of the performance period.

(b) *When total consolidated assets decrease.* (1) A Level 1, Level 2, or Level 3 covered institution will remain subject to the requirements applicable to such covered institution under this part unless and until the total consolidated assets of such covered institution, as reported on the covered institution's regulatory reports, fall below \$250 billion, \$50 billion, or \$1 billion, respectively, for each of four consecutive quarters. The calculation will be effective on the as-of date of the fourth consecutive regulatory report.

(2) A Level 1, Level 2, or Level 3 covered institution that is an investment adviser will remain subject to the

requirements applicable to such covered institution under this part unless and until the average total consolidated assets of the covered institution fall below \$250 billion, \$50 billion, or \$1 billion, respectively as of the most recent fiscal year end.

(3) A covered institution that is a Level 1 or Level 2 covered institution solely by virtue of its being a subsidiary of a depository institution holding company will remain subject to the requirements applicable to such covered institution under this part unless and until such depository institution holding company ceases to be subject to the requirements applicable to it in accordance with 12 CFR 236.3.

### § 303.4 Requirements and prohibitions applicable to all covered institutions.

(a) *In general.* A covered institution must not establish or maintain any type of incentive-based compensation arrangement, or any feature of any such arrangement, that encourages inappropriate risks by the covered institution:

(1) By providing a covered person with excessive compensation, fees, or benefits; or

(2) That could lead to material financial loss to the covered institution.

(b) *Excessive compensation.* Compensation, fees, and benefits are considered excessive for purposes of § 303.4(a)(1) when amounts paid are unreasonable or disproportionate to the value of the services performed by a covered person, taking into consideration all relevant factors, including, but not limited to:

(1) The combined value of all compensation, fees, or benefits provided to the covered person;

(2) The compensation history of the covered person and other individuals with comparable expertise at the covered institution;

(3) The financial condition of the covered institution;

(4) Compensation practices at comparable institutions, based upon such factors as asset size, geographic location, and the complexity of the covered institution's operations and assets;

(5) For post-employment benefits, the projected total cost and benefit to the covered institution; and

(6) Any connection between the covered person and any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the covered institution.

(c) *Material financial loss.* An incentive-based compensation arrangement at a covered institution encourages inappropriate risks that

could lead to material financial loss to the covered institution, unless the arrangement:

(1) Appropriately balances risk and reward;

(2) Is compatible with effective risk management and controls; and

(3) Is supported by effective governance.

(d) *Performance measures.* An incentive-based compensation arrangement will not be considered to appropriately balance risk and reward for purposes of paragraph (c)(1) of this section, unless:

(1) The arrangement includes financial and non-financial measures of performance, including considerations of risk-taking, that are relevant to a covered person's role within a covered institution and to the type of business in which the covered person is engaged and that are appropriately weighted to reflect risk-taking;

(2) The arrangement is designed to allow non-financial measures of performance to override financial measures of performance when appropriate in determining incentive-based compensation; and

(3) Any amounts to be awarded under the arrangement are subject to adjustment to reflect actual losses, inappropriate risks taken, compliance deficiencies, or other measures or aspects of financial and non-financial performance.

(e) *Board of directors.* A covered institution's board of directors, or a committee thereof, must:

(1) Conduct oversight of the covered institution's incentive-based compensation program;

(2) Approve incentive-based compensation arrangements for senior executive officers, including the amounts of all awards and, at the time of vesting, payouts under such arrangements; and

(3) Approve any material exceptions or adjustments to incentive-based compensation policies or arrangements for senior executive officers.

(f) *Disclosure and recordkeeping requirements.* A covered institution must create annually and maintain for a period of at least seven years records that document the structure of all its incentive-based compensation arrangements and demonstrate compliance with this part. A covered institution must disclose the records to the Commission upon request. At a minimum, the records must include copies of all incentive-based compensation plans, a record of who is subject to each plan, and a description of how the incentive-based compensation program is compatible

with effective risk management and controls.

(g) *Rule of construction.* A covered institution is not required to report the actual amount of compensation, fees, or benefits of individual covered persons as part of the disclosure and recordkeeping requirements under this part.

### **§ 303.5 Additional disclosure and recordkeeping requirements for Level 1 and Level 2 covered institutions.**

(a) A Level 1 or Level 2 covered institution must create annually and maintain for a period of at least seven years records that document:

(1) The covered institution's senior executive officers and significant risk-takers, listed by legal entity, job function, organizational hierarchy, and line of business;

(2) The incentive-based compensation arrangements for senior executive officers and significant risk-takers, including information on percentage of incentive-based compensation deferred and form of award;

(3) Any forfeiture and downward adjustment or clawback reviews and decisions for senior executive officers and significant risk-takers; and

(4) Any material changes to the covered institution's incentive-based compensation arrangements and policies.

(b) A Level 1 or Level 2 covered institution must create and maintain records in a manner that allows for an independent audit of incentive-based compensation arrangements, policies, and procedures, including those required under § 303.11.

(c) A Level 1 or Level 2 covered institution must provide the records described in paragraph (a) of this section to the Commission in such form and with such frequency as requested by the Commission.

### **§ 303.6 Reservation of authority for Level 3 covered institutions.**

(a) *In general.* The Commission may require a Level 3 covered institution with average total consolidated assets greater than or equal to \$10 billion and less than \$50 billion to comply with some or all of the provisions of §§ 303.5 and 303.7 through 303.11 if the Commission determines that the Level 3 covered institution's complexity of operations or compensation practices are consistent with those of a Level 1 or Level 2 covered institution.

(b) *Factors considered.* Any exercise of authority under this section will be in writing by the Commission in accordance with procedures established by the Commission and will consider

the activities, complexity of operations, risk profile, and compensation practices of the Level 3 covered institution, in addition to any other relevant factors.

### **§ 303.7 Deferral, forfeiture and downward adjustment, and clawback requirements for Level 1 and Level 2 covered institutions.**

An incentive-based compensation arrangement at a Level 1 or Level 2 covered institution will not be considered to appropriately balance risk and reward, for purposes of § 303.4(c)(1), unless the following requirements are met.

(a) *Deferral.* (1) Qualifying incentive-based compensation must be deferred as follows:

(i) *Minimum required deferral amount.* (A) A Level 1 covered institution must defer at least 60 percent of a senior executive officer's qualifying incentive-based compensation awarded for each performance period.

(B) A Level 1 covered institution must defer at least 50 percent of a significant risk-taker's qualifying incentive-based compensation awarded for each performance period.

(C) A Level 2 covered institution must defer at least 50 percent of a senior executive officer's qualifying incentive-based compensation awarded for each performance period.

(D) A Level 2 covered institution must defer at least 40 percent of a significant risk-taker's qualifying incentive-based compensation awarded for each performance period.

(ii) *Minimum required deferral period.* (A) For a senior executive officer or significant risk-taker of a Level 1 covered institution, the deferral period for deferred qualifying incentive-based compensation must be at least 4 years.

(B) For a senior executive officer or significant risk-taker of a Level 2 covered institution, the deferral period for deferred qualifying incentive-based compensation must be at least 3 years.

(iii) *Vesting of amounts during deferral period.* (A) *Pro rata vesting.* During a deferral period, deferred qualifying incentive-based compensation may not vest faster than on a pro rata annual basis beginning no earlier than the first anniversary of the end of the performance period for which the amounts were awarded.

(B) *Acceleration of vesting.* A Level 1 or Level 2 covered institution must not accelerate the vesting of a covered person's deferred qualifying incentive-based compensation that is required to be deferred under this part, except in the case of death or disability of such covered person.

(2) Incentive-based compensation awarded under a long-term incentive plan must be deferred as follows:

(i) *Minimum required deferral amount.* (A) A Level 1 covered institution must defer at least 60 percent of a senior executive officer's incentive-based compensation awarded under a long-term incentive plan for each performance period.

(B) A Level 1 covered institution must defer at least 50 percent of a significant risk-taker's incentive-based compensation awarded under a long-term incentive plan for each performance period.

(C) A Level 2 covered institution must defer at least 50 percent of a senior executive officer's incentive-based compensation awarded under a long-term incentive plan for each performance period.

(D) A Level 2 covered institution must defer at least 40 percent of a significant risk-taker's incentive-based compensation awarded under a long-term incentive plan for each performance period.

(ii) *Minimum required deferral period.* (A) For a senior executive officer or significant risk-taker of a Level 1 covered institution, the deferral period for deferred long-term incentive plan amounts must be at least 2 years.

(B) For a senior executive officer or significant risk-taker of a Level 2 covered institution, the deferral period for deferred long-term incentive plan amounts must be at least 1 year.

(iii) *Vesting of amounts during deferral period.*—(A) *Pro rata vesting.* During a deferral period, deferred long-term incentive plan amounts may not vest faster than on a pro rata annual basis beginning no earlier than the first anniversary of the end of the performance period for which amounts were awarded.

(B) *Acceleration of vesting.* A Level 1 or Level 2 covered institution must not accelerate the vesting of a covered person's deferred long-term incentive plan amounts that is required to be deferred under this part, except in the case of death or disability of such covered person.

(3) *Adjustments of deferred qualifying incentive-based compensation and deferred long-term incentive plan compensation amounts.* A Level 1 or Level 2 covered institution may not increase deferred qualifying incentive-based compensation or deferred long-term incentive plan amounts for a senior executive officer or significant risk-taker during the deferral period. For purposes of this paragraph, an increase in value attributable solely to a change in share value, a change in interest rates, or the payment of interest according to terms set out at the time of the award is not

considered an increase in incentive-based compensation amounts.

(4) *Composition of deferred qualifying incentive-based compensation and deferred long-term incentive plan compensation for Level 1 and Level 2 covered institutions.*—(i) *Cash and equity-like instruments.* For a senior executive officer or significant risk-taker of a Level 1 or Level 2 covered institution that issues equity or is an affiliate of a covered institution that issues equity, any deferred qualifying incentive-based compensation or deferred long-term incentive plan amounts must include substantial portions of both deferred cash and equity-like instruments throughout the deferral period.

(ii) *Options.* If a senior executive officer or significant risk-taker of a Level 1 or Level 2 covered institution receives incentive-based compensation for a performance period in the form of options, the total amount of such options that may be used to meet the minimum deferral amount requirements of paragraph (a)(1)(i) or (a)(2)(i) of this section is limited to no more than 15 percent of the amount of total incentive-based compensation awarded to the senior executive officer or significant risk-taker for that performance period.

(b) *Forfeiture and downward adjustment.*—(1) *Compensation at risk.* (i) A Level 1 or Level 2 covered institution must place at risk of forfeiture all unvested deferred incentive-based compensation of any senior executive officer or significant risk-taker, including unvested deferred amounts awarded under long-term incentive plans.

(ii) A Level 1 or Level 2 covered institution must place at risk of downward adjustment all of a senior executive officer's or significant risk-taker's incentive-based compensation amounts not yet awarded for the current performance period, including amounts payable under long-term incentive plans.

(2) *Events triggering forfeiture and downward adjustment review.* At a minimum, a Level 1 or Level 2 covered institution must consider forfeiture and downward adjustment of incentive-based compensation of senior executive officers and significant risk-takers described in paragraph (b)(3) of this section due to any of the following adverse outcomes at the covered institution:

(i) Poor financial performance attributable to a significant deviation from the risk parameters set forth in the covered institution's policies and procedures;

(ii) Inappropriate risk taking, regardless of the impact on financial performance;

(iii) Material risk management or control failures;

(iv) Non-compliance with statutory, regulatory, or supervisory standards that results in:

(A) Enforcement or legal action against the covered institution brought by a federal or state regulator or agency; or

(B) A requirement that the covered institution report a restatement of a financial statement to correct a material error; and

(v) Other aspects of conduct or poor performance as defined by the covered institution.

(3) *Senior executive officers and significant risk-takers affected by forfeiture and downward adjustment.* A Level 1 or Level 2 covered institution must consider forfeiture and downward adjustment for a senior executive officer or significant risk-taker with direct responsibility, or responsibility due to the senior executive officer's or significant risk-taker's role or position in the covered institution's organizational structure, for the events related to the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section.

(4) *Determining forfeiture and downward adjustment amounts.* A Level 1 or Level 2 covered institution must consider, at a minimum, the following factors when determining the amount or portion of a senior executive officer's or significant risk-taker's incentive-based compensation that should be forfeited or adjusted downward:

(i) The intent of the senior executive officer or significant risk-taker to operate outside the risk governance framework approved by the covered institution's board of directors or to depart from the covered institution's policies and procedures;

(ii) The senior executive officer's or significant risk-taker's level of participation in, awareness of, and responsibility for, the events triggering the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section;

(iii) Any actions the senior executive officer or significant risk-taker took or could have taken to prevent the events triggering the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section;

(iv) The financial and reputational impact of the events triggering the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section to the covered institution, the line or sub-line of business, and

individuals involved, as applicable, including the magnitude of any financial loss and the cost of known or potential subsequent fines, settlements, and litigation;

(v) The causes of the events triggering the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section, including any decision-making by other individuals; and

(vi) Any other relevant information, including past behavior and past risk outcomes attributable to the senior executive officer or significant risk-taker.

(c) *Clawback*. A Level 1 or Level 2 covered institution must include clawback provisions in incentive-based compensation arrangements for senior executive officers and significant risk-takers that, at a minimum, allow the covered institution to recover incentive-based compensation from a current or former senior executive officer or significant risk-taker for seven years following the date on which such compensation vests, if the covered institution determines that the senior executive officer or significant risk-taker engaged in:

- (1) Misconduct that resulted in significant financial or reputational harm to the covered institution;
- (2) Fraud; or
- (3) Intentional misrepresentation of information used to determine the senior executive officer or significant risk-taker's incentive-based compensation.

#### **§ 303.8 Additional prohibitions for Level 1 and Level 2 covered institutions.**

An incentive-based compensation arrangement at a Level 1 or Level 2 covered institution will be considered to provide incentives that appropriately balance risk and reward for purposes of § 303.4(c)(1) only if such institution complies with the following prohibitions.

(a) *Hedging*. A Level 1 or Level 2 covered institution must not purchase a hedging instrument or similar instrument on behalf of a covered person to hedge or offset any decrease in the value of the covered person's incentive-based compensation.

(b) *Maximum incentive-based compensation opportunity*. A Level 1 or Level 2 covered institution must not award incentive-based compensation to:

- (1) A senior executive officer in excess of 125 percent of the target amount for that incentive-based compensation; or
- (2) A significant risk-taker in excess of 150 percent of the target amount for that incentive-based compensation.

(c) *Relative performance measures*. A Level 1 or Level 2 covered institution

must not use incentive-based compensation performance measures that are based solely on industry peer performance comparisons.

(d) *Volume driven incentive-based compensation*. A Level 1 or Level 2 covered institution must not provide incentive-based compensation to a covered person that is based solely on transaction revenue or volume without regard to transaction quality or compliance of the covered person with sound risk management.

#### **§ 303.9 Risk management and controls requirements for Level 1 and Level 2 covered institutions.**

An incentive-based compensation arrangement at a Level 1 or Level 2 covered institution will be considered to be compatible with effective risk management and controls for purposes of § 303.4(c)(2) only if such institution meets the following requirements.

(a) A Level 1 or Level 2 covered institution must have a risk management framework for its incentive-based compensation program that:

- (1) Is independent of any lines of business;
- (2) Includes an independent compliance program that provides for internal controls, testing, monitoring, and training with written policies and procedures consistent with § 303.11; and
- (3) Is commensurate with the size and complexity of the covered institution's operations.

(b) A Level 1 or Level 2 covered institution must:

- (1) Provide individuals engaged in control functions with the authority to influence the risk-taking of the business areas they monitor; and
- (2) Ensure that covered persons engaged in control functions are compensated in accordance with the achievement of performance objectives linked to their control functions and independent of the performance of those business areas.

(c) A Level 1 or Level 2 covered institution must provide for the independent monitoring of:

- (1) All incentive-based compensation plans in order to identify whether those plans provide incentives that appropriately balance risk and reward;
- (2) Events related to forfeiture and downward adjustment reviews and decisions of forfeiture and downward adjustment reviews in order to determine consistency with § 303.7(b); and
- (3) Compliance of the incentive-based compensation program with the covered institution's policies and procedures.

#### **§ 303.10 Governance requirements for Level 1 and Level 2 covered institutions.**

An incentive-based compensation arrangement at a Level 1 or Level 2 covered institution will not be considered to be supported by effective governance for purposes of § 303.4(c)(3), unless:

(a) The covered institution establishes a compensation committee composed solely of directors who are not senior executive officers to assist the board of directors in carrying out its responsibilities under § 303.4(e); and

(b) The compensation committee established pursuant to paragraph (a) of this section obtains:

- (1) Input from the risk and audit committees of the covered institution's board of directors, or groups performing similar functions, and risk management function on the effectiveness of risk measures and adjustments used to balance risk and reward in incentive-based compensation arrangements;
- (2) A written assessment of the effectiveness of the covered institution's incentive-based compensation program and related compliance and control processes in providing risk-taking incentives that are consistent with the risk profile of the covered institution, submitted on an annual or more frequent basis by the management of the covered institution and developed with input from the risk and audit committees of its board of directors, or groups performing similar functions, and from the covered institution's risk management and audit functions; and
- (3) An independent written assessment of the effectiveness of the covered institution's incentive-based compensation program and related compliance and control processes in providing risk-taking incentives that are consistent with the risk profile of the covered institution, submitted on an annual or more frequent basis by the internal audit or risk management function of the covered institution, developed independently of the covered institution's management.

#### **§ 303.11 Policies and procedures requirements for Level 1 and Level 2 covered institutions.**

A Level 1 or Level 2 covered institution must develop and implement policies and procedures for its incentive-based compensation program that, at a minimum:

- (a) Are consistent with the prohibitions and requirements of this part;
- (b) Specify the substantive and procedural criteria for the application of forfeiture and clawback, including the process for determining the amount of

incentive-based compensation to be clawed back;

(c) Require that the covered institution maintain documentation of final forfeiture, downward adjustment, and clawback decisions;

(d) Specify the substantive and procedural criteria for the acceleration of payments of deferred incentive-based compensation to a covered person, consistent with § 303.7(a)(1)(iii)(B) and (a)(2)(iii)(B);

(e) Identify and describe the role of any employees, committees, or groups authorized to make incentive-based compensation decisions, including when discretion is authorized;

(f) Describe how discretion is expected to be exercised to appropriately balance risk and reward;

(g) Require that the covered institution maintain documentation of the establishment, implementation, modification, and monitoring of incentive-based compensation arrangements, sufficient to support the covered institution's decisions;

(h) Describe how incentive-based compensation arrangements will be monitored;

(i) Specify the substantive and procedural requirements of the independent compliance program consistent with § 303.9(a)(2); and

(j) Ensure appropriate roles for risk management, risk oversight, and other control function personnel in the covered institution's processes for:

(1) Designing incentive-based compensation arrangements, and determining awards, deferral amounts, deferral periods, forfeiture, downward adjustment, clawback, and vesting; and  
(2) Assessing the effectiveness of incentive-based compensation arrangements in restraining inappropriate risk-taking.

#### **§ 303.12 Indirect actions.**

A covered institution must not, indirectly or through or by any other person, do anything that would be unlawful for such covered institution to do directly under this part.

#### **§ 303.13 Enforcement.**

The provisions of this part shall be enforced under section 505 of the Gramm-Leach-Bliley Act and, for purposes of such section, a violation of this part shall be treated as a violation of subtitle A of title V of such Act.

Dated: April 26, 2016.

**Thomas J. Curry,**

*Comptroller of the Currency.*

By order of the Board of Governors of the Federal Reserve System, May 2, 2016.

**Margaret McCloskey Shanks,**

*Deputy Secretary of the Board.*

Dated at Washington, DC this 26th day of April, 2016.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

**Robert E. Feldman,**

*Executive Secretary.*

Dated: April 21, 2016.

By the Federal Housing Finance Agency.

**Melvin L. Watt,**

*Director.*

By the National Credit Union Administration Board on April 21, 2016.

**Gerard Poliquin,**

*Secretary of the Board.*

Dated: May 6, 2016.

By the Securities and Exchange Commission.

**Robert W. Errett,**

*Deputy Secretary.*

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## Part III

## Department of Transportation

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Federal Railroad Administration

49 CFR Part 214

Railroad Workplace Safety; Roadway Worker Protection Miscellaneous  
Revisions (RRR); Final Rule

**DEPARTMENT OF TRANSPORTATION****Federal Railroad Administration****49 CFR Part 214**

[Docket No. FRA–2008–0086]

RIN 2130–AB89

**Railroad Workplace Safety; Roadway Worker Protection Miscellaneous Revisions (RRR)**

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Final rule; retrospective regulatory review (RRR).

**SUMMARY:** FRA is amending its Roadway Worker Protection (RWP) regulation to resolve interpretative issues that have arisen since the 1996 promulgation of that rule. In particular, this final rule adopts certain terms, resolves miscellaneous interpretive issues, codifies certain FRA Technical Bulletins, adopts new requirements governing redundant signal protections and the movement of roadway maintenance machinery over signalized non-controlled track, and amends certain qualification requirements for roadway workers. This final rule also deletes three outdated incorporations by reference of industry standards in FRA's Bridge Worker Safety Standards, and cross references the Occupational Safety and Health Administration's (OSHA) regulations on the same point.

**DATES:** This final rule is effective April 1, 2017. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of April 1, 2017. Petitions for reconsideration must be received on or before August 9, 2016. Petitions for reconsideration will be posted in the docket for this proceeding. Comments on any submitted petition for reconsideration must be received on or before September 13, 2016.

**ADDRESSES:**

*Petitions for reconsideration and comments on petitions for reconsideration:* Any petitions for reconsideration to the Federal Railroad Administrator or comments on petitions for reconsideration related to this docket may be submitted by any of the following methods:

- *Online:* Federal eRulemaking Portal, <http://www.regulations.gov>. Follow the online instructions for submitting documents.
- *Fax:* 202–493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200

New Jersey Avenue SE., Room W12–140, Washington, DC 20590.

• *Hand Delivery:* Room W12–140 on the Ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

*Instructions:* All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note that all submissions received will be posted without change to <http://www.regulations.gov> including any personal information. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

*Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> at any time or to Room W12–140 on the Ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal Holidays.

**FOR FURTHER INFORMATION CONTACT:** Joseph Riley, Track Specialist, Track Division, Office of Safety Assurance and Compliance, FRA, 1200 New Jersey Avenue SE., RRS–15, Mail Stop 25, Washington, DC 20590 (telephone (202) 493–6357); or Joseph St. Peter, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue SE., RCC–10, Mail Stop 10, Washington, DC 20590 (telephone (202) 493–6047 or 202–493–6052).

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**I. Executive Summary**

On August 20, 2012, FRA published a notice of proposed rulemaking (NPRM) proposing amendments to its regulation on railroad workplace safety to resolve interpretative issues that have arisen since the 1996 promulgation of the original RWP regulation. 77 FR 50324. As detailed in the NPRM, FRA based its proposed amendments, in large part, on recommendations of FRA's Railroad Safety Advisory Committee (RSAC).

Noteworthy RSAC recommendations that FRA is adopting in this final rule include: A job briefing requirement regarding the accessibility of the roadway worker in charge; the adoption of procedures for how roadway workers cross railroad track; a new exception for railroads conducting snow removal and weed spraying operations; a clarification of the existing "foul time" provision; three new permissible methods of establishing working limits on non-controlled track; the expanded use of individual train detection at controlled points; an amended provision governing train audible warnings for roadway workers; and, amendment of certain roadway worker training requirements.

FRA is also addressing other items on which RSAC did not reach consensus and certain miscellaneous other revisions proposed in the NPRM. Noteworthy among these items are: Redundant signal protections; the electronic display of working limits authorities; amendments to the existing provision governing the qualification of roadway workers in charge; a new provision establishing minimum safety standards governing the use of "occupancy behind" or "conditional" working limit authorities; the phase-out of the use of definite train location and informational train line-ups; amendments to clarify the existing roadway worker protection and blue signal protection requirements for work performed within shop areas; the use of existing tunnel niches and clearing bays as a place of safety; and, the use of other railroad tracks as a place of safety. This final rule also deletes certain outdated incorporations by reference of personal protective equipment standards in FRA's Bridge Worker Safety Standards

at subpart B of part 214, and instead cross references the relevant OSHA's regulations.

For the 20-year period analyzed, the estimated quantified costs to the railroad industry total \$20,965,962, discounted to \$11,491,330 (present

value (PV), 7 percent) and \$15,832,099 (PV, 3 percent). For the same 20-year period, the estimated quantified benefits total \$53,109,702, discounted to \$28,132,247 (PV, 7 percent) and \$39,506,913 (PV, 3 percent). Net

benefits total \$32,143,740, discounted to \$16,640,917 (PV, 7 percent) and \$23,674,814 (PV, 3 percent). Table 1 presents the estimated quantified costs and benefits broken down by section of the final rule.

**Table 1. Summary of Quantified Costs and Benefits**

Costs		Year 1	2 - 20	Total 20 year	7% PV	3% PV
214.315	Job Briefings	\$179,468	\$179,468	\$3,589,356	\$1,901,284	\$2,670,028
214.318	Training for Locom. & Car Shop Areas	226,601	226,601	4,532,015	2,400,612	3,371,247
214.319	Working Limits, generally	611,658	509,091	7,725,127	4,465,867	5,975,983
214.339	Audible Warning from Trains	29,105	0	29,105	27,200	28,257
214.345	Training on Safe Crossing of Tracks	90,640	90,640	1,812,806	960,245	1,348,499
214.347	Training on Access to Manual	13,596	13,596	271,921	144,037	202,275
214.353	Training RWIC	150,282	150,282	3,005,632	1,592,086	2,235,811
<b>Total</b>		<b>\$1,301,349</b>	<b>\$1,169,678</b>	<b>\$20,965,962</b>	<b>\$11,491,330</b>	<b>\$15,832,099</b>
Benefits		Year 1	2 - 20	Total 20 year	7% PV	3% PV
214.317	Track Snow Removal	367,093	367,093	7,341,864	3,888,991	5,461,420
214.318	Locomotive Service & Shop Areas	1,964,466	1,964,466	39,289,322	20,811,582	29,226,295
214.327	Inaccessible Track	255,946	255,946	5,118,911	2,711,491	3,807,823
214.337	ITD	67,980	67,980	1,359,605	720,183	1,011,374
<b>Total:</b>		<b>\$2,655,485</b>	<b>\$2,655,485</b>	<b>\$53,109,702</b>	<b>\$28,132,247</b>	<b>\$39,506,913</b>
<b>NET BENEFITS</b>		<b>\$1,354,136</b>	<b>\$1,485,807</b>	<b>\$32,143,740</b>	<b>\$16,640,917</b>	<b>\$23,674,814</b>

**Note:** Dollars are discounted over a 20-year period.

## II. Executive Order 13563 Retrospective Review

Consistent with the requirements of Executive Order 13563, this final rule modifies the existing RWP requirements, in part, based on what FRA learned from its retrospective review of the existing regulation. Executive Order 13563 requires agencies to review existing regulations "that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned."<sup>1</sup> As a result of its retrospective review, FRA is deleting or sun setting several sections of the existing RWP regulation it believes to be outdated or

superfluous (§§ 214.302, 214.305, 214.331 and 214.333), and is also increasing flexibility for compliance in several other sections (§§ 214.317, 214.327 and 214.337).

## III. Rulemaking Authority and Background of the Existing RWP Rule

The Federal Railroad Safety Act of 1970, as codified at 49 U.S.C. 20103, provides that, "[t]he Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970." The Secretary's responsibility under this provision and the balance of the railroad safety laws have been delegated to the FRA Administrator. 49 CFR 1.89(a). As noted in the NPRM, in the field of railroad workplace safety, FRA has

traditionally pursued a conservative course of regulation, relying upon the industry to implement suitable railroad safety rules and mandating in the broadest ways that employees be "instructed" in the requirements of those rules and that railroads create and administer programs of operational tests and inspections to verify compliance. This approach is based on several factors, including recognition of the strong interest of railroads in avoiding costly accidents and personal injuries, the limited resources available to FRA to directly enforce railroad safety rules, and the apparent success of management and employees accomplishing most work in a safe manner.

Over the years, however, it became necessary to codify certain requirements, either to remedy

<sup>1</sup> Executive Order No. 13563, 76 FR 3821, Jan. 21, 2011; available online at: <http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf>.

perceived shortcomings in the railroads' rules, emphasize the importance of compliance, or give FRA a more direct means of promoting compliance. A detailed description of the background and history of FRA's RWP regulation is found in the NPRM.

#### IV. RSAC Overview

As explained in the preamble to the NPRM, FRA's RSAC provides a forum for collaborative rulemaking and program development. The RSAC includes representatives from all of the railroad industry's major stakeholder groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties.<sup>2</sup> When appropriate, FRA assigns a task to the RSAC, and, after consideration and debate, the RSAC may accept or reject the task. If the task is accepted, the RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop consensus recommendations to FRA for action on the task. A working group may establish one or more task forces to develop facts and options on a particular aspect of a given task. The individual task force then provides that information to the working group for consideration.

<sup>2</sup> RSAC member groups are: American Association of Private Railroad Car Owners (AAPRCO); American Association of State Highway and Transportation Officials (AASHTO); American Chemistry Council; American Petroleum Institute; American Public Transportation Association (APTA); American Short Line and Regional Railroad Association (ASLRRA); American Train Dispatchers Association (ATDA); Association of American Railroads (AAR); Association of Railway Museums; Association of State Rail Safety Managers (ASRSM); Brotherhood of Locomotive Engineers and Trainmen (BLET); Brotherhood of Maintenance of Way Employees Division (BMWED); Brotherhood of Railroad Signalmen (BRS); Chlorine Institute; Federal Transit Administration (FTA);\* Fertilizer Institute; High Speed Ground Transportation Association (HSGTA); Institute of Makers of Explosives; International Association of Machinists and Aerospace Workers; International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART), including the Sheet Metal Workers' International Association (SMWIA) and United Transportation Union (UTU); International Brotherhood of Electrical Workers (IBEW); Labor Council for Latin American Advancement (LCLAA);\* League of Railway Industry Women;\* National Association of Railroad Passengers (NARP); National Association of Railway Business Women;\* National Conference of Firemen & Oilers; National Railroad Construction and Maintenance Association (NRCMA); National Railroad Passenger Corporation (Amtrak); National Transportation Safety Board (NTSB);\* Railway Supply Institute (RSI); Safe Travel America (STA); Secretaria de Comunicaciones y Transporte (Mexico);\* Tourist Railway Association, Inc.; Transport Canada;\* Transport Workers Union of America (TWU); Transportation Communications International Union/BRC (TCIU/BRC); and Transportation Security Administration (TSA). \* Indicates associate membership.

When a working group comes to unanimous consensus on recommendations for action, the package is presented to the full RSAC for a vote. If the proposal is accepted by a simple majority of RSAC members, the proposal is formally recommended to the FRA Administrator. FRA then determines what action to take on the recommendation. Because FRA staff members play an active role at the working group level discussing the issues and options and drafting the consensus recommendation, FRA often adopts the RSAC recommendation.

FRA is not bound to follow the RSAC's recommendation, and the agency exercises its independent judgment on whether a recommendation achieves the agency's regulatory goal(s), is soundly supported, and is consistent with policy and legal requirements. Often, FRA varies in some respects from the RSAC recommendation in developing the actual regulatory proposal or final rule. FRA explains any such variations in the rulemaking. If RSAC is unable to reach consensus on a recommendation for action, the task is withdrawn and FRA determines the best course of action.

#### V. RWP RSAC Working Group

As detailed in the NPRM, on January 26, 2005, the RSAC formed the RWP Working Group (Working Group)<sup>3</sup> to consider specific actions to advance the on-track safety of railroad employees and their contractors engaged in maintenance-of-way activities throughout the general system of railroad transportation. FRA tasked the Working Group with reviewing the existing RWP regulation, technical bulletins, and a safety advisory dealing with on-track safety for roadway workers, and, as appropriate, to consider enhancements to the existing rule to further reduce the risk of serious injury or death to roadway workers.

The Working Group held 12 multi-day meetings and worked diligently to reach

consensus on 32 separate items. The Working Group's consensus recommendations included adding or amending various provisions in the following sections in part 214, subpart C:

- § 214.7—add two new definitions; revise an existing definition; and incorporate three other existing definitions from part 236.
- § 214.309—revision to address on-track safety manual for lone workers and changes to the manual.
- § 214.315—requirement that on-track safety job briefings include information concerning adjacent tracks and accessibility of the roadway worker in charge.
- § 214.317—new paragraph to formalize procedures for roadway workers to walk across tracks; new paragraph for on-track weed spray and snow blowing operations on non-controlled track.
- § 214.321—new paragraph to address the use of work crew numbers.
- § 214.323—clarification of foul time provision prohibiting roadway worker in charge or train dispatcher from permitting movements into working limits.
- § 214.324—new section called “verbal protection” for abbreviated working limits within manual interlocking and controlled points.
- § 214.327—three new paragraphs to formalize the following methods of making non-controlled track inaccessible: Occupied locomotive as a point of inaccessibility; block register territory; and, the use of track bulletins to make track inaccessible within yard limits.
- § 214.335—revision of paragraph (c) concerning on-track safety for tracks adjacent to occupied tracks. Key elements are the elimination of “large-scale” and the addition of a new requirement for on-track safety for tracks adjacent to occupied tracks for specific work activities (addressed in separate rulemaking proceeding as discussed below).
- § 214.337—allow the use of individual train detection at controlled points consisting only of signals and a new paragraph limiting equipment/materials that can only be moved by hand by a lone worker.
- § 214.339—revision of this section concerning train audible warnings to address operational considerations.
- § 214.343—new paragraph to ensure contractors receive requisite training/and or qualification before engaged by a railroad.
- § 214.345—lead-in phrase requiring all training to be consistent with initial

<sup>3</sup> The Working Group included members representing the following organizations: Amtrak; APTA; ASLRRA; ATDA; AAR, including members from BNSF Railway Company (BNSF), Canadian National Railway Company (CN), Canadian Pacific Railway, Limited (CP), Consolidated Rail Corporation (Conrail), CSX Transportation, Inc. (CSXT), The Kansas City Southern Railway Company (KCS), Norfolk Southern Corporation railroads (NS), and Union Pacific Railroad Company (UP); Belt Railroad of Chicago; BLET; BMWED; BRS; FRA; Indiana Harbor Belt Railroad (IHB); Long Island Rail Road (LIRR); Metro-North Commuter Railroad Company (Metro-North); Montana Rail Link; NRC; Northeast Illinois Regional Commuter Railroad Corporation (Metra); RailAmerica, Inc.; Southeastern Pennsylvania Transportation Authority (SEPTA); UTU; and Western New York and Pennsylvania Railroad (WNY&P).

or recurrent training, as specified in § 214.343(b).

- §§ 214.347, 214.349, 214.351, 214.353, and 214.355—consistent requirements for various roadway worker qualifications and a maximum 24-month time period between qualifications.

On June 26, 2007, the full RSAC voted to accept the above recommendations presented by the Working Group. In addition to the above, the Working Group worked on a proposal to use electronic display of authorities as a provision under exclusive track occupancy. The Working Group developed lead-in regulatory text and agreed to some conceptual items. When circulated back to the Working Group prior to the full RSAC vote, however, technical issues were raised that could not be resolved in the time available. Accordingly, in the NPRM, FRA addressed the electronic display issue, and certain other issues the Working Group did not reach consensus on, and FRA is addressing certain of those items in this final rule. Other items the Working Group did not reach consensus on include:

- § 214.7—new term and definition for a “remotely controlled hump yard facility.”
- § 214.7—revision to the definition for the term “roadway worker.”
- § 214.317—use of tunnel clearing bays.
- § 214.321—track occupancy after passage of a train.
- § 214.329—removal of objects from the track under train approach warning.
- § 214.336—passenger station platform snow removal and cleaning.
- § 214.337—consideration of allowance for the use of individual train detection at certain types of manual interlockings or controlled points.
- § 214.353—qualification of employees other than roadway workers who directly provide for the on-track safety of a roadway work group.

As described further in either the preamble to the NPRM or below, FRA is not addressing all of these non-consensus items in this final rule. This rule does not address revisions to the terms “roadway worker” or “remotely controlled hump yard facility,” the removal of objects from the track under train approach warning, the addition of a new “verbal protection” section, or passenger station platform snow removal and cleaning, but the remaining non-consensus items this rule does address are discussed in detail in the relevant Section-by-Section analyses below.

## VI. Proceedings Concerning On-Track Safety Procedures for Adjacent Tracks

As mentioned above, the Working Group reached consensus on items that dealt specifically with adjacent-track on-track safety issues. In light of roadway worker fatality trends involving adjacent track protections, and to expedite lowering the safety risk associated with roadway workers fouling adjacent tracks, FRA undertook a rulemaking proceeding to separately address the adjacent-track safety issues the Working Group contemplated. FRA then published an NPRM addressing adjacent-track on-track safety on July 17, 2008 (73 FR 41214), but formally withdrew the NPRM on August 13, 2008 (73 FR 47124). FRA then published a revised NPRM on November 25, 2009 (74 FR 61633), and a final rule on November 30, 2011 (76 FR 74586). FRA received two petitions for reconsideration of the final rule, and five public comments on those petitions for reconsideration. See Docket No. FRA–2008–0059, available at [www.regulations.gov](http://www.regulations.gov). On December 27, 2013, FRA issued an amended final rule which made certain modifications to the adjacent track final rule in light of issues the petitions for reconsideration raised. 79 FR 1743. The final rule, as amended, became effective on July 1, 2014. The provisions in that rulemaking have limited interaction with the miscellaneous revisions in this final rule amending subpart C. However, as a result of the adjacent track rulemaking, the subpart C section numbering in this final rule for the RSAC’s consensus recommendations is slightly different from that recommended. Any relevant numbering changes are noted in the Section-by-Section analysis below.

## VII. Proceedings in This Rulemaking to Date

On August 20, 2012, FRA published an NPRM in the **Federal Register** proposing nearly all the RSAC consensus recommendations the adjacent track rulemaking did not address and requesting public comment on a variety of other proposals. 77 FR 50324. Noteworthy consensus recommendations proposed in the NPRM include: A job briefing requirement regarding the accessibility of the roadway worker in charge; the adoption of procedures for how roadway workers walk across railroad track; a new allowance for railroad’s conducting on-track snow removal and weed spraying operations; a clarification of the existing “foul time” provision; a new “verbal protection” provision; three new permissible methods of

establishing working limits on non-controlled track; the expanded use of individual train detection at controlled points; an amended provision governing audible warnings by trains for roadway workers; and, clarification of training requirements for roadway workers.

The NPRM also addressed items on which the Working Group did not reach consensus and certain miscellaneous other revisions. These items include: electronic display of track authorities, NTSB Safety Recommendation R–08–06 (redundant signal protections), using certain tunnel niches as a place of safety for roadway workers; a new provision for the removal of objects from railroad track when train approach warning is used as the method of on-track safety; amendments to the existing provision governing the qualification of roadway workers in charge (RWIC); a new section addressing passenger station platform snow removal; a new provision governing using “occupancy behind” or “conditional” working limit authorities; the phase-out of using definite train location and informational train line-ups, potential amendments to the existing RWP and blue signal protection requirements for work performed within shop areas, and, using other railroad track as a place of safety when train approach warning is used as the method of on-track safety. Finally, the NPRM also proposed to delete certain incorporations by reference of personal protective equipment standards in FRA’s Bridge Worker Safety Standards at subpart B of part 214, and instead cross reference OSHA’s regulations on the same point.

## VIII. Public Comments Received

FRA received 14 comments in response to the NPRM. Commenters include: AAR, APTA, ASLRRA, BMWED and BRS (jointly; BMWED/BRS comment), Kimberly Clark Professional, Metro-North and LIRR jointly (MTA comment), New Jersey Transit (NJT), NTSB, Reflective Apparel Factory, SEPTA, and 3M Occupational Health and Environmental Safety Division (3M). FRA also received two comments from individuals, and an additional late comment from BMWED. Section VIII.A below contains a summary and analysis of the comments FRA received that FRA is not adopting in this final rule. Section VIII.B below addresses the effective date of the final rule. Section VIII.C below contains a discussion of the general comments FRA received in response to the NPRM. Section IX contains the Section-by-Section discussion of the final rule, and addresses comments received in response to the NPRM on

each respective section of the regulation.

#### *A. Comments on NPRM Proposals Not Included in Final Rule*

##### **1. Passenger Station Platform Snow Removal and Cleaning**

In the NPRM, FRA proposed a new § 214.338 addressing snow removal and cleaning on passenger station platforms. As proposed, under certain circumstances a single RWIC could oversee several “station platform work coordinators” each responsible for directing the on-track safety of a roadway worker or workgroup performing snow removal or cleaning at passenger stations. FRA intended the proposal to address issues associated with snow removal and routine maintenance operations, and to ensure roadway worker safety while facilitating railroads’ ability to carry out these tasks on passenger stations platforms.

FRA received seven comments on this proposal. NTSB’s comment opposed FRA’s proposal, stating it would detract from safety. The BMWED/BRS comment also opposed the proposal, asserting it would weaken existing safety protections and that the existing regulation already facilitates timely removal of snow from passenger station platforms. AAR’s comment indicated proposed § 214.338 is confusing and suggested changes to the proposal (including removal of the 79 mph speed limitation and increased exceptions for snow removal on crosswalks). APTA also opposed FRA’s proposal, and specifically noted it disagreed with FRA’s stated position that part 214 applies to routine passenger station maintenance activities. APTA and BMWED/BRS’s comment also opposed this provision’s related training section (proposed § 214.352). MTA opposed FRA’s proposal, citing an alleged lack of benefits and implying FRA’s NPRM preamble discussion attempted to expand the existing requirements of part 214. SEPTA commented that snow removal and maintenance activities do fall under the scope of existing part 214’s on-track safety requirements and supported the proposal. NJT commented that it successfully utilizes snow removal procedures like those proposed on the Northeast corridor, but stated the proposed 79 mph speed limit would impose financial burdens on the railroad with no resulting safety benefit.

After evaluating the issue and comments received, FRA is not adopting proposed § 214.338 in this final rule. After recent winters in which many States received heavy snowfalls, FRA’s evaluation of this issue indicates the

existing regulation is not problematic. Thus, FRA concludes the proposed amendments are not necessary. Further, several commenters opposed all or parts of FRA’s proposal, with two commenters asserting that adopting the proposal would decrease safety. Because FRA is not adopting proposed § 214.338 in this final rule, FRA is not adopting that provision’s related training at proposed § 214.352. Similarly, FRA is not adopting the proposed revisions to existing § 214.329(a) or to § 214.7’s definition of the term “watchmen/lookouts” that both related to the sight distance exception of proposed § 214.338.

While FRA is not including the station platform snow removal and cleaning proposal in this final rule, FRA believes it is important to clarify that snow removal activities involving railroad employees or contractors fouling track are subject to the requirements of existing part 214. The definition of a roadway worker includes employees or contractors to a railroad who perform maintenance of roadway or roadway facilities on or near track, or with the potential of fouling a track, which includes snow removal activities. Whether a roadway worker sweeps snow from a switch, a signal appliance, or at a passenger station, if the roadway worker is fouling track (or could potentially foul the track), the risk of injury or death to the roadway worker is the same. FRA recognizes the risks of fouling track may be somewhat mitigated when snow removal is conducted on elevated station platforms (railroad passengers safely occupy the same area where these activities occur). However, not all station platforms are high platforms, and often roadway workers face risks when they foul track with their bodies or equipment while removing snow or performing other routine maintenance activities (e.g., a roadway worker clearing snow from an outside station platform may foul the track with his or her shovel). Before receiving the comments, FRA believed industry understood part 214 applies to snow removal activities. For example, in 2011, Amtrak petitioned FRA for relief from part 214’s definition of “fouling a track” when hand tools are used to remove snow from a station platform’s tactile warning area. *See* Docket No. FRA 2011–0077, available at [www.regulations.gov](http://www.regulations.gov). As noted in BMWED/BRS’s comment, FRA granted that waiver.

In the NPRM, FRA also requested comment on whether station platform work coordinators should be required to wear highly visible garments conforming to the standards of the

American National Standards Institute/International Safety Equipment Association. In response, APTA, BMWED/BRS, 3M, Kimberly-Clark Professional, the Reflective Apparel Factory, and NTSB commented. The BMWED/BRS commented that individual railroads should determine the selection and their employees’ use of highly visible protective equipment. NTSB commented that most railroads currently require roadway workers to wear highly visible vests, and, because of the low visibility conditions that typically exist during snow removal operations on station platforms, FRA should require highly visible safety apparel for all work performed in those conditions. APTA’s comment supported using high visibility apparel to help differentiate passengers on the platform from workers, but stated it did not support considering these workers “roadway workers.” Kimberly-Clark Professional, the Reflective Apparel Factory, and 3M all expressed general support for a highly visible garment requirement for station platform work coordinators. As discussed above, FRA is not adopting proposed § 214.338 in this final rule. Accordingly, FRA is not adopting a highly visible garment requirement. As noted in NTSB’s comment, FRA understands most railroads already require roadway workers to wear highly visible garments.

##### **2. Verbal Protection**

Consistent with a recommendation of the Working Group, in the NPRM, FRA proposed new § 214.324, designed to enable roadway workers to establish working limits using “verbal protection.” In the NPRM, FRA explained that by proposing to adopt the Working Group’s “verbal protection” recommendations, it intended to address discrepancies discussed by the Working Group regarding how on-track safety terminology and use varies in different parts of the country. As proposed, verbal protection nearly mirrored the requirements of foul time. For example, as proposed, if a RWIC established working limits utilizing either verbal protection or foul time, he or she would not have to copy a written authority and maintain possession of it while working limits were in effect. Instead, the RWIC would only have to correctly repeat back the applicable working limits information to the train dispatcher or control operator. The primary difference between verbal protection as proposed and the existing rule allowing establishment of working limits via foul time is that under verbal protection, a RWIC could authorize on-track equipment and trains to move into

and within working limits. Under existing § 214.323, foul time can be utilized both within and outside of manual interlockings or controlled points, but trains and on-track equipment are prohibited from moving into working limits until the roadway worker who obtained the foul time reports clear of the track.

In the NPRM, FRA requested comment on whether a RWIC using verbal protection to establish working limits should be required to make and maintain a copy of the working limits information. FRA noted that such a requirement would ensure a RWIC could reference a written document if any question regarding the working limits arose. FRA believes this would be particularly important when a RWIC utilizing verbal protection is asked to clear track to permit trains or other on-track equipment to move through his or her working limits and then resume work.

In response to this request for comment, FRA received comments from AAR, MTA, and the BMWED/BRS. AAR's comment stated the rule should not require a RWIC to make and maintain a written copy of working limits when using verbal protection, as there is no "significant opportunity for confusion if the procedures for verbal protection are followed." AAR further stated the use of a written authority would defeat the purpose of verbal protection. MTA's comment made the same point and added that requiring a RWIC to copy the information could potentially distract that RWIC. BMWED/BRS's comment indicated this proposal would exclude lone workers from being able to establish verbal protection working limits (due to § 214.7's proposed definition of the term "roadway worker in charge") and advocated requiring the RWIC to make a written copy of working limits authority via verbal protection. BMWED/BRS indicated that because an RWIC could authorize train and on-track equipment movements into working limits authorized by verbal protection, a written document would enhance safety and eliminate mental errors regarding the working limits.

In light of the comments received, FRA again reviewed the records of the Working Group's discussions on verbal protection. Those records indicate the Working Group may have primarily intended verbal protection as a method for roadway maintenance machines to occupy and move through interlockings and controlled points and to perform short duration work as necessary. FRA notes that existing part 214 already accommodates these activities through

the establishment of working limits via foul time (§ 214.323) and exclusive track occupancy (§ 214.321). Existing § 214.323 permits the establishment of foul time working limits within a manual interlocking or controlled point, and permits the working limits to be established verbally by the RWIC and dispatcher. Although part 214 does not specify any time limit on the duration of foul time, typically, foul time is used for short durations. If longer duration work needs to be performed, and a RWIC desires to let trains through working limits without giving up his or her authority, the RWIC can use the exclusive track occupancy procedures at existing § 214.321. Further, FRA notes that part 214 does not always require the establishment of working limits to move roadway maintenance machines through an interlocking or controlled point. Existing § 214.301(c) allows roadway maintenance machine movements in travel mode (not performing work such that working limits are required) to do so under the authority of a dispatcher or control operator. Because existing part 214 already provides the flexibility FRA intended the proposal for verbal protection to achieve, and consistent with AAR's comment, FRA believes requiring a RWIC to write down his or her working limits information would make verbal protection somewhat indistinguishable from existing exclusive track occupancy procedures under § 214.321.

FRA also believes that in some instances using verbal protection could raise safety issues if not utilized as intended (e.g., a roadway work group's establishment of working limits within an interlocking to perform work requiring the group to repeatedly clear and then re-occupy track to let trains travel through working limits). After careful consideration of this issue, FRA strongly believes that if a work group wants to let trains or other on-track equipment travel through working limits without releasing its authority, the RWIC should have a written (or electronic) document to refer to containing all relevant information for that authority (e.g., the exact limits of the authority, track number(s)). The existing exclusive track occupancy procedures at § 214.321 provide for such a document for the work group to reference.

FRA understands the operating rules of railroads may utilize different terminology than exists in part 214 (e.g., some railroads' rules may refer to § 214.321's exclusive track occupancy requirements as "foul time"). FRA also understands some railroads' rules may

differ from part 214 in not permitting using certain forms of working limits within the limits of an interlocking or controlled point. However, existing part 214 has no such restrictions. A new verbal protection section would not create any flexibility in establishing working limits within a manual interlocking or controlled point that part 214 does not already provide, and could potentially introduce safety concerns that do not currently exist if not used as the Working Group seems to have originally intended. Thus, FRA declines to adopt the proposed "verbal protection" section in this final rule.

### 3. Physical Characteristics Qualification for Watchmen/Lookouts and Lone Workers

Existing § 214.353 governs the qualification and training of RWICs and includes training on the "relevant physical characteristics of the territory of the railroad upon which the roadway worker is qualified." However, similar training and qualification is not required for lone workers or watchmen/lookouts. See §§ 214.347 and 214.349. In the NPRM, FRA requested comment on whether lone workers and watchman/lookouts should be trained and qualified on the physical characteristics of a territory similar to the qualification requirement for RWICs. Lone workers are similar to RWICs because they establish on-track safety, but only for themselves rather than for an entire roadway work group like an RWIC. FRA sought comment on this issue to determine if such a requirement could potentially improve the safety of lone workers and better enable watchmen/lookouts to provide effective train approach warning at particular locations.

BMWED/BRS, AAR, SEPTA, NJT, and MTA each commented on this proposal. The BMWED/BRS comment supported including physical characteristics qualification and training for lone workers, noting they must be able to establish working limits when necessary, and be familiar with their assigned territory. Both BMWED/BRS and SEPTA opposed physical characteristics training for watchmen/lookouts because such employees work under the supervision of a RWIC who must be qualified on the physical characteristics and have cost concerns. Noting the lack of accidents attributed to roadway workers lacking familiarity with the physical characteristics of a territory, AAR's comment opposed this proposal, stating there is no evidence to support the requirement and citing cost concerns. NJT's comment stated lone workers already have to be qualified on

physical characteristics to foul track. FRA agrees with NJT to the extent a railroad chooses to require physical characteristics training to consider a lone worker “qualified,” as that term is defined at existing § 214.7. With regard to watchmen/lookouts, NJT’s comment stated that physical characteristics qualification would not always help an employee determine proper sight distances and such a requirement would not significantly enhance safety. Rather, NJT suggested FRA should clarify job briefing requirements when roadway work groups utilize watchmen/lookouts. MTA’s comment stated it does not believe watchmen/lookouts should be required to have physical characteristics qualification.

After evaluating the comments, FRA is not adopting either the lone worker or watchmen/lookouts physical characteristics qualification requirement. First, no commenters supported the proposal on watchmen/lookouts, pointing to cost prohibitions, the fact that each roadway work group is already required to have a RWIC qualified on the physical characteristics, and issues with logistics and efficiency. Although some commenters did support such a requirement applying to lone workers, FRA is not aware of accident data to offset the costs such a requirement might entail and does not believe that specifically mandating the physical characteristics qualification of lone workers would yield any real safety benefit. As a practical matter, as NJT’s comment recognized, lone workers are often already qualified on the physical characteristics of a territory, as they need to be conversant in which type of protection (working limits versus individual train detection) is appropriate at any given work location. FRA also notes that under the existing RWP regulation lone workers always have the absolute right to establish working limits when fouling track, which eliminates safety concerns regarding the use of individual train detection if the lone worker is not comfortable using that form of on-track safety at any location. *See* 49 CFR 214.337(b).

#### 4. Removal of Objects by Hand Under Train Approach Warning

Consistent with the Working Group’s consensus recommendation, in the NPRM FRA proposed to add new paragraph (g) to § 214.337. Paragraph (g) is adopted in this final rule and prohibits lone workers from utilizing individual train detection to provide on-track safety when using a roadway maintenance machine, equipment, or material that cannot be readily removed

from the track by hand. As noted in the NPRM, the Working Group also discussed the use of train approach warning (§ 214.329) by roadway work groups using roadway maintenance machines, equipment, or material not easily removed from the track. Although the Working Group did not reach consensus on this point, because the existing RWP regulation is silent on this issue, FRA proposed in the NPRM new § 214.329(h). FRA intended paragraph (h) to prohibit using train approach warning as the form of on-track safety when a roadway work group is using equipment they cannot easily remove from the track and to clarify the establishment of working limits is necessary in such situations. FRA is not adopting proposed § 214.329(h) in this final rule for the reasons explained below.

NTSB and BMWED/BRS comments opposed adding proposed paragraph (h) to § 214.329. NTSB stated the purpose of existing § 214.329 governing train approach warning provided by watchmen/lookouts is to ensure roadway workers can occupy a place of safety not less than 15 seconds before a train arrives. Further, NTSB notes the section is intended to protect roadway workers by allowing them to immediately move to occupy a place of safety when train approach warning is provided, not to allow the coordination of equipment removal.

Like NTSB’s comments, BMWED/BRS commented that train approach warning is limited to warning persons to clear the track and is not intended to protect equipment fouling a track. BMWED/BRS noted that issues with removing equipment from track have not arisen in situations involving the train approach warning regulation. BMWED/BRS explained that if a roadway worker is holding a hand tool or a small handheld power tool, he or she will normally carry that tool with them to the place of safety. BMWED/BRS argued proposed paragraph (h) is unsafe, would increase the risk of roadway workers being struck by trains or on-track equipment, and that “FRA should not require roadway workers to do anything except immediately move to a predetermined place of safety upon receiving a train approach warning.”

After FRA published the NPRM, on January 6, 2014, the rail industry’s Fatality Analysis of Maintenance-of-Way Employees and Signalmen (FAMES) Committee<sup>4</sup> published a

report analyzing fatal accidents which occurred under train approach warning.<sup>5</sup> The report noted that three of the 10 fatal accidents analyzed, which occurred when roadway workers used train approach warning to establish on-track safety, resulted from watchmen/lookouts not being fully focused on the task of detecting approaching trains. The FAMES report emphasized compliance with certain practices required by existing § 214.329. That existing regulatory provision requires watchmen/lookouts to devote their full attention to detecting the approach of trains and communicating the appropriate warnings to roadway workers. That section further prohibits assigning any other duties to the watchman/lookout while that individual is functioning as a watchmen/lookout. After careful consideration of the comments received and the findings of the FAMES report, FRA believes that emphasis on the existing requirements of § 214.329 and continued vigilant enforcement efforts are the best methods to ensure roadway worker safety when train approach warning is used to establish on-track safety. Accordingly, FRA is not adopting proposed paragraph (h) in this final rule. FRA believes the commenters raised valid points regarding the safety of roadway workers and that the regulation is intended to protect roadway workers, not equipment. FRA also agrees a roadway worker’s first responsibility upon receiving train approach warning is to move to occupy a place of safety. While FRA intended this proposal to improve safety, it appears safety is best improved by reinforcing strict compliance with existing § 214.329. That section, if followed, provides for effective on-track safety for roadway workers.

#### B. Effective Date

In the NPRM, FRA requested comment regarding the appropriate effective date of this final rule. SEPTA, MTA, BMWED/BRS, and AAR submitted comments in response to this request. SEPTA agreed with the NPRM’s preamble discussion noting that the effective date of this final rule should consider railroad training schedules. MTA commented that FRA should consider the time needed for the preparation of training materials to select an effective date. MTA’s comment also indicated that if this final rule required certain employees to be trained

<sup>4</sup> The FAMES Committee consists of safety representatives from a cross section of railroad labor, railroad management, and federal regulators. FAMES analyzed all fatalities and selected related

incidents to make recommendations to reduce the risk of future occurrences and eliminate fatalities to roadway workers.

<sup>5</sup> <http://www.fra.dot.gov/eLib/Details/L04902>.

on both part 218's blue signal protections and subpart C's roadway worker protections, additional time for developing training would be necessary. FRA is not adopting a requirement that employees be trained on the protections in both part 218 (blue signal) and part 214 (on-track safety) in this final rule.

BMWED/BRS requested the effective date to be timed to coincide with the effective date of the adjacent track final rule. However, that rule already took effect on July 1, 2014. AAR's comment urged FRA to choose an effective date providing sufficient time to allow for the preparation of training materials for training classes.

In light of the comments received and consideration of the safety benefits to be gained from implementation of this rule, the effective date of this final rule is April 1, 2017. As this final rule is being published in the first half of 2016, railroads have adequate time to adjust training materials used for training classes to be conducted in the first quarter of 2017, or during the time period when annual training is typically conducted for roadway workers. Industry practice is for railroads to finalize their annual rules instruction programs in the fourth quarter of the calendar year, and then to actually instruct their employees in the first quarter of the next calendar year. Based on the implementation date chosen, railroads will not have to alter the timing of their instruction programs for the rule to take effect after the first quarter of 2017.

#### *C. Discussion of General Comments Received*

SEPTA recommended that FRA limit this rulemaking to issues the RSAC addressed. As noted in the NPRM and discussed above, the Working Group meetings that form the basis for much of this final rule took place between 2005 and 2007. Since these meetings, FRA focused its efforts and resources on the adjacent track rulemaking discussed above and other safety issues and Congressional mandates (most notably implementation of the Rail Safety Improvement Act of 2008 (Pub. L. 110-432, Division A, 122 Stat. 4848) (RSIA), which required significant new FRA regulatory efforts). In the interim time, however, FRA continued to address safety issues related to roadway worker protection in general, including NTSB Safety Recommendation R-08-06. Therefore, issuing a regulation not taking into consideration the latest relevant developments and safety issues would be an inefficient and ineffective use of FRA's resources.

APTA requested that FRA publish specific proposed rule text to comment on so the public can appropriately focus their comments and increase the effectiveness of public comments. The Administrative Procedure Act (*see* 5 U.S.C. 553(b)(3)), does not require an agency to propose specific regulatory text in proposed rules, but instead allows an agency to provide "a description of the subjects and issues involved." Nevertheless, in the NPRM, FRA proposed specific regulatory text for almost all its proposals. In this final rule, FRA is adopting three of the items proposed without specific regulatory text (tunnel niches (§ 214.317(d)), blue signal allowances (§ 214.318), and redundant signal protections (§ 214.319(b)). FRA believes the public comments received addressing the benefits and/or drawbacks and potential burdens of these proposals sufficiently inform FRA's reasonable regulatory decisions, particularly in light of the past RSAC discussions. Further, on certain proposals, such as whether FRA should permit using blue signal protections for certain maintenance performed within locomotive and car shop areas, FRA reasonably sought comments broadly addressing how best to implement the proposals if adopted in a final rule (*see* new § 214.318 below). Last, AAR commented that the NPRM's accompanying cost-benefit analysis relied on business benefits. AAR stated that where NPRM proposals would impose burdens on the railroad industry, to adopt those provisions in a final rule, the proposals must be modified if there are no offsetting safety benefits. FRA addresses this comment further in the Regulatory Impact Analysis (RIA) accompanying this rule.

### **IX. Section-by-Section Analysis**

#### *Section 214.7 Definitions*

In the NPRM, FRA proposed amending the existing part 214 definitions to add both new definitions and revise existing definitions. In this final rule, FRA is adding new definitions for the following terms: controlled point; interlocking, manual; maximum authorized speed; on-track safety manual; and roadway worker in charge (RWIC). FRA is also amending part 214's existing definitions for "effective securing device" and "watchman/lookout."

Consistent with the consensus recommendation of the Working Group, in the NPRM, FRA proposed to add the same definition of "controlled point" to part 214 as in FRA's signal regulations at 49 CFR 236.782. In this final rule, FRA is adopting the definition as

proposed. As explained in the NPRM, a definition of "controlled point" in part 214 is necessary because existing § 214.337 prohibits using individual train detection by a lone worker inside the limits of a "controlled point." *See* § 214.337(c)(3). However, the term "controlled point" is not defined in the existing RWP regulation. As also explained in the NPRM, in 2005, in response to interpretation issues, FRA issued Technical Bulletin G-05-29. Technical Bulletin G-05-29 adopted § 236.782's definition of "controlled point" and that definition is used in the RWP regulation today.

AAR and BMWED/BRS commented on this proposal. AAR expressed concern that under the proposed definition any location with a remote controlled power switch would be considered a controlled point. AAR stated that absolute signals are not always at these locations (*e.g.*, dual-control switches that may be manipulated either by hand or remotely, typically by a train dispatcher or control operator) in non-signaled track warrant control territory. In addition, AAR stated the practical effect of this definition would be that railroads could not use individual train detection where there is a remote controlled power switch since it only permits using individual train detection outside the limits established by a controlled point. AAR also expressed concern that switch heaters, snow blowers, signal call lights, blue signal protection, electric switch locks, and bridges can be "controlled" by dispatchers via the control system, but these locations are not considered "controlled points" as commonly understood in the industry. AAR urged FRA to delete the words "and/or other functions of a traffic control system" from the definition of "controlled point" in this final rule.

BMWED/BRS expressed concern about allowing roadway workers to use individual train detection at power-operated switches. BMWED/BRS asserted that power-operated switches can be manipulated by a train crew from a distance resulting in injury to a roadway worker performing work on such a switch while relying on individual train detection as his or her means of on-track safety. BMWED/BRS urged FRA to prohibit lone workers from using individual train detection as a method of on-track safety while working on power-operated switches.

FRA agrees with AAR's comments to the extent that FRA did not intend to include most of the mechanisms AAR listed in the definition of "controlled point" (switch heaters, blue signal protection, snow blowers, *etc.*). FRA

disagrees, however, with regard to remote-controlled power switches and to bridges that are moveable via a control machine (by train dispatcher or control operator). FRA does intend to include those mechanisms in the definition. Under the existing regulation, a lone worker working on a moveable bridge that is a controlled point is always required to establish working limits because a lone worker using individual train detection as his or her form of on-track safety is not required to notify a train dispatcher or control operator of the work they are performing. If a lone worker used individual train detection on a moveable bridge “controlled point,” the dispatcher or control operator may be unaware of the roadway worker’s presence and could remotely move the bridge with the roadway worker on it, creating risk of injury or death to the roadway worker. Accordingly, FRA does not agree with AAR’s comment regarding movable bridges has merit.

In the NPRM, FRA explained that power-operated switches are not generally considered interlockings or controlled points when the switches have wayside indication devices that convey the position of a switch and are operated by train crews. However, FRA further noted that if a power operated switch can be remotely operated by a control operator or dispatcher, it may be considered a “controlled point.” See 77 FR 50333. The Working Group specifically contemplated whether to expand the allowable use of individual train detection in the otherwise prohibited “controlled point” locations, but did not reach consensus on this issue, largely for safety reasons. FRA agrees with the Working Group’s concerns and does not believe it prudent to expand use of individual train detection to “controlled points” consisting of remote-controlled power switches. As explained in the original 1996 RWP final rule, using individual train detection is appropriate only in

very limited circumstances. 61 FR 65959, 65971.

In response to the BMWED/BRS comment, in the NPRM, FRA addressed power-operated switches (77 FR 50333), explaining that use of individual train detection by a lone worker at power-operated switch installation locations is permitted if:

- The signals at these installations do not convey train movement authority; and
- The switch installation is not controlled by a train dispatcher or control operator, and is not part of a manual interlocking or controlled point.

FRA does not believe it prudent to expand the definition of “controlled point” to include all power-operated switches. Rather, the longstanding guidance described above from FRA Technical Bulletin G–05–11 regarding which power-operated switches constitute “controlled points,” will continue to control. Lone workers performing work at these installations, or at any other location where individual train detection use is permitted, maintain the absolute right to use a form of on-track safety other than individual train detection. See § 214.337(b). Thus, a blanket expansion of the definition to address all power-operated switches is not justified. Upon the effective date of this final rule, the definitions of “controlled point” and “interlocking, manual” (discussed below) adopted in this rule supplant FRA Technical Bulletin G–05–29.

Consistent with the Working Group recommendation, in the NPRM FRA proposed amending the existing definition of “effective securing device” to incorporate the contents of Technical Bulletin G–05–20. In this final rule, FRA is adopting the revised definition as proposed. FRA intended to clearly identify effective securing devices and to prevent railroad employees from being injured attempting to operate a secured device. Therefore, FRA proposed to specify in the definition of

“effective securing device” that any such device must be equipped with a “unique tag” clearly indicating to other railroad employees that the switch is secured by roadway workers.

AAR, BMWED/BRS, and an individual submitted comments on FRA’s proposed amendment to this definition. BMWED/BRS advocated for a tag affixed to an effective securing device to be either a generic or a unique tag if the tag clearly indicates inaccessible track working limits and the railroad’s rules prohibit operating in those limits except as the RWIC permits. AAR similarly commented that FRA should clarify the meaning of “unique” tag. AAR stated unique tags should be craft-specific, and not unique to an individual employee. AAR also stated that requiring an individual employee to sign the tag would be unnecessary and burdensome. Finally, an individual commenter asked if an RWP-specific tag would suffice or whether FRA’s proposed amendment would require an additional “unique” tag.

FRA is adopting the revised definition as proposed. In response to the comments received, FRA clarifies that the tag does not have to be “unique” to a specific person or work gang. Rather, a craft-specific tag is considered unique.

In this final rule, as proposed in the NPRM and consistent with BMWED/BRS’s comment supporting the proposal, FRA is adopting the Working Group’s recommended definition for the new term “interlocking, manual.” This definition mirrors the existing definition for the same term in FRA’s signal and train control regulation (§ 236.751).

Because we are not making substantive revisions in this final rule to the proposals in the NPRM for the definitions of “controlled point” or “interlocking, manual,” for ease of reference, below, FRA is duplicating the table included in the NPRM, summarizing the applicability of individual train detection on various types of track arrangements:

Track arrangement	Individual train detection permitted
Controlled point/manual interlocking with switches, crossings (diamonds), or moveable bridges .....	No.
Controlled point with signals only—see § 214.337(c)(3) .....	Yes.
Manual interlocking .....	No.
Automatic interlocking .....	Yes.
Power-operated switch installations .....	See discussion above.

In this final rule FRA is adopting the new definition for the term “maximum authorized speed” proposed in the NPRM. Existing § 214.329(a) requires that train approach warning be given in

sufficient time for a roadway worker to occupy a previously arranged place of safety not less than 15 seconds before a train moving at the maximum speed authorized on that track can pass the

location of the roadway worker. Existing § 214.337(c) contains a similar requirement for lone workers. However, no definition for “maximum authorized speed” exists in the current RWP

regulation. Accordingly, the Working Group recommended that FRA define the term “maximum authorized speed” as the speed designated for a track in a railroad’s timetable, special instructions, or bulletin. The Working Group agreed that using a temporary speed restriction as the basis to determine the appropriate train approach warning distance could pose inherent dangers. That danger can occur when someone removes a temporary restriction from a particular segment of track without notifying the roadway work group or lone worker using that temporary speed restriction so they can determine the appropriate train approach warning distance.

In response to the NPRM proposal, both NJT and BMWED/BRS comments agreed temporary speed restrictions should not be used to determine appropriate train approach warning distances and supported the proposed definition. Therefore, FRA is adopting the new definition as proposed. FRA notes this new definition also applies to the RWP requirements in the adjacent track rulemaking. *See* § 214.336.

Consistent with the consensus recommendation of the Working Group, in the NPRM, FRA proposed to define “on-track safety manual.” FRA intended the proposed definition to provide clarity. FRA is adopting the definition substantially as proposed, with minor clarifying language suggested by BMWED/BRS.

As noted in the NPRM, existing § 214.309 requires each RWIC and lone worker to have with them a manual containing the rules and operating procedures governing track occupancy and protection. To clarify the materials that must be included in such a manual, FRA proposed to define the term “on-track safety manual,” in part, as “the entire set of instructions designed to prevent roadway workers from being struck by trains or other on-track equipment.” BMWED/BRS suggested that the definition require “the entire set of on-track safety rules and instructions” to be in the manual and to expressly state the on-track safety rules and instructions must be maintained together in one manual. FRA agrees with both of BMWED/BRS’s suggestions. First, BMWED/BRS’s suggested reference to “the entire set of on-track safety rules and instructions” more accurately captures the manual’s required contents. Second, consistent with the existing RWP regulation, FRA intended to require that the “on-track safety manual” be a single manual. As discussed in the NPRM preamble, and in the 1996 final rule preamble BMWED/BRS quoted in their

comment, that single manual may be divided into binders (separate sections where appropriate), rather than requiring railroads to issue new manuals each time it amends a rule or issues a new rule. For example, the manual could be broken into separate sections addressing on-track safety rules, good faith challenge procedures, roadway maintenance machine procedures, and other relevant issues.

As discussed in the NPRM, FRA Technical Bulletins G-05-12 and G-05-25 both address concerns regarding the requirement to maintain on-track safety manuals. Because this final rule’s adoption of a definition for “on-track safety manual” alleviates the need for Technical Bulletins G-05-12 and G-05-25, those Technical Bulletins are supplanted upon the effective date of this final rule.

Next, in the NPRM FRA proposed a definition for the term “roadway worker in charge” (RWIC). The term is used in existing § 214.321, and is also described interchangeably throughout the existing regulation as the “roadway worker responsible for the on-track safety of others,” the “roadway worker designated by the employer to provide for on-track safety for all members of the group,” the “roadway workers in charge of the working limits,” and other similarly descriptive terms. The Working Group’s consensus recommendations for this rulemaking also used the term “roadway worker in charge” in several places. However, that term is not defined in the existing regulation, and the Working Group did agree on a recommended definition of the term.

The NPRM’s proposed definition of RWIC mirrored the existing definition for the term in FRA’s Railroad Operating Practices Regulation (*see* § 218.93). FRA also proposed to amend numerous sections of part 214 to substitute the term “roadway worker in charge” for the wide variety of terms currently used to describe the roadway worker who is in charge of a roadway work group and establishes on-track safety for that group.

In its comments on FRA’s proposed definition of RWIC, BMWED/BRS recommended that FRA revise the proposed definition to include lone workers. BMWED/BRS supported including lone workers in the definition of “roadway worker in charge” to permit a lone worker to establish on-track safety for his or her self (without unnecessary regulatory text referring to both RWICs and lone workers). Specifically, BMWED/BRS suggested adding the words “and lone workers qualified in accordance with § 214.347

for the purpose of establishing on-track safety for themselves” to the end of the proposed definition.

FRA concurs with the BMWED/BRS comment, and, in this final rule, is adopting a slightly different definition of RWIC than the suggested language. FRA is defining “roadway worker in charge” as a roadway worker who is qualified under § 214.353 to establish on-track safety for roadway work groups, and lone workers qualified under § 214.347 to establish on-track safety for themselves. Under the current regulation, lone workers can establish on-track safety for their own protection, either via individual train detection or by establishing working limits. In the NPRM, FRA did not intend to prohibit lone workers from establishing working limits for their own protection. FRA emphasizes, however, that consistent with the existing regulation, a lone worker who is qualified under § 214.347 may establish the appropriate form of on-track safety for his or herself. However, if a lone worker is establishing on-track safety for any other roadway workers, he or she must be qualified under § 214.353 as a RWIC.

Finally, FRA noted in the preamble of the NPRM that a RWIC may only perform watchman/lookout duties if the requirements of § 214.329 are met. Section 214.329(b) requires that watchmen/lookouts devote full attention to detecting the approach of trains and communicating warning thereof, and shall not be assigned any other duties while functioning as watchmen/lookouts. Thus, a RWIC could not perform any other duties, such as providing direction to a roadway work group, while simultaneously serving as a watchman/lookout. The limitation on performing other tasks while simultaneously serving as a watchman/lookout severely limits the instances when a RWIC may permissibly fill both roles.

In the NPRM, FRA proposed to amend the definition of “watchman/lookout” to account for the proposed use of station platform work coordinators and requested comment on potentially amending the existing definition to more accurately reflect the training and qualification requirements for a watchman/lookouts. In this final rule, FRA is not adopting the proposed station platform work coordinators provisions. Thus, the proposed revision to the watchman/lookout definition is unnecessary. With regard to watchman/lookout training and qualification requirements, the existing regulation defines a watchman/lookout, in part as, an employee who has been annually trained and qualified to provide train

approach warning to roadway workers of approaching trains or on-track equipment. See § 214.7. However, as discussed below in the Section-by-Section analysis for § 214.347, the current regulation does not specify the frequency of “periodic” qualification requirements for specific roadway worker qualifications (e.g., lone worker, watchman/lookout, flagman, or RWIC qualification). Existing § 214.349(b) requires initial and periodic qualification of a watchman/lookout to be evidenced by demonstrated proficiency, mirroring the other existing additional roadway worker qualification sections. FRA requested comment on whether it should remove the word “annually” from the existing definition of “watchman/lookout” so the definition more accurately reflects both the current and any future RWP refresher qualification and training requirements and is consistent with the other existing roadway worker qualification definitions.

BMWED/BRS submitted a joint comment in response to the proposal, and BMWED, submitted its own additional late comment. Noting that the Working Group reached consensus on annual training and qualification requirements for roadway workers, in their comments, BMWED/BRS opposed removing the word “annual” from the definition of watchman/lookout.

After consideration of BMWED/BRS’s comment, in this final rule FRA is removing the word “annually” from the definition of “watchman/lookout.” As stated above, removing the reference to “annual” is for consistency with the definitions of the other roadway worker qualifications, and because the “periodic” qualification requirement is not considered an “annual” requirement under the RWP regulation. FRA’s longstanding position since the RWP rule became effective in 1997 is that roadway worker training is an annual requirement (see Section-by-Section analysis discussion for §§ 214.343, 214.345, 214.347, 214.349, 214.351 and 214.353). As discussed in the Section-by-Section analysis for the roadway worker training sections below, the RSAC consensus recommendation was for a 24-month “periodic” re-qualification requirement, and the training standards rulemaking at 49 CFR part 243 requires a minimum three-year qualification interval. FRA is not amending the annual training requirement for watchmen/lookouts or for roadway workers generally. However, as discussed in the Section-by-Section analysis for the training sections below, FRA is adopting a

definite interval for periodic re-qualification in this final rule.

The BMWED’s later comment expressed concern that some railroads are not providing watchmen/lookouts with any audible or visual warning devices to provide appropriate train approach warning. The comment points out the existing definition of the term “watchman/lookout” in § 214.7 requires, in part, that roadway workers acting as watchmen/lookouts be properly equipped to provide visual and auditory warning, such as whistle, air horn, white disk, red flag, lantern, fusee. The comment urges FRA to clarify in this final rule that use of such audible and/or visible warning devices are mandatory to provide train approach warning under § 214.329. FRA concurs with the BMWED. Both the definition of watchman/lookout, and the operative train approach warning regulation at § 214.329(c) and (g), provide that watchmen/lookouts must be properly equipped to provide train approach warning. As explained in the preamble to the 1996 final rule implementing subpart C:

[t]his section further imposes a duty upon the employer to provide the watchman/lookout employee with the requisite equipment necessary to carry out his on-track safety duties. It is intended that a railroad’s on-track safety program would specify the means to be used by watchmen/lookouts to communicate a warning, and that they be equipped according to that provision.

61 FR 65970, Dec. 16, 1996. Thus, FRA emphasizes that under the existing RWP regulation, a railroad must properly equip a watchman/lookout with the equipment specified by the railroad’s on-track safety program to properly communicate a warning. Except in limited circumstances (e.g., a watchman/lookout assigned to provide train approach warning for a single welder and who is located immediately next to the welder to provide a warning), if a railroad does not provide equipment with the specified auditory or visual warning capabilities to the roadway workers a watchman/lookout is protecting, the railroad is in violation of § 214.329. If an on-track safety program fails to specify the “requisite equipment necessary” for a watchman/lookout to provide on-track safety for a roadway work group, the program also is not compliant with part 214.

#### *Subpart B—Bridge Worker Safety Standards*

In the NPRM, FRA proposed to delete the existing incorporations by reference of certain outdated industry standards for personal protective equipment (PPE) in subpart B of part 214 (Bridge Worker

Protection). Specifically, §§ 214.113, 214.115, and 214.117 incorporate by reference certain American National Standards Institute (ANSI) standards governing head, foot, eye, and face protection, respectively. FRA originally promulgated those sections in 1992 and they reference standards from 1986. 57 FR 28116, Jun. 24, 1992. Although the regulatory requirements have not been substantively updated in some time, ANSI has updated the standards themselves. Employers and employees may not be able to obtain PPE manufactured using the older standards currently incorporated by reference. As such, FRA proposed to (1) amend these existing sections to reflect the updated ANSI standards, (2) allow the continued use of any existing equipment which meets the standards currently incorporated by reference in part 214, and (3) allow the use of equipment meeting updated versions of those standards. FRA received no comments on these NPRM proposals and is adopting the revisions to §§ 214.113, 214.115, and 214.117 as proposed. For a detailed discussion of these amendments, see the preamble to the proposed rule at 77 FR at 50335–36.

#### *Subpart C—Roadway Worker Protection* Section 214.301 Purpose and Scope

Section 214.301 sets forth the purpose and scope of subpart C of part 214. Existing paragraph (c) explains that subpart C prescribes safety standards for the movement of roadway maintenance machines when such movements affect the safety of roadway workers. Paragraph (c) further explains that subpart C does not affect the movements of roadway maintenance machines that are conducted under the authority of a train dispatcher, a control operator, or the operating rules of a railroad. To clarify the paragraph’s meaning, FRA proposed regulatory text explicitly stating that while roadway maintenance machines are traveling under the authority of a train dispatcher, a control operator, or the operating rules of the railroad, the operator is not required to establish on-track safety under part 214. FRA did not intend this proposed amendment to be substantive but rather to clarify the existing meaning of paragraph (c) consistent with FRA Technical Bulletin G–05–14. Technical Bulletin G–05–14 explains that the regulation does not affect movements of roadway maintenance machines over non-controlled track being made under the operating rules of the railroad, but, those same machines, while actually conducting work, must establish on-track safety. After careful consideration

of the issue and comments received, FRA concluded the meaning of paragraph (c) is already well understood and the proposed amendment is unnecessary. Thus, in this final rule, FRA is not adopting this proposed amendment to paragraph (c).

However, FRA is adding a reference in paragraph (c) to new § 214.320 adopted in this final rule. Section 214.320 pertains to the NPRM's proposed revisions to § 214.301 on the movement of roadway maintenance machines over non-controlled track equipped with automatic block signal (ABS) systems where trains are permitted to travel at greater than restricted speed. The discussion of that issue, and of the comments received, appears below in the Section-by-Section analysis for new § 214.320.

As a result of the amendments this final rule makes to §§ 214.301, 214.320, and 214.329, and as noted in the NPRM, upon the effective date of this final rule Technical Bulletin G-05-14 is supplanted.

#### Section 214.302 Information Collection Requirements

FRA received no comments in response to this proposal. Therefore, as proposed in the NPRM, FRA is deleting this existing section from part 214. For a detailed summary of the information collection requirements, please see the Paperwork Reduction Act discussion in Section X of the preamble below.

#### Section 214.305 Compliance Dates

As proposed in the NPRM, FRA is deleting existing § 214.305, because the compliance dates in the section are obsolete. FRA received no comments in response to this proposal.

#### Section 214.307 On-Track Safety Programs

Existing § 214.307 requires a railroad to notify FRA in writing at least one-month in advance of its on-track safety program becoming effective, and sets forth FRA's formal review and approval process for such programs. In the NPRM, FRA proposed to amend this section by: (1) Rescinding the requirement that railroads provide FRA advance notice of the effective date of their on-track safety programs; and (2) modifying the existing on-track safety program formal approval process. Instead, FRA proposed to review railroads' on-track safety programs upon request. FRA proposed these amendments intending to alleviate burdens as part of its retrospective review of subpart C. Related to this proposed revision, FRA proposed a new paragraph (b) mirroring other provisions

FRA recently adopted in the Federal railroad safety regulations (*see* 49 CFR 220.313). In new paragraph (b), FRA proposed that the FRA Associate Administrator for Railroad Safety and Chief Safety Officer could disapprove a program for cause stated, and proposed requiring a railroad to respond to any such disapproval within 35 days by either (1) amending its program and submitting the amendments for approval, or (2) providing a written response in support of its program. As proposed, FRA's Associate Administrator for Railroad Safety and Chief Safety Officer would subsequently render a decision in writing either approving or disapproving the program. Under this proposal, FRA would consider a failure to submit an amended program or provide a written response as the section requires a failure to implement a program under this part. Finally, in the NPRM, FRA proposed removing the outdated reference to the compliance dates of § 214.305.

BMWED/BRS submitted comments recommending that FRA retain and clarify the advance notification requirement of the section, and additionally suggested language clarifying the requirement for railroads to maintain an on-track safety program approved by FRA. BMWED/BRS also recommended requiring railroads amending or adopting an on-track safety program notify FRA one month prior to the effective date of any amendments to a program or implementation of a new program.

FRA agrees with BMWED/BRS's comment regarding the retention of the advance notification requirement. FRA is retaining that existing provision but moving it to paragraph (b) of this section. FRA agrees it should continue to have advance notice so it can review new on-track safety programs (or railroads' amendments to existing FRA-approved programs). FRA is, however, amending this section to eliminate the required formal review process for each new program and each amendment to existing FRA-approved programs. Specifically, FRA is amending paragraph (a) of this section to require railroads to maintain and make their programs available to FRA upon request. This amendment will enable FRA to better utilize its limited resources to focus on addressing legitimate safety concerns with railroads' on-track safety programs, rather than conducting mandatory formal reviews of programs that, in some instances, been established and approved by FRA for many years.

As proposed in the NPRM, FRA is also amending this section to eliminate

reference to the compliance dates in § 214.305, because as explained above, those dates are obsolete and this final rule deletes § 214.305. Given the deletion of § 214.305, however, FRA is amending paragraph (a) of § 214.307 to specifically require railroads to have an on-track safety program in effect by the date on which each railroad's operations commence. Finally, FRA is adopting proposed paragraph (b), but is redesignating it as paragraph (c) in this final rule.

#### Section 214.309 On-Track Safety Manual

Existing § 214.309, titled "On-track safety program documents," mandates, in part, that rules and operating procedures governing track occupancy and protection be maintained together in one manual and be readily available to all roadway workers. In the NPRM, FRA proposed amendments to this section consistent with the consensus language recommended by the Working Group. In this final rule, FRA is amending this section to incorporate the definition for the new term "on-track safety manual" (*see* discussion of § 214.7 above for background on this newly-defined term). As proposed in the NPRM, FRA is also amending the title of this section to reflect the new term "on-track safety manual." As proposed in the NPRM, new paragraph (a) of this section incorporated the term "on-track safety manual," and then repeated the current existing text of § 214.309. In response to this proposal, for consistency with the new term "roadway workers in charge," BMWED/BRS suggested that FRA add the words "in charge" to the second sentence of this paragraph (so that the sentence would require RWICs responsible for the on-track safety of others and lone workers to have and maintain a copy of the on-track safety manual). FRA concurs, and, in final rule, is amending paragraph (a) consistent with BMWED/BRS's suggestion.

In the NPRM, FRA intended new paragraph (b) to address the difficulty a lone worker, such as a signal maintainer or a walking track inspector, might experience carrying a large on-track safety manual. FRA proposed that a railroad must provide an alternate process for a lone worker to obtain on-track safety information. As proposed, the alternate process could include use of a phone or radio for a lone worker to contact an employee who has the on-track safety manual readily accessible. In response to this proposal, BMWED/BRS suggested FRA remove the reference to situations where it is impracticable for a lone worker to

“carry” the on-track safety manual, and instead refer to situations where it is “impracticable for the on-track safety manual to be readily available” to a lone worker. FRA agrees BMWED/BRS’s proposed language more accurately captures the requirement with regard to access to the on-track safety manual, and is adopting that change in this final rule.

Related to the “alternative access” provision of paragraph (b), FRA is also adopting the Working Group’s recommendation to require each railroad’s lone worker training program to include training on the on-track safety manual alternative access requirement (see discussion of § 214.347 below).

As proposed, new paragraph (c) of this section provides for the temporary publication of changes to a railroad’s on-track safety manual in bulletins or notices carried along with the on-track safety manual. This proposed change recognizes that railroads often need to make temporary or permanent changes to on-track safety rules and procedures and to publish and distribute those new or revised requirements on an as-needed basis. While any permanent amendments to a railroad’s on-track safety program must be incorporated into the on-track safety manual, existing § 214.309 does not allow for the temporary nature of some documents or the practical difficulties with incorporating permanent changes immediately after issuance.

In response to this proposal, consistent with their recommendation in paragraph (b) of this section and noting that bulletins and notices are not always literally “carried” by a RWIC or lone worker, the BMWED/BRS suggested that FRA not require temporary bulletins and notices to be “carried” with the on-track safety manual, but rather any temporary publications be “retained” with the on-track safety manual. FRA concurs with this suggestion and is adopting this change in the final rule.

In response to proposed paragraph (c), BMWED/BRS also suggested that to prevent “an open-ended process where stacks of ‘temporary’ notices will ultimately supplant” a railroad’s on-track safety manual, FRA should require employers to update their on-track safety manual at least annually to incorporate any relevant changes. FRA declines to adopt an annual update requirement because the RSAC did not recommend the requirement, FRA did not propose the requirement in the NPRM, and FRA data does not demonstrate a pattern of problems or accidents resulting from a lack of

updates to railroads’ on-track safety manuals. Even so, FRA encourages railroads to regularly update their on-track safety manuals to ensure roadway workers have clear access to the most current on-track safety rules.

#### Section 214.315 Supervision and Communication

Existing § 214.315 mandates that railroads provide job briefings to roadway workers assigned duties requiring the worker to foul a track. Section 214.315 sets forth certain communication requirements between members of a roadway work group, and, in the case of a lone worker, between that lone worker and his or her supervisor or other designated employee. The Working Group recommended FRA add new requirements to this existing section, mainly addressing job briefing terminology and the substance of the required job briefings. FRA addressed most of these consensus recommendations in the adjacent track rulemaking. 74 FR 74614. One recommendation FRA did not address in the adjacent track rulemaking is the Working Group’s recommendation to require job briefings to include information regarding the accessibility of the RWIC to individual roadway workers and alternative procedures if the RWIC is not accessible to members of the roadway work group. In the NPRM, FRA proposed the Working Group’s recommended consensus language requiring employers to designate a substitute employee with the relevant qualifications to serve as RWIC when a roadway work group’s original RWIC departs a work site for an extended period of time. FRA is adopting that language in this final rule.

SEPTA commented on this proposed amendment noting the inconsistency of the proposal with FRA Technical Bulletin G–05–07. Specifically, SEPTA noted that Technical Bulletin G–05–07 states “‘when a RWIC departs a work site for an extended period, a substitute employee with relevant qualifications *may* be designated.’” (Emphasis added.) SEPTA specifically took exception to FRA’s use of the word “must” in the NPRM’s preamble rather than the word “may” used in the technical bulletin.

An RWIC is the person who establishes and directs the on-track safety for a roadway work group, and it is critical that each roadway worker in a roadway work group have access to the RWIC. Access is necessary when a member of the group invokes a good faith challenge, or when he or she has questions concerning the established on-track safety protection. As discussed

in FRA Technical Bulletin G–05–07, generally a RWIC must be located in the immediate vicinity of the work activity, but it may be necessary for a RWIC to depart a work location for a short period to travel to another area encompassing the same work activity (e.g., to conduct on-track safety checks throughout a large mechanized production activity). When an RWIC is away from a work site for a short period, it is imperative the roadway work group have a readily available means to communicate with that person. When a RWIC departs a work site for an extended period and is not readily available to communicate with members of the roadway work group, the roadway work group members effectively do not have a RWIC, as he or she is not at the work group’s location and cannot communicate with the group.

After carefully considering SEPTA’s comment, FRA finds that “must” is correct. The RWIC is responsible for ensuring the on-track safety of members of a roadway work group and must be readily available to communicate with members of the group. Thus, FRA is adopting this recommended consensus item as the NPRM proposed.

In the NPRM, FRA also proposed minor changes to existing paragraphs (b), (c), and (d) to reflect that roadway work groups often include multiple roadway workers and to ensure consistent use of the term “roadway worker in charge” and “on-track safety job briefing” throughout subpart C. FRA received no comments on these minor proposed amendments and is adopting them in this final rule. For more background on these amendments see the discussion in the preamble to the NPRM. 77 FR 50338.

#### Section 214.317 On-Track Safety Procedures, Generally

Existing § 214.317 generally requires employers to provide on-track safety for roadway workers by adopting on-track safety programs compliant with §§ 214.319 through 214.337. In the NPRM, FRA proposed adopting two substantive amendments to this section recommended by the Working Group. The first recommendation would impose requirements for roadway workers who walk across railroad track in new paragraph (b), and the second recommendation would provide new exceptions for roadway workers conducting snow removal or weed spraying operations on non-controlled track in new paragraph (c). FRA also requested comment on whether it should amend subpart C to address using tunnel niches or clearing bays less than four feet from the field side of the

near rail. After consideration of comments received, FRA is adopting a slightly modified new paragraph (b), paragraph (c) substantially as proposed, and a new paragraph (d) to address the use of certain tunnel niches and clearing bays. FRA is also redesignating the existing text of § 214.317 as paragraph (a) of the section to account for new paragraphs (b), (c), and (d).

In the NPRM, FRA proposed new paragraph (b) in this section to require roadway workers to (1) stop and look before crossing track and (2) move directly and promptly across tracks. Proposed paragraph (b) would also require railroads to adopt rules governing how roadway workers determine if it is safe to cross track and clarify the section is not a substitute for required on-track safety when roadway workers are required to foul the track to perform roadway worker duties. As explained in the NPRM, this proposal addresses the practical reality that roadway workers often need to walk across tracks while not directly engaged in activities covered by the existing RWP regulation. For example, a roadway worker might incidentally walk from a work site on a track in which working limits are in effect to a vehicle adjacent to the right of way. While walking to the vehicle, a roadway worker may have to cross over other "live" tracks where working limits or another form of on-track safety is not in effect. Proposed paragraph (b) is intended to prevent roadway workers from being struck by trains or other on-track equipment when incidentally crossing track, while at the same time recognizing the need for procedures enabling roadway workers to cross tracks safely without formal on-track safety in place.

As proposed, paragraph (b) would have required roadway workers to first stop and look in all directions a train or other on-track equipment could approach from before starting across a track to ensure they could safely clear the track before the arrival of any train or other on-track equipment. FRA intended the proposal to provide an opportunity for roadway workers to physically stop what they are doing and consider the on-track circumstances before crossing live track.

SEPTA, BMWED/BRS, NJT, and AAR submitted comments in response to this proposal. SEPTA's comment opposed a requirement that roadway workers stop before crossing each track, explaining that a person who would attempt to cross a track without proper sight distance or in a high traffic area is not likely to stop and look in all directions anyway, so the utility of such a

provision would be minimal. NJT's comment supported the requirement that roadway workers look in both directions before crossing a track. BMWED/BRS supported requiring roadway workers to look in all directions before starting across track, but opposed requiring roadway workers to "stop" before crossing. The labor organizations stated a requirement to stop: (1) Is unnecessary; (2) would cause delays; (3) could lead to increases in slips, trips, and falls; (4) is over-prescriptive; and (5) could subject roadway workers to abuse by managers or FRA inspectors conducting safety audits. AAR also opposed the requirement to "stop" before crossing, stating there could be no expectation such a requirement would regularly be followed, and railroads would then be liable for such noncompliance.

After evaluating the comments, in this final rule FRA is not adopting the proposed requirement that roadway workers stop and look in all directions before crossing track. Commenters expressed unanimous opposition to the proposed requirement and FRA recognizes it would be very difficult to enforce. FRA believes stopping and looking before crossing railroad track is also a matter of common sense and a necessary reality roadway workers are already faced with. Thus, while in this final rule FRA is not adopting the proposed language requiring roadway workers to stop and look before crossing tracks, FRA is adopting the remaining portions of proposed paragraph (b). New paragraph (b) requires roadway workers to move directly and promptly across tracks and railroads to adopt rules governing how roadway workers determine if it is safe to cross track. Consistent with the proposal in the NPRM, as adopted in this final rule, paragraph (b) also clarifies the requirements of the paragraph are not a substitute for required on-track safety when roadway workers are required to foul the track to perform roadway worker duties. For further background on when on-track safety is required for roadway workers, see the discussion in the preamble to the NPRM. 77 FR 50339–50340.

FRA is also adopting the Working Group's recommendation to require a railroad's safety rules governing walking across railroad tracks to be included in all roadway worker training. As proposed in the NPRM, FRA has adopted this recommended training requirement in the roadway worker training provision at § 214.345 (discussed below).

New paragraph (c) of this section addresses the Working Group's

recommendation for on-track snow removal and weed spraying on non-controlled track. As proposed, paragraph (c) permits on-track snow removal and weed spraying operations on non-controlled track without requiring the track to be made inaccessible under § 214.327. FRA intends the provision to alleviate the difficulty of establishing working limits on non-controlled track for operating equipment moving over long distances, and where roadway workers are conducting limited to no on-ground work activities.

After careful consideration of comments responding to proposed paragraph (c), in this final rule, FRA is adopting the paragraph substantially as proposed. Paragraph (c) allows weed spraying and snow removal operations under § 214.301, with the limitations and/or conditions listed in paragraphs (c)(1) through (4) of the paragraph. AAR's comments advocated expanding this provision to allow inspection activities under the same circumstances, but noted the Working Group did not discuss this possibility. Because the Working Group did not discuss this possibility, and FRA did not propose it, FRA declines to include inspection activities in the activities covered by paragraph (c). Also, FRA believes allowing expansion of this exception to include inspection activities would present safety risks as "inspection activities" may entail many different roadway worker activities, and are not of the specialized and more limited nature of the specific snow removal and weed spray operations the Working Group addressed. Further, § 214.301 already covers certain inspection activities while roadway maintenance machines are in "travel" mode, and hi-rail inspection activities are also already subject to certain on-track safety exclusions under § 214.336. Thus, FRA is retaining the existing on-track safety requirements for work activities other than the specific snow removal and weed spray operations the Working Group addressed.

Paragraph (c)(1) requires railroads to adopt and comply with procedures for on-track snow removal and weed spraying operations if the allowances under paragraph (c) are utilized. Paragraphs (c)(1)(i) through (iv) set minimum standards for what those procedures must include. Paragraph (c)(1)(i) requires all on-track movements in the area where on-track snow removal or weed spraying operations are occurring be informed of those operations. AAR's comment opposed this requirement, stating it is unnecessary and problematic in areas

without radio reception. In response, FRA notes that in areas without radio reception it may be likely there are no other persons conducting on-track movements in the "affected area" required to be notified. Further, there are communication methods other than radio if a railroad wishes to utilize the exception in § 214.317(c) in an area without radio reception. FRA also emphasizes paragraph (c) is an exception to the requirement to establish on-track safety, and FRA anticipates that in the majority of instances this exception can be utilized for, radio reception will not be an issue. If radio reception is an issue and there is no other way to inform others making on-track movements in the area of snow removal or weed spraying operations, railroads will have to follow existing methods of establishing on-track safety to perform the work.

As proposed in the NPRM, paragraph (c)(1)(ii) of this final rule requires railroads' procedures to ensure all weed spraying and snow removal operations conducted under paragraph (c) operate at restricted speed defined in § 214.7; except on other than yard tracks and yard switching leads, where movements may operate at no more than 25 miles-per-hour (mph) and must be prepared to stop within one-half the range of vision. Paragraph (c)(1)(iii) requires the procedure adopted by a railroad to ensure there is a means of communication between on-track equipment conducting snow removal and weed spraying operations and any other on-track movements in the area.

Paragraph (c)(1)(iv) prohibits remotely controlled hump yard facility operations from being in effect while snow removal or weed spraying operations are in progress and also prohibits the kicking of cars unless agreed to by the RWIC of the snow removal or weed spraying operation. The prohibition on kicking cars is intended to help ensure there is no free rolling equipment near on-track snow removal or weed spraying operations. Thus, before machines can operate under this provision in remotely controlled hump yard facilities, humping operations must be suspended. As explained in the NPRM, in proposing to prohibit weed spraying and snow removal operations when hump yard operations are "in effect," FRA considered AAR's post-RSAC recommendation to instead prohibit weed spraying and snow removal operations when hump operations are "in progress." BMWED's post-RSAC comment stated it favored "in effect," because that term is more inclusive as hump operations might be "in effect" but not actually "in progress" (e.g., cars

not literally being humped right at the moment that weed spraying operations begin). FRA agreed with the BMWED's position, and proposed the initial Working Group's consensus wording of "in effect," but requested further comment on this issue from all interested parties.

In response to the NPRM proposal, the BMWED/BRS comment reconfirmed the labor organizations' support for the term "in effect" for the status of hump yards. BMWED/BRS stated if "hump yard operations are not 'in effect', that would mean that humping operations have been suspended until released back to the hump by the RWIC." The labor organizations objected to using the term "in progress" because hump operations are not suspended just because humping may not actually be "in progress" at a particular moment.

After considering these additional comments, FRA continues to agree with BMWED/BRS's recommendation to prohibit snow removal and weed spraying operations when hump yard operations are "in effect." This language makes clear FRA's intent for no humping operations to take place until a roadway work group utilizing this section reports clear of hump yard tracks that present the possibility of being struck by humped cars. Thus, FRA is adopting the language it proposed in the NPRM.

FRA does not intend that the only way the exceptions in this section may be utilized is to shut down an entire classification yard. Rather, FRA's intent is the hump operations must not be in effect for the tracks (or group of tracks) that would be affected by snow removal or weed spray operations. For example, under this section it is permissible for a block to be placed on a group of tracks within a classification yard where snow blowing activities are taking place, such that equipment could not be humped into those tracks until the roadway work group utilizing this section reports clear of those tracks.

Paragraph (c)(2) provides that roadway workers engaged in snow removal or weed spraying operations retain an absolute right to utilize the provisions of § 214.327 (inaccessible track). FRA is adopting this provision as proposed.

Paragraph (c)(3) provides that roadway workers engaged in snow removal or weed spraying operations subject to § 214.317 can line switches for the machine's movement without establishing a form of on-track safety under §§ 214.319 through 214.337, but may not engage in any roadway work activity. In its comments, AAR recommends amending this provision to

include the lining of derails. FRA agrees with AAR's recommendation as applied to derails lined via switch stands. The lining of derails by switch stand does not typically require fouling the track. FRA does not agree with AAR's recommendation for derails not operated via switch stands. These derails require roadway workers to bend down onto the rail (or directly adjacent to and in the foul of the rail) to operate the derail. Thus, FRA is adding the words "or derails operated by switch stand" to this provision. For derails not operated by switch stand, a method of on-track safety complaint with subpart C is required.

As proposed and adopted in this final rule, paragraph (c)(4) contains the consensus recommendation of the Working Group for the roadway equipment utilized under this provision. Paragraph (c)(4) requires that each machine engaged in snow removal or weed spraying operations under § 214.317(c) be equipped with: (1) An operative 360-degree intermittent warning light or beacon; (2) an illumination device, such as a headlight, capable of illuminating obstructions on the track ahead in the direction of travel for a distance of 300 feet under normal weather and atmospheric conditions; (3) a brake light activated by the application of the machine braking system, and designed to be visible for a distance of 300 feet under normal weather and atmospheric conditions; and, (4) a rearward viewing device, such as a rearview mirror. If a machine is utilized in snow removal or weed spraying operations conducted during the period between one-half hour after sunset and one-half hour before sunrise, or in dark areas such as tunnels, that machine must also be equipped with work lights, unless equivalent lighting is otherwise provided. AAR commented that paragraph (c)(4) does not address what happens when there is an equipment failure, such as if a machine's headlight burns out. AAR suggested that railroads be permitted to operate the equipment under § 214.317 for seven days after learning of a failed component. FRA declines to adopt AAR's suggested amendment. As noted above, § 214.317(c) is designed as an exception to the current requirement to establish on-track safety while certain roadway work activities are performed. FRA believes under the provisions of this paragraph the specified activities can be conducted safely. When equipment fails, such as a headlight in AAR's example, the safety of the operation is potentially compromised. Accordingly, when equipment required

by this section fails, railroads must default to part 214's existing on-track safety requirements until the equipment is repaired and operating.

Finally, in the NPRM, FRA requested comment on using certain existing tunnel niches (also referred to as clearing bays) as places of safety for roadway workers. As explained in detail in the NPRM (77 FR 50331), some existing railroad tunnels have niches built into the sidewalls that roadway workers occupy as places of safety while performing work in tunnels (typically inspection work). Some of the niches may, by design, be slightly less than four feet from the field side of the near rail. Because existing subpart C does not address using tunnel niches as places of safety, the use of niches less than four feet from the field side of the near rail as a place of safety technically violates the existing regulation because a roadway worker occupying the niche would be "fouling a track" as defined by § 214.7. The Working Group discussed this issue but did not reach consensus. The Working Group did, however, decide against modifying the definition of "fouling a track" to accommodate using tunnel niches. Working Group discussions indicated tunnel niches outside the clearance envelope, but less than four feet from the field side of the rail, existed on a small number of railroads, primarily in the Eastern United States, and those railroads have a long history of safely utilizing the niches.

FRA did not propose specific regulatory text regarding the use of tunnel niches, but requested comment on whether, and how, to address the issue in a final rule. FRA listed certain items it anticipated a regulatory provision allowing using tunnel niches would need to include (*e.g.*, railroad designation of niches, time for a roadway worker to move into a niche upon the approach of a train, that niches must be free from debris).

In response to its request for comments on tunnel niches, FRA received comments from SEPTA, MTA, BMWED/BRS, APTA, and AAR. SEPTA's comment stated that using tunnel niches as a safe place should be allowed if individuals using the niches are not at risk of being struck by moving on-track equipment. MTA's comment supported using niches as a safe place for roadway workers, and indicated railroads should review each niche location before designating it as a safe place. BMWED/BRS's comment opposed using tunnel niches less than four feet from the near running rail as a place of safety. Citing the presence of debris, vagrants, rats, spiders, mice,

raccoons and other hazards, and noting that conditions such as claustrophobia could cause roadway workers to panic and jump out of a tunnel niche into the path of an oncoming train, BMWED/BRS indicated its members typically establish working limits before entering tunnels with close side clearances. BMWED/BRS also expressed concern about roadway work groups exceeding the capacity of a tunnel niche, potentially resulting in one or more roadway workers being left out in the foul with no ability to reach an alternative place of safety.

In its comments, AAR disagreed with BMWED/BRS noting that, particularly in the Northeast United States, railroads have safely used tunnel niches for a century. AAR specifically noted Amtrak's use of tunnel niches as places of safety for inspectors and argued that given the decades of experience demonstrating that tunnel niches can be safely used, FRA should permit Amtrak to continue to use tunnel niches.

APTA's comment indicated that tunnel niches, clearing bays on bridges, and passenger platforms all provide appropriate clearance of the envelope of train and equipment passage and all are safe places with "no historical incident data" supporting the need for FRA to establish additional regulatory provisions to improve their safety. Finally, APTA recommended FRA allow using tunnel niches, clearing bays on bridges, and platforms as designated places of safety and require analysis of any related potential safety issues under FRA's future risk reduction and system safety regulations.

After further evaluating this issue and considering the comments received, in this final rule FRA is adopting new paragraph (d) in § 214.317 authorizing, subject to certain conditions, the use of existing tunnel niches or clearing bays less than four feet from the nearest rail as places of safety for roadway workers. Although FRA recognizes some railroads have successfully used tunnel niches and clearing bays as designated places of safety for roadway workers for some time, existing subpart C technically prohibits such use. New paragraph (d) of § 214.317 sets minimum standards for the use of such existing niches to ensure their continued safe use. Consistent with existing § 214.337(b) applicable to lone workers and § 214.317(c)(2) adopted in this final rule for certain snow removal and weed spraying operations, paragraph (d) also makes clear RWICs and lone workers maintain the absolute right to designate a place of safety in a location other than a tunnel niche or to establish working limits if appropriate.

Paragraph (d) authorizes only using tunnel niches and clearing bays that have a place of safety less than four feet from the field side of the near rail in existence on the effective date of this final rule, if the conditions of paragraphs (d)(1) and (2) are met. Paragraph (d)(1) requires RWICs or lone workers to inspect each tunnel niche or clearing bay prior to determining the niche is suitable to use as a place of safety. Consistent with the requirements of §§ 214.329 and 214.337, paragraph (d)(2) requires a RWIC or lone worker to determine if there is adequate sight distance to permit roadway worker(s) to occupy the place of safety in the niche or clearing bay at least 15 seconds prior to the arrival of a train or other on-track equipment at the work location.

Finally, like existing § 214.337's provision providing lone workers with the absolute right to establish alternate methods of on-track safety, paragraph (d)(3) gives the RWIC or lone worker the absolute right to designate a place of safety in a location other than a tunnel niche or clearing bay, or to establish working limits if appropriate.

Compliance with this new paragraph will ensure the continued safe use of existing tunnel niches, as the RWIC or lone worker is required to visually inspect each niche and determine the proper sight distance to utilize each niche before designating the niche a safe place. Moreover, by providing RWICs and lone workers the absolute right to designate a place of safety other than a tunnel niche which might be less than four feet from a running rail, or to utilize another method of establishing on-track safety, FRA believes BMWED/BRS's safety concerns are alleviated.

#### Section 214.318 Locomotive and Car Shop Repair Track Areas

In the NPRM, FRA requested comment on potentially amending subpart C and/or the existing blue signal regulations in part 218, subpart B to provide a limited exception from part 214's on-track safety requirements for using blue signal protections for certain incidental work performed by mechanical employees within the limits of locomotive servicing and car shop repair track areas (shop areas). FRA did not propose specific regulatory text on this issue, but indicated it might adopt a provision addressing this topic in a final rule. For the reasons explained below, in this final rule FRA is amending subpart C by adding a new § 214.318 addressing incidental work performed in locomotive servicing and car shop repair track areas. This amendment allows "workers," as defined by § 218.5, to utilize blue signal

protections in place of subpart C's on-track safety procedures.

As discussed in the NPRM, subpart C currently requires "roadway workers" performing work with the potential to foul a track within a locomotive servicing or car shop repair track area (including performing work on signals or structures within those areas that may involve fouling track) to utilize the on-track safety procedures of subpart C. Conversely, any "workers," as defined by § 218.5 (typically mechanical department employees), performing work involving the inspection, testing, repairing, or servicing of rolling equipment within locomotive servicing or car shop repair track areas are required to do so in compliance with the blue signal regulations. Because certain incidental duties "workers" under § 218.5 typically perform in shop areas often technically meet the definition of the type of work a "roadway worker" would do (e.g., mechanical department employee performing work on the overhead door of a locomotive maintenance building when such work involves fouling a track), questions arose over what protections are appropriate within shop facilities for certain types of "incidental" work performed by mechanical department employees (i.e., "workers" under § 218.5).

FRA's Technical Bulletin G-08-03 addresses this issue, and explains FRA will not take enforcement action for "incidental" work performed in shop areas similar to roadway worker duties (e.g., sweeping a shop floor or changing a light bulb in an inspection pit). Despite Technical Bulletin G-08-03, many railroads argue shop personnel ("workers" under § 218.5) are already trained on the blue signal regulations and believe FRA should exempt certain work within shop areas from the subpart C on-track safety requirements. Railroads argue shop employees perform the work safely utilizing the blue signal protections they are trained on and most familiar with. Railroads further argue that training shop personnel on two different protection regimes is both costly and confusing for the employees. Thus, railroads argue the requirement to require using the on-track safety protections of subpart C by "worker" in shop areas is detrimental to safety.

In the NPRM, FRA requested comment on potential amendments to the existing part 214 or 218 to address this issue. Because contractor employees are subject to part 214 but not part 218's blue signal requirements, FRA also specifically asked how best to

address applying these requirements to contractor employees.

FRA received six comments in response to this request from APTA, AAR, BMWED/BRS, ASLRRA, MTA, and SETPA. According to APTA, the existing blue signal and RWP regulations are adequate for work performed in shop areas and there is no accident history supporting concerns about this issue. AAR's comment acknowledged the controversy, but noted that for decades blue signal protection has proven to be an effective way to provide for the safety of employees in shop areas. AAR reasoned if blue signal protection adequately protects employees when working on rolling stock, it also will adequately protect employees performing other incidental activities in shop areas. From a safety perspective, AAR stated employees should be permitted to utilize the method of protection they are most familiar with—for mechanical employees within shop areas, that is blue signal protection (part 218), and for roadway workers it is roadway worker protections under part 214, subpart C. AAR also recommended FRA treat contractors the same as railroad employees.

AAR also asserted significant additional costs would result if FRA does not permit mechanical employees who might foul track while performing their duties inside a shop area to utilize blue signal protection as opposed to RWP protection, and noted certain potential drug and alcohol testing implications. AAR explained costs would be incurred for: (1) Providing additional training; (2) placing RWICs in shop areas; and (3) purchasing additional switch locks. AAR indicated one large railroad estimated initial costs at \$1.2 million, and costs of \$700,000 in subsequent years. AAR proposed specific rule text for parts 214 and 218 to permit employees in shop areas to use blue signal protections under part 218, instead of complying with the RWP requirements of part 214.

In its comments, ASLRRA disagreed with FRA's explanation in the NPRM of certain activities within shop areas being subject to the on-track safety regulations of part 214. ASLRRA said FRA's position, consistently applied, would require railroads to use blue signal protection to repair a roadway maintenance machine irrespective of the repair location. ASLRRA urged FRA to not change the regulations.

BMWED/BRS's comment stated the type of work being performed governs whether the blue signal regulations or the RWP regulations apply and argued against any change eliminating the

distinction between the two different forms of protection.

Noting the existing blue signal protection requirements provide a proven level of Safety, SEPTA's comment indicated the railroad industry would be better served if mechanical department employees could perform certain facility-maintenance work within the limits of shop areas using blue signal protection rather than the on-track safety requirements of part 214. Further, SEPTA stated any inconsistency in the forms of protection employees utilize increases the potential for confusion and reduces safety. SEPTA also questioned if the original RWP rulemaking even considered applying the on-track safety requirements in shop areas and expressed doubt that the intended scope of the original RWP regulation even covered work in shop areas.

MTA's comment indicated the primary consideration in deciding what protections to follow in shop areas should be whether employees are adequately protected while performing their assigned duties. MTA asserted it would be overly prescriptive to require employees to be familiar with different types of protection and recommended individual railroads determine the appropriate type of protection employee's should use based on the specific task being performed.

FRA believes the assertion that part 214 as it currently exists does not apply in shop areas is without merit. FRA notes the discussion in the NPRM preamble titled "RWP and Blue Signal Protection in Shop Areas" (77 FR 50329-50330) did not, as AAR and ASLRRA suggested in their comments, attempt to expand the scope of the existing RWP and blue signal regulations. Rather, the discussion described the existing state of interplay between the two regulations. FRA is puzzled by AAR's comment asserting estimated additional costs would be incurred to comply with the requirements of the RWP regulation in place since 1997. FRA agrees it is not in the best interests of safety to apply the requirements of part 214 to certain activities in shop areas not involving work on, under, or between rolling equipment. FRA notes, however, the existing regulations do not allow certain work to be conducted in shop areas without on-track protection under part 214. Thus, compliance with the existing regulation could not impose additional new costs to railroads as AAR's comment states.

FRA also disagrees with the ASLRRA comment asserting "[i]f one were to apply FRA's logic consistently . . .

every time a roadway maintenance machine broke down and had to be repaired on any track, blue signal protections would have to be applied, whether in a yard or on a main track.” FRA cannot envision how the existing regulations could require blue signal protections be applied to repair of roadway maintenance machines as ASLRRA’s comment asserted. The existing blue signal protection regulation (part 218, subpart B) applies to work performed on, under, or between “rolling equipment.” The part 218 definition of the term “rolling equipment” (locomotives and cars), and the corresponding definition of the term “locomotive,” do not include roadway maintenance machines. Repairs to roadway maintenance machines are specifically covered by the definition of “roadway worker” in part 214. Therefore, the literal application of the regulations would not require blue signal protections be applied to repair of roadway maintenance machines as ASLRRA’s comment asserted.

FRA generally agrees with the comments of BMWED/BRS, SEPTA, and MTA and believes allowing railroad employees and contractors to utilize the procedures they are trained on and most familiar with provides clear direction and consistency and will actually eliminate confusion and increase safety. FRA agrees with SEPTA’s comment that the original RWP rule did not specifically discuss maintenance work performed in shop areas. BMWED/BRS argued against FRA eliminating any distinction between RWP protection and blue signal protection and warned doing so could present unforeseen consequences. FRA does not believe providing railroads with the flexibility to use blue signal protection or RWP protection in certain instances within shop facilities in any way eliminates a distinction between the two forms of protection. Finally, FRA believes new § 214.318 addresses both SEPTA and MTA’s stated concerns as “workers” in shop areas will be permitted to utilize blue signal protections in most instances to ensure they are protected while performing their assigned duties.

For all the reasons discussed above, in this final rule, FRA is amending part 214 to permit “workers” (as defined by § 218.5), in certain instances, to utilize the blue signal protections of part 218, subpart B (as opposed to the on-track safety requirements of part 214) in locomotive servicing and car shop repair track areas when fouling track while performing duties incidental to inspecting, testing, servicing, or repairing rolling equipment. FRA believes this is the reasonable and

logical application of parts 214 and 218 in locomotive servicing and car shop repair track areas. Although FRA is not adopting the specific regulatory language amending both parts 214 and 218 AAR suggested, FRA believes new § 214.318 accomplishes the same goal.

As noted by several commenters, for decades “workers” have successfully used blue signal protections in shop areas. In general, when blue signal protections are applied on a track, the regulations prohibit: (1) The movement of equipment on the track (except under the very specific conditions described in § 218.29); (2) coupling to any equipment on the track; and (3) rolling equipment from passing a blue signal. These requirements ensure worker safety by prohibiting the movement of equipment on a protected track. As SEPTA’s comments noted, the conditions in shop areas (where mechanical employees repair rolling equipment secured from movement) are different than situations the RWP regulation typically addresses (e.g., maintenance-of-way workers working along the railroad right-of-way where trains and other on-track equipment pass). FRA does not believe safety is improved by mandating that a railroad employee be trained on, and comply with, the requirements of the blue signal regulation to safely tighten a bolt on a locomotive, and also be trained on and apply the differing requirements of the RWP regulation while standing in the exact same location to perform the incidental work of tightening a bolt on an overhead door. Such a literal approach to the regulations introduces the potential for confusion and the misapplication of the differing requirements, and is also not cost effective, efficient, or reasonable.

Accordingly, new § 214.318(a) reasonably allows “workers” (as defined by § 218.5) within the limits of locomotive servicing and car shop repair track areas (as also defined by § 218.5) to utilize a railroad’s blue signal protection procedures to perform duties incidental to their work on, under, or between rolling equipment while fouling a track protected by blue signal(s). If a railroad chooses to allow “workers” to use blue signal protections authorized by this new section, paragraph (a) also requires the railroad rules address how those protections apply to the incidental duties “workers” perform. By “incidental” duties, FRA means duties within the shop area such as working on a shop door, sweeping excess ballast off a shop floor or away from a work area, cleaning up fluid spills in the gage of the track in a work area, or performing electrical work in a locomotive shop to an appliance such as

an exhaust hood above a track. FRA emphasizes that for this new section to apply, all work must be performed on a track protected by blue signals as required by part 218, subpart B.

This new section does not require railroads to use blue signal protections instead of part 214 on-track safety procedures where applicable inside shop areas. Instead, this new section only gives railroad’s the option to decide the appropriate form of protection for “workers” in shop areas. Roadway workers still must comply with part 214 when fouling track within a shop area. For example, if a signal department employee fouls a track in a shop area while performing work on an electronic system controlling the blue signal display within the shop area, that employee must comply with part 214’s on-track safety requirements because as a signal department employee, he or she is not a “worker” under § 218.5 who inspects, tests, services, or repairs rolling equipment. Similarly, bridge and building department employees required to foul track while building a structure within a shop area also still must establish on-track safety under part 214 because bridge and building department employees are clearly not “workers” under part 218 (they do not inspect, test, service, or repair rolling equipment).

Paragraph (b) of this section addresses how this section applies to contractor employees. As discussed in the NPRM, although the on-track safety requirements of part 214 apply to contractor employees, FRA’s blue signal regulations do not. Typically, however, railroad rules require contractors to follow the railroad’s blue signal procedures when performing work within shop areas. As noted above, AAR recommended FRA treat contractors the same as railroad employees for purposes of what protections apply to those employees while performing the same work as railroad employees. FRA agrees, but because contractor employees do not meet part 218’s definition of “workers,” FRA cannot enforce part 218’s requirements on contractors. Accordingly, in paragraph (b), FRA is extending application of paragraph (a) of this section to contractor employees, but only if the contractor employee’s work is supervised by a railroad employee qualified on the railroad’s rules and procedures implementing the requirements of part 218, subpart B. Thus, if a railroad elects to use the exception in paragraph (a), a contractor within a shop area performing duties incidental to those of inspecting, testing, servicing, and repairing rolling equipment may perform the work

utilizing the railroad's blue signal protections, if the contractor employee is supervised by a railroad employee qualified (as defined by § 217.9) on the railroad's blue signal rules

For example, if a railroad elects to use the exception in paragraph (a) of this section, a contractor employee servicing a shop building's exhaust hood above idling locomotives on a track protected by blue signals may do so under the supervision of a blue signal-qualified railroad employee. If a railroad does not elect to use the exception in paragraph (a), or the contractor employee is not supervised by a blue-signal qualified railroad employee, the contractor would be subject to the RWP requirements of subpart C of part 214 when servicing the exhaust hood because the employee would be a "roadway worker," under § 214.7.

Similarly, if a railroad elects to use the exception in paragraph (a), and implements rules governing its use, if a contractor employee vacuums water from a switch in a locomotive shop on track protected by blue signals and his/her work is supervised by a blue signal-qualified railroad employee, the contractor need only comply with the railroad's blue signal requirements. If the contractor employee is not supervised by a blue signal-qualified employee while performing this duty, the contractor must comply with the on-track safety requirements of part 214 because the work performed makes the contractor a "roadway worker" per existing § 214.7.

Paragraph (c) of this new section requires compliance with part 214, subpart C, for any work performed within a shop area requiring the presence of a person qualified under § 213.7 of FRA's Track Safety Standards. FRA intends this paragraph to make clear traditional inspection, construction, maintenance, or repair of railroad track affecting the ability of rolling equipment to move safely over that track continues to be governed by the on-track safety requirements of part 214, regardless of the craft of a particular employee (or whether the employee(s) are railroad employees or contractors) performing the work. FRA intends this provision to prevent situations where "workers" who are not qualified to perform maintenance-of-way duties perform such duties in a shop or locomotive repair area, potentially affecting the safe movement of rolling equipment over track structures.

To determine if railroad employees or contractors working in shop areas are "workers" under § 218.5 (and can use blue signal protection) or roadway

workers under § 214.7 (and required to establish on-track safety under part 214), FRA will look to the employee's primary duties and the primary purpose of the work performed (whether the work is performed on, under, or between rolling equipment or incidental to work performed on, under, or between rolling equipment). Examples include:

- A mechanical department employee whose primary duty is performing electrical work on locomotives, but to access part of a locomotive to perform such work, fouls a track while shoveling snow from the gauge of the track on which the locomotive is located (and on which blue signal is applied). This mechanical department employee's primary duties involve the inspection, testing, repair, or servicing of rolling equipment. As such, shoveling snow off the track to access the locomotive is performing duties incidental to his or her primary duties. FRA would consider this employee a "worker" under § 218.5, and if the railroad elected to utilize the paragraph (a) exception in this section, the employee could use the railroad's blue signal procedures as opposed to establishing on-track safety under part 214.

- A railroad engineering department employee who is assigned to repair a switch in a locomotive shop area is a "roadway worker" who requires on-track safety compliant with part 214 because the primary duties of engineering department employees do not typically include testing, inspecting, servicing, or repairing rolling equipment. Rather, the primary duties of engineering department employees typically involve the maintenance and repair of railroad track.

- A railroad employee replacing concrete in front of the doors of a shop to ensure an adequate flangeway for the wheels on rolling stock must establish on-track safety under part 214, because such duties are not "incidental" to work on, under, or between rolling equipment and because the work likely requires the presence of a person qualified under § 213.7.

FRA understands not all examples will be so obvious, particularly on smaller railroads where one employee may fill many roles. In such instances FRA would look to the primary purpose of the work being performed, and whether such work was related to that performed on, under, or between rolling equipment. As a practical matter, if an employee of a small railroad routinely performs varying jobs' functions involving both maintenance-of-way work, work traditionally thought of as mechanical work on rolling equipment,

the employee already must be trained the on-track safety requirements of part 214 when performing "roadway worker" duties, and likewise, must be trained on blue signal protection under part 218 when working on, under, or between rolling equipment.

In developing this final rule, FRA considered adopting a requirement for RWICs of roadway work groups performing work within the limits of locomotive shop or car shop repair track areas to notify the person in charge of workers in the shop prior to beginning work. FRA believes such a notification procedure may be useful in situations where unknown to the person in charge of the workers in the shop area, a roadway work group uses derails or other protections to establish working limits in the shop area. Due to cost considerations, FRA is not adopting such a notification requirement in this rule. However, FRA encourages railroads, as circumstances may warrant, to adopt such a procedure. FRA will continue to monitor this issue and may implement such a notification requirement in a future rulemaking.

Upon the effective date of this final rule, FRA Technical Bulletins G-05-21 and G-08-03 are supplanted. Those technical bulletins are no longer valid in light of the adoption of new § 214.318 here.

#### Section 214.319 Working Limits, Generally

Existing § 214.319 sets forth the requirements for establishing working limits consistent with subpart C. FRA is making several changes to this section in the final rule. First, FRA redesignated the last sentence of the existing introductory text of this section as paragraph (a), and redesignated existing paragraphs (a)-(c) of this section as paragraphs (a)(1) through (3). This amendment is only structural and not intended to be substantive in nature to accommodate adding new paragraph (b) of this section (discussed below).

As proposed in the NPRM, FRA is replacing "roadway worker" in newly designated paragraphs (a)(1) and (2) with "roadway worker in charge." These revisions are consistent with the use of the new term "roadway worker in charge" discussed in the Section-by-Section analysis of that term in § 214.7 and clarify that only a roadway worker who is qualified in accordance with § 214.353 can establish or have control over working limits for the purpose of establishing on-track safety.

In the NPRM, FRA also proposed amending the introductory paragraph of § 214.319 to reference the "verbal protection" method of establishing

working limits proposed in new § 214.324. However, as explained above, in this final rule FRA is not adopting the proposed “verbal protection” provision, so the reference to that section is no longer necessary.

Next, FRA is adding new paragraphs (b) and (c) to this section. In the NPRM, in response to NTSB Safety Recommendation R–08–06, FRA asked if railroads should be required to utilize redundant forms of working limits protection when a roadway work group depends on a train dispatcher or control operator to provide signal protection when working limits are established in signalized controlled track territories. NTSB issued Safety Recommendation R–08–06, after a 2007 accident near Woburn, Massachusetts in which two Massachusetts Bay Transportation Authority (MBTA) maintenance-of-way employees died. At the time of the accident, MBTA’s rules required roadway workers to shunt track circuits to provide redundant signal protections to prevent trains or other rolling equipment from entering working limits. NTSB found the roadway work group involved in the accident did not comply with that rule and cited two probable causes of the accident: (1) The roadway work group’s failure to apply a shunting device under the railroad’s rule; and (2) the train dispatcher’s failure to maintain blocking that provided signal protection for the track segment occupied by the working group.<sup>6</sup> In Safety Recommendation R–08–06, NTSB recommends that FRA “[r]equire redundant signal protection, such as shunting, for maintenance of way work crews who depend on the train dispatcher to provide signal protection.” In 2013, NTSB reiterated Safety Recommendation R–08–06 to FRA after an accident in which a Metro-North maintenance-of-way employee was struck and killed by a train in Connecticut.<sup>7</sup>

FRA notes that both the 2007 MBTA and the 2013 Metro-North accidents involved violations of the existing requirements of subpart C. In both instances the train dispatchers did not maintain the required blocking devices, allowing train movements into the roadway work groups’ established working limits without the relevant RWIC’s knowledge. *See, e.g.,* § 214.321(d). Despite the fact that FRA’s

regulations already prohibit the actions that led to these accidents, FRA recognizes more can be done to try to prevent these types of mistakes from causing future tragedies.

In response to FRA’s request for comment regarding a potential redundant protection requirement, AAR, NTSB, SEPTA, BMWED/BRS, APTA, MTA, NJT, and an individual, submitted comments. NTSB urged FRA to add a provision in this final rule requiring using redundant forms of protection such as shunting. AAR urged FRA not to adopt such a provision, indicating it would be counterproductive from a safety perspective. AAR stated such a provision would be counterproductive because shunting cannot be relied on due to: (1) The characteristics of track infrastructure that lead to periodic loss of shunt for certain equipment; (2) the susceptibility of shunts to work only intermittently when used near signal islands; and (3) the lack of reliability of individual locomotives or roadway maintenance machines to shunt. AAR’s comment pointed to the safety issues shunting presents in some circumstances, specifically grade crossing warning device malfunctions and signal system interference, and to concerns related to cost, training, and the practicality of shunting requirements (*e.g.*, trying to shunt as a roadway worker conducts walking track inspections or mobile weed spray operations). BMWED/BRS supported using redundant forms of protection, if it does not interfere with grade crossing warning devices. BMWED/BRS also indicated a requirement for roadway workers to use shunts would necessitate additional training to ensure using shunts did not interfere with grade crossing warning devices or signal systems’ operation.

In its comment, SEPTA recommended that the use of redundant protections be left up to individual railroads because each railroad is in the best position to evaluate the using such a requirement on its property. NJT commented a requirement to use shunts could pose a problem when work is performed within the limits of an interlocking containing a moveable bridge, because if a roadway work group planned to let a train(s) pass through the group’s working limits, the shunts would have to be removed and replaced for each train to allow the signal system to clear to permit the bridge operator to open or close the bridge. MTA commented shunting can result in unintended consequences, including grade crossing malfunctions and signal system disruptions. Citing a discussion in the

preamble to a 2003 FRA rule (68 FR 44388, 44390) addressing roadway maintenance machines (RMMs), individual commenters expressed support for a redundant protection requirement. Noting that RMMs do not reliably shunt signal systems, these commenters stated a uniform requirement for protection beyond those provided by a dispatcher would improve safety.

Subsequent to publication of the NPRM and NTSB issuing Safety Recommendations R–08–06 and R–13–17, on December 4, 2015, the President signed into law the Fixing America’s Surface Transportation Act, Public Law 114–94, 129 Stat. 1686 (Dec. 4, 2015) (FAST Act). Section 11408 of the FAST Act (Section 11408) addresses redundant signal protections and requires FRA (as the Secretary of Transportation’s delegate) to promulgate a rule requiring railroads, whenever practicable and consistent with other safety requirements, to implement redundant signal protections for roadway work groups who depend on train dispatchers to provide signal protection. Section 11408 also requires FRA to consider exempting from any redundant signal protection requirements each segment of track for which operations are governed by a PTC system. Thus, to fulfill the mandates of Section 11408 and address the NPRM’s request for comment, FRA is adopting new paragraphs (b) and (c) of this section. Paragraph (b) requires Class I and II railroads and intercity passenger and commuter railroads utilizing controlled track working limits in signalized territory to establish on-track safety to adopt redundant signal protection procedures. Paragraph (c) explains the procedures to request an exemption from the redundant signal protections for segments of track governed by a functioning PTC system.

Under the discretion Section 11408 affords, FRA is not specifically requiring railroads to utilize shunting as a redundant signal protection. Consistent with the views of several commenters, including BMWED/BRS and AAR, FRA is concerned that in many instances shunting presents new risks. As the NTSB stated in its report on the 2007 MBTA accident at Woburn, shunting by maintenance-of-way crews is not a common practice in the railroad industry. Track shunts have traditionally been designed as a tool to test signal systems rather than to provide protection to roadway workers. Shunting procedures can be disruptive to signal systems and grade crossing warning systems (improper use may violate 49 CFR parts 234 and 236) and,

<sup>6</sup> See NTSB Accident Report NTSB/RAR–0801, “Collision of Massachusetts Bay Transportation Authority Train 322 and Track Maintenance Equipment near Woburn, Massachusetts, January 9, 2007;” available online at: <http://www.nts.gov/doclib/reports/2008/RAR0801.pdf>.

<sup>7</sup> <http://www.nts.gov/doclib/recletters/2013/R-13-17.pdf>.

in certain situations, employees applying shunts may be unnecessarily exposed to electrical hazards and other environmental hazards along the railroad right-of-way. Shunts are also not failsafe and do not guarantee the signal system will protect a roadway work group. FRA is concerned a mandatory shunting requirement nationwide could increase certain railroad safety risks involving highway-rail grade crossing warning devices and railroad signal systems. Further illustrating the risks shunting can present, FRA is currently investigating a fatality that occurred in February 2016 when a railroad employee was attempting to install shunts to conduct an operational test and was struck by a train.

In developing this final rule, FRA conducted a preliminary cost-benefit analysis of a nationwide requirement to shunt, or to otherwise adopt a redundant signal protection involving manipulating the signal system or implementing a technology-based solution allowing roadway work groups to prevent train incursions into established working limits. FRA's analysis indicates the costs of a specific shunting or similar requirement would significantly outweigh the potential benefits and would cost the railroad industry well in excess of \$100 million annually.

For the above reasons, FRA concurs with SEPTA's comment that an individual railroad is in the best position to determine what method of providing redundant signal protections is appropriate for its own operations. Thus, paragraph (b) requires Class I or II and passenger railroads that establish on-track safety using controlled track working limits (§§ 214.321–214.323) in signalized territories to evaluate their particular operations and identify what type of redundant signal protection(s) is appropriate. This evaluation must be completed by July 1, 2017. Varying signal systems, physical characteristics, equipment, operating rules, and other factors make a one-size fits all Federal mandate to shunt, or to adopt a specific form of redundant signal protection, impractical and not the safest course of action.

After railroads conduct the required evaluation, paragraph (b) requires them to adopt (if such procedures are not currently in place) an appropriate method of redundant signal protections in their on-track safety program by January 1, 2018, and to comply with the adopted procedure(s). FRA may object to a railroad's method of providing redundant signal protections under the review procedures specified in

§ 214.307, or may take other appropriate enforcement action if a railroad neglects to evaluate, adopt, and comply with appropriate redundant protection procedures.

Paragraph (b)(1) explains that for purposes of this section, the term “redundant signal protections” means risk mitigation measures or safety redundancies adopted to ensure the proper establishment and maintenance of signal protections for controlled track working limits until such working limits are released by the roadway worker in charge. In other words, “redundant signal protections” are intended to protect against dispatchers or control operators unintentionally or mistakenly allowing train or other on-track movements into working limits before a roadway work group has released its authority (e.g., by removing a signal blocking device). Redundant signal protections could include various individual risk mitigation measures (or a combination of measures) such as technology, training, supervision, or operating-based procedures; or could include use of redundant signal protection such as shunting, designed to prevent signal system-related incursions into established controlled track working limits.

Permissible redundant signal protections under new paragraph (b) do not have to require members of the roadway work group or the RWIC to manipulate the signal system. Instead, redundant protections under this section could involve redundant actions by the control operator or train dispatcher operating the signal system. As noted above, NTSB cited apparent errors by the train dispatchers involved in both the 2007 MBTA and 2013 Metro-North accidents as probable causes of the accidents. Thus, FRA intends that appropriate redundant procedures required of the dispatcher involving operation of the signal system could also fulfill the requirement of new paragraph (b).

FRA notes a railroad is free to utilize shunting procedures to comply with paragraph (b) if the railroad's evaluation identifies such procedures as an appropriate way to provide redundant protections. FRA believes many railroads have already implemented redundant protections other than shunting procedures meeting the requirements of new paragraph (b). For example, at least one Class I railroad utilizes a technology-based procedure in its dispatching system that, if implemented properly, could satisfy the requirements of paragraph (b). FRA understands that dispatching system will not allow a dispatcher to release

controlled track working limits until the RWIC affirmatively indicates via an electronic prompt that he or she is releasing working limits authority. Other railroads use extended job briefing procedures between the RWIC and dispatcher before a dispatcher may remove a blocking device, and/or monitor dispatcher job performance with extra operational tests and audits involving the removal of blocking devices. As an example of an additional briefing procedure (via radio communication) that would be an appropriate component of a railroad's redundant signal protections, a railroad could adopt in its railroad rules a prohibition on dispatchers releasing working limits and removing blocking devices until the RWIC confirms all roadway workers and equipment are clear of the track to be released. Similarly, a railroad rule requiring an additional member of the roadway work group to make the same confirmation to the dispatcher that the track to be released is clear of roadway workers and equipment could also be one component of a railroad's procedures adopted to comply with this new redundant signal protections requirement.

As additional background, on November 25, 2014, FRA published Safety Advisory 2014–02 (Advisory) regarding clear communication, compliance with existing rules and procedures, and ensuring appropriate safety redundancies are in place. 79 FR 70268; correction published at 79 FR 71152, Dec. 1, 2014. The Advisory recommended, in part, that railroads monitor their employees for compliance with existing applicable rules and procedures and examine their train dispatching systems, rules, and procedures to ensure appropriate safety redundancies are in place in the event of miscommunication or error. *Id.* at 70270. FRA issued the Advisory in response to then-open NTSB Safety Recommendation R–08–05, open Safety Recommendation R–08–06, and other incidents where roadway workers were either outside of working limits authority, or where working limits were no longer protected due to dispatcher error. The Advisory discussed available technologies to establish redundant signal protections for roadway work groups (not involving shunting) that, depending on a railroad's specific operating situation, could serve as appropriate forms of redundant protection under new paragraph (b) of this section. Specifically, the Advisory discussed the Enhanced Employee Protection System (EEPS). *Id.* at 70269. FRA understands certain railroads are

deploying the EEPS system. And, the NTSB deemed Metro-North's response to Safety Recommendation R-13-17 (redundant signal protections recommendation to Metro-North specifically) as "Closed-Acceptable Action" after Metro-North implemented EEPS on its system.<sup>8</sup> FRA encourages railroads to use new technologies such as EEPS as they become available to provide redundant signal protections for roadway work groups and to comply with new paragraph (b). As is FRA's practice, it polled railroads to evaluate what, if any, actions railroads took to address the recommendations in the Advisory. A review of responses indicates many railroads' existing procedures already comply with new paragraph (b), as redundancies currently exist within their train dispatching procedures and procedures governing the release of controlled track working limits in signalized territory. FRA is also aware that in addition to these existing safety redundancies, many railroads' roadway maintenance machines are being equipped with modern shunting devices that more effectively shunt track while operating.

Each railroad subject to paragraph (b) must conduct the required evaluation of its on-track safety program by July 1, 2017. This evaluation must be completed even if the railroad believes its existing on-track safety program already provides appropriate redundancies. A railroad's on-track safety program must specifically identify and implement any redundancies by January 1, 2018. FRA believes this amount of time is adequate for each railroad to conduct the evaluation required by paragraph (b), formulate any necessary additions to the on-track safety program, and train roadway workers, train dispatchers, and control operators on any new redundant protections a railroad adopts.

Given operational and practicability considerations, new paragraph (b), requiring redundant protections, applies only to Class I and II railroads and intercity passenger and commuter railroads. By limiting the applicability of this requirement to these larger railroads, FRA is addressing nearly all of the controlled, signalized track in this country, and not imposing an unnecessary burden on smaller entities (Class III railroads). For purposes of this final rule, FRA considers carriers providing "intercity rail passenger transportation" and "commuter rail passenger transportation" to be the same

as those defined at 49 U.S.C. 24102 (definitions of passenger railroads required to install PTC systems under 49 U.S.C. 20157(a)).

FRA must evaluate the costs and benefits of all new regulatory requirements and the burdens of those requirements on small businesses. In short, the safety issues requiring the redundant signal protections contemplated by paragraph (b) of this section are not typically present on the smallest railroads. Generally, Class III railroads do not have signalized controlled track where the redundant protections provision of paragraph (b) would even apply and Class III railroad operations are typically lower speed operations as compared to passenger and Class I or II railroad operations. The accidents NTSB's Safety Recommendation R-08-06 and R-13-07 address both occurred on commuter railroads and the more recent notable accidents described in the Advisory all occurred on either Class I or commuter railroads. Regarding the costs/burden of this new requirement, as discussed above, FRA polled the Class I and II railroads and certain passenger railroads to determine what actions railroads have taken to implement the recommendations in the Advisory. Most railroads that responded indicated they had redundant protections in place prior to FRA issuing the Advisory through their existing dispatching and on-track safety procedures. FRA does not believe there will be prohibitive costs to implement this new requirement, particularly with the flexibility that this final rule provides. A more detailed discussion of the estimated costs and benefits of this new provision is in the RIA accompanying this final rule.

New paragraph (c) of § 214.319 implements the "alternative safety measures" provision of Section 11408 paragraph (b). That paragraph requires FRA to consider exempting from the redundant signal protections requirements "a segment of track for which operations are governed by a [PTC] system certified under [49 U.S.C. 20157], or any other safety technology or practice that would achieve an equivalent or greater level of safety in providing additional signal protection." Paragraph (c) establishes how railroads may request FRA consideration of such an exemption for a segment of track.

FRA's regulations governing the implementation of PTC systems are in 49 CFR part 236, subpart I. Among other safety protections, part 236 requires PTC systems to prevent incursions into established roadway worker working limits. 49 CFR 236.1005(a)(1)(iii). To

comply with this requirement, railroads generally have numerous system design options. In FRA's 2010 initial final rule on PTC, however, FRA explained it would scrutinize a railroad's PTC development and safety plans to determine if the plans left any opportunity for a single point human failure with regard to incursions into work zones (e.g., any opportunity for a dispatcher to remove a blocking device in error as occurred in the 2007 MBTA accident described above). 75 FR 2598, 2613. As noted in that rule, FRA funded the development of a portable terminal allowing an RWIC to control the entry of trains (and restrict train speed) into established working limits, and prohibiting a dispatcher from releasing working limits in the absence of verification of a desired release from the RWIC. *Id.* In the 2010 final rule, FRA strongly recommended railroads utilize terminals with such functionality in implementing PTC. *Id.*

FRA believes a PTC system involving dual protections for roadway work groups (such as described above) would improve roadway worker safety and be consistent with allowing an appropriate PTC exemption from the redundant protection requirements in paragraph (b) of this section. However, without knowing the particular PTC system a railroad is using at a given location, and to ensure this type of dual protection system is successfully implemented, FRA cannot provide a universal exemption without performing a detailed review of each PTC system's working limits' incursion protections. Moreover, a railroad may use a solution to the PTC standard that is not necessarily redundant and would not fulfill the FAST Act's signal protections mandate.

Thus, new paragraph (c) requires a railroad seeking to exempt a segment of track governed by a PTC system from the redundant signal protections requirement of paragraph (b) to submit a written request for exemption to FRA's Associate Administrator for Railroad Safety and Chief Safety Officer. The written request for approval must include all relevant details regarding how the PTC system at a given location prevents train incursions into established working limits, and discuss how such a PTC system eliminates a single point human failure in the enforcement of established working limits. Paragraph (c) specifies that FRA will provide notice of approval or disapproval of a railroad's request within 90 days, and will specify the basis for FRA's decision if the request is disapproved. Of course, a railroad may choose to implement appropriate

<sup>8</sup> [http://www.ntsb.gov/investigations/\\_layouts/ntsb.recsearch/Recommendation.aspx?Rec=R-13-017](http://www.ntsb.gov/investigations/_layouts/ntsb.recsearch/Recommendation.aspx?Rec=R-13-017).

redundant signal protections under new § 214.319(b) on segments of track governed by an operative PTC system to provide an extra measure of safety for roadway workers.

Both MBTA and Metro-North (the railroads that experienced the accidents which led NTSB to issue Safety Recommendation R-08-06) are required to install PTC. FRA already accounted for the cost of PTC installation and the corresponding benefits of preventing other types of unintended work zone incursions in the final PTC rule. 75 FR 2598; *see* accompanying FRA RIA, Docket No. 2008-0132-0060; available online at [www.regulations.gov](http://www.regulations.gov). The Advisory discussed above also reiterated the probability of certain types of work zone incidents occurring as a result of non-compliance with existing rules and regulations could be significantly reduced by effective implementation of PTC systems. FRA believes paragraph (b)'s new redundant protections provision, along with implementation of PTC systems under part 236, will greatly reduce the likelihood of future injuries and deaths resulting from incursions into controlled track working limits in signalized territory. However, FRA will continue to evaluate this issue, and, as new technologies evolve, may revisit the topic of redundant signal protections.

#### Section 214.320 Roadway Maintenance Machine Movements Over Signalized Non-Controlled Track

In the NPRM, FRA proposed to amend § 214.301 to address a potential safety issue resulting from roadway maintenance machine movements under that section on non-controlled track. Section 214.301 allows train or on-track equipment movements on non-controlled track without authorization from a train dispatcher or control operator.<sup>9</sup> Typically, movements on non-controlled track are governed by railroad operating rules limiting movements to speeds not exceeding restricted speed. Section 214.7 defines restricted speed as a speed that will permit a train or other equipment to stop within one-half the range of vision of the person operating the train or other equipment, but not exceeding 20 miles per hour, unless further restricted by the operating rules of the railroad. The requirement to stop within one-half the range of vision prevents collisions between any equipment operating on the same non-controlled track. As such,

under existing § 214.301(c), operations at restricted speed allow roadway maintenance machines to safely travel over non-controlled track without having to establish working limits. However, some non-controlled track is equipped with automatic block signal (ABS) systems. ABS systems are designed to prevent collisions while allowing trains to operate at speeds greater than restricted speed. As discussed in the NPRM, this scenario is problematic for purposes of the movement of roadway maintenance machines on non-controlled track under existing paragraph (c) because roadway maintenance machines do not all shunt track circuits. Absent the establishment of inaccessible track working limits or other protections, nothing in existing part 214 prevents a train operating on non-controlled ABS-signaled track at greater than restricted speed from colliding with roadway maintenance machines traveling on the same track that do not shunt the signal system (no authority is needed to occupy non-controlled track and trains are not required to stop within one-half their operator's range of vision).

As noted in the NPRM, one Class I railroad had a significant stretch of ABS non-controlled track and a train traveling at greater than restricted speed struck a hi-rail vehicle.<sup>10</sup> To address this safety concern, in the NPRM, FRA proposed allowing roadway maintenance machine movements on signalized non-controlled track under § 214.301(c) (*i.e.*, without establishing working limits) only if train and locomotive speeds on the track are limited to speeds at or below restricted speed.

With the exception of block register territories (addressed in proposed § 214.327(a)(7) below), FRA believes railroad operations over most non-controlled track are already limited to restricted speed. For example, FRA understands yard track is typically non-controlled track with operations limited to restricted speed. Thus, FRA did not believe this proposed requirement would represent a cost burden to the industry. To provide additional flexibility on this point, however, in the NPRM FRA also proposed allowing the movement of roadway maintenance machines over non-controlled track without establishing working limits under operating rules other than restricted speed that are demonstrated

to provide an equivalent level of protection as restricted speed rules. This proposal only referred to train and locomotive speeds on non-controlled track, and not to the speeds at which roadway maintenance machines are authorized to travel over non-controlled track. Existing § 214.341 already requires each railroad's on-track safety program to address the spacing between machines and the maximum working and travel speeds for machines depending on weather, visibility, and stopping capabilities. Roadway maintenance machines typically have stopping capabilities far in excess of that of trains. FRA intended this proposal to address situations where trains and locomotives are not required to stop within one-half the range of vision on non-controlled track, and could collide with roadway maintenance machines in travel mode under railroad operating rules that do not shunt signal systems.

AAR commented on this proposal. AAR's comment suggested altering FRA's proposed language by specifying that "restricted speed" would permit train and equipment movements at up to 25 miles per hour (mph). AAR also suggested specific rule text for alternate procedures if FRA allowed speeds greater than restricted speed (versus the NPRM proposal requiring FRA approve or disapprove of any alternative procedures adopted by railroads). AAR's comment estimated a cost of \$297 million over a 20-year period for one railroad "if no other relief were granted."<sup>11</sup>

In this final rule, FRA is adding new § 214.320 addressing the movement of roadway maintenance machines on non-controlled track without establishing working limits. For purposes of this new section, FRA defines restricted speed as movements prepared to stop within one-half the range of vision but not exceeding 25 mph. The 25-mph maximum speed is consistent with the meaning of restricted speed for purposes of new § 214.317(c) (discussed above) in which FRA adopted an RSAC-consensus provision allowing on-track roadway maintenance machines to conduct snow removal and weed spraying operations while traveling over non-controlled track without establishing working

<sup>11</sup> FRA notes the calculation in AAR's comment incorrectly indicates AAR's \$297 million estimated cost relates to the NPRM's proposed RSAC consensus definition of the term "controlled point" (see the title of Attachment B to AAR's comment). In reviewing AAR's comment, however, it is clear the \$297 million cost estimate actually pertains to FRA's proposal to amend existing § 214.301(c) to address a safety risk that occurs when roadway maintenance machines travel over signalized non-controlled track.

<sup>9</sup> Section 214.7 defines "non-controlled track" as track upon which trains are permitted by railroad rule or special instruction to move without receiving authorization from a train dispatcher or control operator.

<sup>10</sup> Another Class I railroad with non-controlled, signaled track, moves roadway maintenance machines over the track by creating working limits via a dispatcher controlling the signals at either end of the non-controlled limits to make the track inaccessible.

limits. The 25-mph maximum speed is also consistent with AAR's recommended revisions and will minimize the potential costs, if any, of this new paragraph. This new section requires roadway workers moving roadway maintenance machines over non-controlled track equipped with an ABS signal system, and over which trains are permitted to operate at speeds over restricted speed (above 25 mph), to establish working limits under § 214.327. Because no control operator or dispatcher controls movements over non-controlled track, and roadway maintenance machines may not shunt the track while traveling over it, this new section helps prevent roadway maintenance machines from colliding with trains or other on track equipment where movements are made at speeds in excess of restricted speed on non-controlled track.

To address this situation, AAR suggested specific rule text requiring dispatchers or control operators to provide permission for a train to move into or within non-controlled track. By definition, however, FRA believes this would make the track "controlled track." See § 214.7 definition of "controlled track". If track is "controlled track," then this provision as proposed and as adopted in new § 214.320 would not even apply. FRA also notes AAR's recommended procedure is very similar to the procedures in new § 214.327(a)(8) adopted in this final rule for establishing working limits on non-controlled track. Thus, a railroad may choose to comply with new § 214.327(a)(8) if it does not want to comply with the restricted speed provision of new § 214.320 or an FRA-approved alternate procedure under that section.

In this new section, FRA provides flexibility for railroads to adopt alternate procedures to move roadway maintenance machines over non-controlled track and to utilize those procedures instead of establishing working limits or restricting on-track movements to restricted speed. With the new methods of establishing working limits on non-controlled track discussed below in § 214.327, the flexibility provided in this new § 214.320, and the small number of situations when § 214.320 will apply, FRA believes railroads have sufficient flexibility to conduct train movements at track speed over signalized non-controlled track, while at the same time providing for the safe movement of non-shunting roadway maintenance machines traveling over the same non-controlled track.

AAR's comment estimated one railroad would incur costs of \$297 million as a result of this provision. FRA disagrees with AAR's calculation. According to AAR, this one railroad identified 13 locations covered by the NPRM proposal. The railroad then estimated 252 trains operating over those 13 locations daily, with an additional 126 "opposing trains delayed" per day at these locations, for a total of 378 trains affected daily. AAR then estimated delay costs for each of the 378 trains, for every single day of the year, for a 20-year period. AAR stated the delay costs are due to trains being delayed as a result of having to travel at restricted speed.

AAR's calculation is flawed. Nothing in the NPRM or this final rule requires trains to travel at restricted speed at any of the identified 13 locations. This provision merely requires roadway workers, at the periodic times when roadway maintenance machines travel over non-controlled track, to establish working limits under § 214.327. If a railroad does not want to require its roadway workers to establish working limits under these circumstances, new § 214.320 allows railroads to adopt alternative procedures providing an equivalent level of protection to restricted speed protections. These alternative procedures, once demonstrated to provide an equivalent level of safety as restricted speed protections and approved by FRA, would permit roadway maintenance machines to travel over these locations without establishing working limits.

AAR's basis for its train delay estimate is also unfounded because as mentioned above, neither the NPRM nor this final rule require any trains to travel at restricted speed. This provision only requires roadway workers to establish working limits if no alternative procedures are adopted, which would only affect a fraction of train traffic at these 13 locations. If for some reason a railroad chooses not to adopt alternative procedures providing an equivalent level of protection for roadway maintenance machines movements, FRA is unsure any of these trains would be affected, because even under the existing railroad rules, trains permitted to operate at greater than restricted speed on non-controlled track already have to somehow yield to roadway maintenance machine movements travelling over the same track to avoid colliding with the machines. As explained in the accompanying RIA, FRA does not believe new § 214.320 will impose any significant costs. FRA understands the one railroad estimating costs for this NPRM provision revised

its procedures to designate some track in question "controlled track" and is now using new procedures that may already comply with this section. Thus, via existing industry practices, FRA does not believe there are any large costs to implement this provision. FRA believes this final rule will, at most, only impose de minimis costs in light of the additional methods of establishing working limits via § 214.327 proposed in the NPRM that are akin to AAR's proposal in its comment discussed above. Also, as explained above, FRA has specified restricted speed is a maximum of 25 mph (stopping within one-half the range of vision) for purposes of this provision, per the request made in AAR's comment. This further alleviates any stated cost concerns.

#### Section 214.321 Exclusive Track Occupancy

Existing § 214.321 sets forth the requirements for establishing working limits on controlled track through exclusive track occupancy procedures. In the NPRM, FRA proposed several amendments to this section, including both Working Group consensus items and non-consensus items. FRA proposed to replace the words "roadway worker" in existing paragraphs (a) and (b) with "roadway worker in charge." As discussed previously, this change is intended to clarify the existing variety of generic references to roadway workers in charge and, in this section in particular, to clarify that an authority for exclusive track occupancy must be communicated to the "roadway worker in charge," as opposed to the "roadway worker" as currently stated in existing paragraph (b) of this section (per existing § 214.319, only a roadway worker in charge can establish working limits).

Next, existing paragraph (b) of this section states a "data transmission" may be used to transmit an exclusive track occupancy authority to a roadway worker (*i.e.*, a roadway worker in charge). However, existing paragraph (b)(2) states only that the roadway worker in charge must maintain possession of a "written or printed authority" while the authority for working limits is in effect, and does not currently account for authorities conveyed via data transmission displayed on the screen of an electronic device. In the NPRM, FRA proposed to amend paragraph (b)(2) to clarify that an authority displayed on an electronic screen may be used in place of the "written or printed" authority existing § 214.321(b)(2) requires. FRA is adopting this amendment in this final

rule. FRA notes that electronic authorities must also comply with the requirements of new § 214.322, discussed in the Section-by-Section analysis below.

The Working Group recommended consensus language requiring exclusive track occupancy authorities to specify a unique roadway work group number, an employee name, or other unique identifier. In the NPRM, FRA proposed language consistent with this Working Group recommendation as new paragraph (b)(4) to § 214.321.

AAR and NJT submitted comments about this proposal. AAR supported this proposal, but noted an inconsistency between the preamble discussion and proposed rule text. AAR noted the preamble discussion implied using an employee name to identify an exclusive track occupancy authority when conveying working limits would not be permitted, but the proposed rule text allowed using an employee name. FRA agrees and notes that as proposed and as adopted in this final rule, paragraph (b)(4) of this section permits using an employee's name to identify an exclusive track occupancy authority.

NJT requested clarification of the language in paragraph (b)(4) which required railroads to adopt procedures requiring precise communication between trains and other on-track equipment and the RWIC or lone worker controlling the working limits in accordance with § 214.319. Specifically, NJT asked if the language was meant to require a train to communicate with every piece of on-track equipment in a roadway work group, in addition to communicating with the RWIC, when seeking to pass through working limits. NJT indicated that if this proposal required such communication, both locomotive engineers and roadway work groups could become distracted due to excessive sounding of the locomotive horn as the train passed through working limits. FRA clarifies this language, as proposed in the NPRM and adopted in this final rule, is intended to require a train or other on-track equipment to communicate only with the RWIC (or lone worker) of the working limits through which the train or on-track equipment seeks to enter or travel through. FRA addresses NJT's comment on potential excessive sounding of the locomotive horns in these circumstances in the Section-by-Section analysis for § 214.339 below.

Next, as proposed, FRA is amending existing paragraph (d) to refer to the "roadway worker in charge" rather than to the "roadway worker" having control over the working limits. As discussed elsewhere in this preamble, FRA is

making similar changes in multiple locations in this final rule to replace the varying existing language generically referring to the "roadway worker in charge" throughout subpart C. Existing paragraph (d) of this section requires the movement of trains and other on-track equipment within exclusive track occupancy working limits be made only under the direction of the RWIC. As discussed in the preamble to the NPRM, in 2005 FRA issued Technical Bulletin G-05-22 addressing paragraph (d) and recognizing there may be times, such as during an emergency, when a RWIC cannot be contacted by a train or other on-track equipment seeking to move into or through the RWIC's working limits. In this final rule, FRA intends new paragraph (b)(4) to work in conjunction with the requirements of existing paragraph (d). New paragraph (b)(4) requires railroads to adopt procedures governing communications between trains and RWICs. FRA expects railroads to adopt procedures addressing what actions employees must take if there is an emergency and a RWIC cannot be contacted by a train crew or the operator of other on-track equipment. Upon the effective date of this final rule, Technical Bulletin G-05-22 is supplanted.

In addition, as explained in the NPRM, the existing text of the beginning of the second sentence of paragraph (d) currently reads that "[s]uch movements shall be restricted speed." FRA proposed to amend that text to instead state "[s]uch movements shall be made *at* restricted speed." (Emphasis added.) For clarity and readability, FRA is adopting this proposed revision.

Finally, in the NPRM, FRA proposed adding new paragraph (e) to this section. This paragraph proposed minimum safety requirements when an exclusive track occupancy authority is given to a RWIC (or lone worker) before the roadway work group (or lone worker) is to occupy the limits, or when train(s) may be occupying the same limits. As explained in the NPRM, these authorities are referred to as "occupancy behind," "conditional," or "do not foul the limits ahead of" authorities<sup>12</sup> and enable a train dispatcher or control operator to issue an authority allowing a roadway work group (or lone worker) to occupy a track, if such occupancy

only occurs after certain trains or other on-track equipment pass. At the time occupancy behind authorities are issued to roadway work groups (or lone workers), trains may still be ahead of the point the roadway worker(s) will be occupying, or in some cases may be past the point to be occupied but still within the working limits. Railroads have a history of using "occupancy behind" authorities and expressed to FRA using such authorities is crucial for efficient railroad operations. The Working Group discussed potential problems with miscommunications involving "occupancy behind" authorities, but did not reach consensus on recommended regulatory text addressing the issue. However, FRA believes it is necessary to adopt minimum safety requirements for using such authorities when RWICs (or lone workers) are establishing exclusive track occupancy working limits.

As proposed, paragraph (e)(1) requires the RWIC or lone worker to confirm affected train(s) are past the point the roadway worker(s) intend to occupy or foul before working limits may be established under paragraph (e). Paragraph (e)(2), as proposed, requires a railroad's operating rules to include procedures prohibiting affected train(s) from making reverse moves into the limits roadway worker(s) are authorized to foul or occupy when a RWIC or lone worker confirms the passage of affected train(s) by visually identifying the train(s). Paragraph (e)(3), as proposed, requires the RWIC or lone worker, after confirming the affected train(s) had passed the point the roadway worker(s) intended to occupy or foul, to record "on the authority" the time the train(s) passed and locomotive number(s) of the affected train(s). As proposed, paragraph (e)(4) prohibits roadway workers located between the rear end of the last affected train and the RWIC, or who are still located ahead of any affected train, from fouling or occupying the track until the RWIC confirms and records affected train(s) passed under paragraphs (e)(1) and (3) and provides the roadway worker(s) permission to occupy or foul the track.

NTSB, SEPTA, BMWED/BRS, and AAR commented on this proposal. After careful consideration of each of these comments, in this final rule, FRA is adopting paragraphs (e)(1) through (3) as proposed and paragraph (e)(4) with slight modifications from that proposed. FRA believes adoption of this paragraph's minimum standards for establishing "occupancy behind" working limit authorities codifies best practices and will help ensure safety. A detailed discussion of FRA's responses

<sup>12</sup> FRA notes 49 CFR 220.61 requires issuing "mandatory directives" via radio transmission for both trains and on-track equipment. Exclusive track occupancy authority to establish working limits granted by a train dispatcher or control operator to a RWIC are sometimes also considered "mandatory directives" under that section. The existing requirements in § 214.321 are in addition to the requirements of existing § 220.61.

to comments received on to new paragraph (e) is below.

NTSB indicated its awareness of the perceived benefits of “occupancy behind” track authorities, but cited four train accidents occurring between 1996 and 2004 involving the use of these types of authorities. NTSB urged FRA not to adopt the proposed changes in a final rule, indicating such changes would diminish safety. FRA appreciates and understands NTSB’s point of view on this issue, but FRA believes adopting minimum safety standards for “occupancy behind” authorities will improve safety. The use of conditional authorities, such as those contemplated by paragraph (e), currently occurs in the railroad industry. The existing on-track safety regulations of subpart C do not address this practice. By adopting paragraph (e) in this final rule, FRA is establishing minimum Federal safety requirements for this practice and believes these standards will further improve track-related safety issues, as roadway workers and dispatchers will continue to be able to maximize the time available for roadway workers to perform quality track inspections as required by 49 CFR part 213. If FRA prohibited using occupancy behind authorities, the time available for roadway workers to conduct track inspections in busy rail corridors would likely decrease as authorities for roadway workers to occupy or foul track could not be issued until after all trains passed the point the roadway worker(s) need to occupy or foul track. FRA believes more frequent and quality track inspections will improve railroad safety, as track-caused derailments are one of the leading causes of railroad accidents.

SEPTA requested clarification of the requirements in proposed paragraphs (e)(3) and (4). SEPTA asked how, under proposed paragraph (e)(3), a RWIC could confirm in writing the train passed if the roadway worker received the authority through a data transmission. SEPTA also asked if under proposed paragraph (e)(4) every roadway worker between the RWIC and the affected train(s) would have to be qualified to the level of a RWIC, or whether each additional work group would be required to have an employee qualified as a RWIC.

In response, FRA clarifies that if an authority is conveyed electronically, a RWIC or lone worker may, under paragraph (e)(3), record the time of passage and engine numbers of trains passing the point to be occupied or fouled in one of two ways. First, a railroad could program its system to issue electronic authorities so roadway workers can enter the required

information electronically onto the authority and maintain access to that information while the authority is in effect. Second, as discussed in the NPRM, an RWIC could write the time of passage and engine numbers on a paper and maintain that paper while the authority is in effect. This written information is considered part of the authority, and must be kept by the RWIC while the authority is in effect.

In response to SEPTA’s request for clarification of paragraph (e)(4), in this final rule, FRA is amending the text to clarify the paragraph refers to separate roadway work groups. FRA intended this provision to allow separate roadway work groups (or lone workers) located between the rear end of affected trains and the RWIC to have a roadway worker qualified under § 214.353 communicate with the RWIC holding the authority.

BMWED/BRS opposed amending the regulations to accommodate issuing “conditional authorities” to establish working limits. Noting the Working Group did not reach consensus on this point, the labor organizations stated working limits should only be in effect after all trains and on-track equipment have reported clear of the working limits. BMWED/BRS indicated that if conditional authorities such as those proposed are permitted, all trains and on-track equipment traveling within working limits must be required to operate at restricted speed.

In response, FRA notes that in many instances, particularly in high-volume corridors, the potential economic costs of requiring all trains to travel at restricted speed within authority limits in occupancy behind situations would likely outweigh the economic benefits of such a requirement. FRA also reiterates that in the absence of FRA action in this final rule, occupancy behind authorities would continue to be used regularly by the railroad industry without this final rule’s minimum safety requirements addressing such use. Thus, FRA believes this provision improves safety.

AAR’s comment stated paragraph (e)(3)’s requirement that the RWIC record the time of passage and engine numbers of a train after the train has passed is problematic and unnecessary. AAR asked where a RWIC should record such information if an electronic authority is used. AAR also stated it is unaware of an instance where the information regarding time of passage and train engine numbers would have been useful.

AAR’s comment also stated that paragraph (e)(4)’s requirement regarding additional RWICs could be costly, as a RWIC might have roadway workers acting under his or her working limits

authority located miles apart. AAR asserted this requirement could necessitate additional communication within a roadway group, and could lead to confusion in large work gangs accustomed to a single source for confirmation regarding whether it is safe to foul a track. Finally, AAR’s comment questioned what constitutes a separate roadway work group under paragraph (e)(4), stating the reasonable approach is that when all the workers are engaged in a common task only one employee qualified as a RWIC should be required.

In response to AAR’s first question regarding where a roadway worker who is utilizing an electronic authority should copy the time of passage and engine numbers of a passing train, FRA refers to the response to SEPTA’s similar inquiry above, and to the NPRM’s discussion regarding a separate written document. 77 FR 50344. The RWIC can copy that information in writing so it can be compared to the information in the electronic authority. The written information must be kept by the RWIC while the authority is in effect under § 214.321(b). 77 FR 50344. FRA believes roadway workers must copy this information, because if a dispatcher gives a roadway worker authority behind or after the passage of a train(s), the engine numbers are a simple check to ensure the train that has passed the RWIC’s location is indeed the train the dispatcher had intended would pass before roadway workers fouled track. FRA staff is aware of situations when there was confusion over whether the roadway workers could occupy a track after a particular train passed. This provision helps eliminate any confusion, and, in some instances, will save time by alleviating the need for additional dispatcher communication to verify the appropriate trains have passed the point to be occupied.

Regarding paragraph (e)(4)’s requirement addressing an additional RWIC for roadway work groups that might piggyback within the working limits of the RWIC named on the authority, FRA also refers to the response to SEPTA’s comment above. Consistent with FRA’s intent in the NPRM, FRA is clarifying in this final rule that this requirement only applies to separate roadway work groups at a location away from the RWIC listed on the authority. Regarding AAR’s inquiry about what constitutes a separate roadway work group, FRA agrees a roadway work group is composed of roadway workers “. . . organized to work together on a common task” as stated in the definition of the term “roadway work group” at existing § 214.7. In this regard, roadway workers

who are part of the same group will continue to follow the instructions of the RWIC when fouling track, as is required in all instances under the existing regulation. So, a large roadway work group that might be spread out over some distance will not be permitted to foul the track in question until the RWIC indicates the members of the roadway work group may do so (and after the passage of the trains listed on the authority).

In this final rule, FRA retains the NPRM's text addressing a RWIC of a roadway work group away from the location of the initial group. If a second roadway work group wishes to "piggyback" on an occupancy behind authority, the RWIC of the second group must also have a copy of the authority and confirm the affected trains have passed the group's location before the group occupies the track. As an example, if the RWIC of a tie gang establishes working limits authority under paragraph (e), and a bridge gang two miles away wishes to piggyback on that authority, the bridge gang must have its own RWIC communicate with the tie gang's RWIC before permitting the bridge gang to foul the track. In many regards, this is the same way roadway work groups are used under another RWIC's authority under existing part 214. FRA notes this procedure is not limited to two roadway work groups, but multiple groups may be involved.

FRA believes that from a safety perspective these requirements are necessary. Where an additional roadway work group is located a distance from the RWIC listed on the authority, the only safe way for that additional roadway work group to ensure affected trains have passed their location is to make the required confirmation of train engine numbers. This is necessary because a second roadway work group may have arrived at location either before or after an affected train listed on the authority has already passed that location. Meaning, unless confirmation is made by each roadway work group, the group may not know how many affected trains have already passed (or if a train exited the track to be occupied, or stopped, before reaching a roadway work group's location). If the RWIC listed on an authority is not physically present at a separate roadway work group's location, which may be some distance away, he or she cannot know whether a train has actually passed that other location to be able to tell an additional roadway work group it is safe to foul the track yet. The RWIC at the particular location where the piggybacking group wishes to foul track

must make that determination. This procedure is necessary to avoid miscommunications between separate roadway work groups on an occupancy behind authority, and addresses safety concerns regarding occupancy behind authorities discussed by the Working Group. Such qualification is necessary to ensure the RWIC of a separate work group utilizing another group's authority has been trained on, and can apply, the rules regarding occupancy behind procedures. It also ensures a RWIC is present to recognize whether appropriate on-track safety measures are in place and to address any potential good faith challenges.

As mentioned above, FRA is slightly amending the rule text of (e)(4) based on further evaluation of this issue, to more clearly account for situations where additional roadway work groups are located at the same place as the RWIC listed on the authority. In that instance, the RWIC who obtained authority may confirm the passage of affected train(s), and may communicate to an additional roadway work group it is safe to foul the track (without need for an additional RWIC to have a copy of the authority). If the RWIC can see the affected trains are past a separate roadway work group's location, the RWIC of the authority can verbally inform the other roadway work group it is permissible to foul the track without need for that second group to have a copy of the authority per paragraphs (e)(4)(i) and (ii).

With regard to the requirements and application of new paragraph (e) as a whole, paragraph (e)(1) states an authority is only in effect after the RWIC or lone worker confirms affected train(s) have passed the point to be occupied or fouled by the roadway work group or lone worker. This is necessary because in many instances the train(s) listed in the roadway worker in charge's authority may still be ahead of (*i.e.*, may have not yet reached and traveled past) the point to be occupied or fouled. The text permits such confirmation to be made in three ways: (1) By visually identifying the affected train(s); (2) by direct radio contact with a crew member of the affected train(s); or (3) by receiving information about the affected train(s) from the dispatcher or control operator.

Paragraph (e)(2) states that when such confirmation is made by the RWIC visually identifying the affected train(s), the railroad's operating rules must include procedures to prohibit such trains from making a reverse movement into the limits being fouled or occupied (this provision, in addition to the requirements of proposed

§ 214.321(e)(4) below, protects roadway worker(s) located ahead of the point to be occupied who intend to "piggyback" on a RWIC's exclusive track occupancy authority). FRA believes this is necessary, as this confirmation method does not require the RWIC to actually talk to the crew of the affected train(s) (or for the train dispatcher to talk with the crew or verify that that train is beyond the point to be occupied), such that the crew may not be cognizant of the working limits or point to be occupied. In this final rule, FRA has also added the word "within" to this provision, as whether a reverse movement is made into, or within the working limits, by a train after having passed the point to be occupied presents the same risk to a roadway work group that will be fouling the track.

Paragraph (e)(3) requires that after confirmation of the passage of affected train(s) is made, the RWIC must record on the authority document (or display) both the time of passage and the engine (locomotive) numbers of the affected train(s). If passage confirmation is made via radio communication with the train crew, the time of that communication along with the engine numbers must be recorded on the authority. When confirmation of the passage of the affected train(s) is made via the train dispatcher or control operator, the time of such confirmation and the engine numbers must be recorded on the authority. If the time and engine numbers are not recorded on the authority itself, as explained above (and in the NPRM), FRA considers a separate written document used to record information regarding passing trains to be a component of the authority. That separate document must be maintained with the authority while it is in effect.

Paragraph (e)(4) states separate roadway work groups who are located away from the RWIC listed on the authority may only foul track under an occupancy behind authority after receiving permission to do so from the RWIC who received the authority and after the RWIC fulfilled the provisions of proposed § 214.321(e)(1) and (3). As explained above in response to the AAR and SEPTA comments, FRA has amended the NPRM's reference to "roadway workers" in paragraph (e)(4) to instead refer to a "separate roadway work group." FRA's intent was that each additional roadway work group piggybacking on the initial roadway work group's authority would also have its own roadway worker qualified under § 214.353. For the reasons explained above, the RWIC of another roadway work group piggybacking on an occupancy behind authority is also

required to have a copy of such authority and fulfill the requirements of § 214.321(e)(1) and (3) before working limits may be occupied or fouled at a particular location. The authority information may be verbally transmitted by the RWIC to the additional roadway work group utilizing the working limits.

FRA removed what was proposed paragraph (e)(5) in the NPRM from this final rule. Proposed (e)(5) would have reiterated that lone workers who wished to utilize this occupancy behind procedure must comply with the same procedures a RWIC of a roadway work group is required to adhere to under paragraph (e). This paragraph was unnecessary, however, as paragraph (e)(1) and the amended definition of “roadway worker in charge” already account for lone workers utilizing the procedures under this paragraph.

New paragraph (e)(5) (formerly proposed paragraph (e)(6)) establishes any train movements within working limits after passage of the affected trains listed on the authority will continue to be governed by existing § 214.321(d), or under the direction of the RWIC.

#### Section 214.322 Exclusive Track Occupancy, Electronic Display

Existing § 214.321(b) permits an exclusive track occupancy authority to be issued via data transmission from the train dispatcher or control operator to the RWIC. Certain railroads utilize electronic devices to display such authorities received via data transmission. FRA anticipates that using such electronic devices to display working limits authorities will continue to grow, especially with the implementation of PTC systems. As such, the Working Group considered this topic, and contemplated minimum requirements for using such electronic displays. The Working Group agreed in principle to basic concepts for using electronic display for working limits. However, the Working Group did not agree to consensus language.

Paragraph (a), as proposed in the NPRM, contained the items agreed to in principle by the Working Group, and established that an electronically displayed authority must be readily viewable by the RWIC while such authority is in effect. Proposed paragraph (a)(1) stated that when a device malfunctions or fails, or cannot otherwise display an authority in effect (e.g., batteries powering the electronic device displaying the authority lose charge), the RWIC must instruct all roadway workers to stop and occupy a place of safety until a written or printed copy of the authority can be obtained, or another form of on-track safety can be

established. FRA requested comment regarding whether to first allow the RWIC the opportunity to obtain a written copy of an authority before requiring the members of the roadway work group to stop work and occupy a place of safety (and if a written authority could not immediately be obtained, *then* requiring the work group to occupy a place of safety).

Paragraph (a)(2), as proposed in the NPRM, stated the RWIC must conduct an on-track job safety briefing to determine the safe course of action with the roadway work group. Proposed paragraph (a)(2) attempted to provide flexibility in situations where an electronic display fails and the RWIC cannot communicate with the train dispatcher via radio, which might occur in a deep rock cut or a tunnel, and a roadway work group may have to move within established working limits to a location where they can occupy a place of safety and/or re-establish communication with the dispatcher.

FRA received comments from BMWED/BRS, AAR, and SEPTA about proposed paragraph (a). The BMWED/BRS comment supported proposed paragraph (a)'s requirement that, in the event of an electronic display failure, roadway workers must stop and occupy a place of safety until a copy of the authority could be obtained or another form of on-track safety could be established. The comment indicated there is no reason to delay the order to occupy a place of safety while the RWIC tries to get access to the authority or establish another form of on-track safety.

AAR's comment stated a RWIC should have an opportunity to obtain a written copy of the authority expeditiously before work is required to stop, indicating there is no reason to stop work immediately when a momentary lapse in the visibility of the authority occurs. AAR stated the display failure will have no effect if a written copy of the authority is obtained without delay. AAR also stated that a roadway worker having a written copy of the authority at all times (either paper or on an electronic display) is inconsistent with authorization of verbal protection (as was proposed in the NPRM but not adopted in this final rule). AAR also questioned what would constitute a place of safety for a worker on a bridge or in a tunnel if the electronic display failed.

The SEPTA comment disagreed with the proposed requirement that roadway workers stop work and occupy a place of safety until a written copy of the authority is obtained or another form of on-track safety is obtained. SEPTA

stated that as long as the working limits are not released, the roadway workers would be no less safe than they were before the display failure. Rather than require a work stoppage, SEPTA suggested the RWIC should have an opportunity to obtain an alternate copy of the authority, stating that there is no logical reason to stop work unless the actual work conditions change.

After evaluating this issue and the comments received, FRA decided to consolidate proposed (a)(1) and (2) into a single paragraph (b). FRA decided to allow the RWIC an opportunity to obtain a written or printed copy of an authority without delay before requiring roadway workers to occupy a place of safety. FRA believes that as long as an authority is still in effect, and the only issue is the display failure, in many instances the track on which working limits have been established is the safest place for a roadway worker to occupy. However, FRA is specifying that any moving roadway maintenance machines must stop if an electronic display fails, so if there is a question about the limits of an authority, there is no risk of roadway workers traveling outside of protected working limits on a moving machine. If a new authority cannot be obtained or another form of on-track safety cannot be established, work must stop and roadway workers are required to occupy a place of safety. A job safety briefing must then be conducted with the roadway work group to determine the safe course of action. FRA believes this is the appropriate course from a safety perspective when a new authority cannot be obtained, because if questions arise regarding the on-track safety being provided, the working limits authority cannot be referenced or amended if necessary. Of course, a method to prevent this situation from even occurring is for a RWIC to also print a copy of the authority after it is issued via data transmission. If a display fails, a copy of the authority is then already available for reference.

FRA added the words “without delay” to describe how the RWIC must obtain another version of the authority if an electronic display fails. This means the RWIC must contact the dispatcher or obtain new authority directly upon noticing a display failure. If, for example, the dispatcher responds by instructing the RWIC to call back at a later time to obtain a new authority, then the roadway work group would have to stop work and occupy a place of safety until an authority can be obtained. If a dispatcher or control operator does not respond to contact attempts by the RWIC, the work group must stop work and occupy a place of

safety. In response to AAR's comment about a tunnel or bridge and what constitutes a place of safety, FRA understands the track on which working limits have been established may be the best, or only, place of safety in such instances. As such, FRA would not take exception to such situations, and expects the on-track job safety briefing following a display failure to be used to determine the safest course of action for the group, even if the safest course of action is to continue to occupy the track on which working limits had been established. In this final rule, FRA also added reference to hi-rail vehicles in paragraph (b), as FRA recognizes a hi-rail vehicle on track is not always considered an "on-track roadway maintenance machine" as defined by § 214.7 if used to inspect track. Thus, this provision also applies to an electronic authority being used by a roadway worker(s) occupying track in a hi-rail vehicle.

Paragraphs (c)–(h) (proposed as paragraphs (b)–(g)) address technical attributes of the electronic display of exclusive track occupancy authorities, and are safety and security-related. FRA is largely adopting the rule text proposed as discussed below. FRA received comment on these proposals from the BMWED/BRS. Their comments supported these security provisions, but suggested four changes. The comment stated FRA should add a provision on display survivability, addressing the ability of an electronic device to stand up to environmental conditions such as heat and cold. The comment also suggested a provision regarding readability by a roadway worker, indicating the display must be legible in all environmental conditions and appearing in text, with supplemental graphic displays allowed. The comment next suggested that authorities transmitted electronically must be retained for one year (versus the proposed 72 hours) and the authority must be available for review, recall, and printing by the requesting employee during that time. Last, the comment suggested roadway workers should have the absolute right to speak to the dispatcher via voice communications rather than via data transmission to ensure proper on-track safety is in place.

FRA is declining to adopt these suggested revisions. First, FRA believes the environmental requirements are unnecessary, as FRA has established requirements to provide for roadway worker safety if a display fails. Also, because of continuous improvement in technology, such technical standards for a display device would quickly become outdated, and also might be so costly

they could not be justified economically. Nevertheless, FRA expects railroads to take into account the environment such devices will be subject to during use. As noted in the NPRM, railroads are always allowed to implement more restrictive security requirements provided the requirements do not conflict with Federal regulation.

FRA also believes that regulation text requiring electronic authorities to be in text and the RWIC to have an absolute right to talk to a dispatcher via voice communication instead of via data transmission are unnecessary. Under existing § 214.313(c), roadway workers are already required to ascertain that on-track safety is being provided before fouling a track. If there is any question regarding on-track safety, FRA urges roadway workers to clarify the extent of the working limits (or any other questions that may arise), and notes § 214.313(d) already provides for a good faith challenge procedure. If roadway workers are required to foul track while uncertain of the extent of the on-track safety being provided, FRA urges roadway workers to raise a good faith challenge and to not foul track until those questions have been resolved. Further, the required on-track job safety briefing required to take place before track is fouled is also a tool to resolve any potential questions regarding the on-track safety being provided.

With regard to the BMWED/BRS suggestion that all authorities be retained for one-year, FRA believes such a requirement is unnecessary. First, FRA is already specifying that for electronic devices used to obtain an authority where an accident is then involved, such authority data must be kept for one year, and for 72 hours in the absence of an accident. FRA notes there are no similar requirements for written authorities under the sections in part 214 addressing working limits. For cost reasons, FRA chose not to adopt any similar requirements for written authorities (though 49 CFR part 228's requirements apply to certain dispatcher-created records), and also because traditionally FRA has not had issue obtaining copies of written authorities after an accident, and can review dispatcher records and radio recordings. As such, FRA is not certain what utility a one-year electronic retention requirement in the absence of an accident would provide, and is not reasonably certain any utility would outweigh potential costs.

With regard to application of new § 214.322, paragraphs (c) and (d) require identification and authentication of users. A user is the RWIC and train dispatcher or control operator, as they

are most often involved in an exclusive track occupancy authority transaction. A user could also be a process or a system that accesses or attempts to access an electronic display system to perform tasks or process an authority. Identification is the process through which a user presents an identifier uniquely associated with that user to gain access to an electronic authority display system.

Authentication is the process through which an individual user's identity is validated. Most authentication techniques follow the "challenge-response" model by prompting the user (the challenge) to provide some private information (the response). Basic authentication factors for individual users could involve information an individual knows, something an individual possesses, or something an individual is (e.g., personal characteristics or "biometrics" such as a fingerprint or voice pattern).

Paragraph (d) requires any authentication scheme utilized to ensure the confidentiality of authentication data and protect that data from unauthorized access. Such schemes must utilize algorithms approved by the Federal government's National Institute of Standards and Technology (NIST), or any similarly recognized standards body.<sup>13</sup> This requirement parallels a similar requirement for PTC systems at 49 CFR 236.1033(b),<sup>14</sup> and is intended to help prevent deliberate "spoofing" or "man in the middle" attacks on exclusive track occupancy authority information communicated and displayed via electronic device.

Paragraph (e) addresses transmission, reception, processing, and storing exclusive track occupancy authority data, and is proposed to help ensure the integrity of such data. Data integrity is the property of data not being altered since the time data was created, transmitted, or stored, and generally refers to the validity of the data. This paragraph establishes that new electronic authority display systems placed into service on or after July 1, 2017 are required to utilize message authentication codes (MACs) to ensure data integrity. Similar to the requirements of paragraph (d), MACs would have to utilize algorithms approved by NIST or a similarly recognized standards body. Unlike Cyclical Redundancy Codes (CRCs), MACs protect against malicious interference. Paragraph (e) permits the

<sup>13</sup> NIST is responsible for defining cryptographic algorithms for non-Department of Defense entities.

<sup>14</sup> 75 FR 2598, 2676, Jan. 15, 2010.

use of systems implemented prior to July 1, 2017 to utilize CRCs, but requires that the collision rate for the CRCs' checks utilized be less than or equal to 1 in  $2^{32}$  (*i.e.* two to the 32nd power). This collision rate helps provide reasonable protection against accidental or non-malicious errors on channels subject to transmission errors, and is based on a Department of Defense standard. Existing systems using CRCs that do not meet this minimum standard must be retired and replaced with systems that utilize MACs not later than July 1, 2018. Paragraph (e)(2) requires that MACs' or CRCs' checks only be used to verify the accuracy of a message, and that an authority must fail if the checks do not match.

Paragraph (f) requires the actual electronic device used to display an authority issued via data transmission to retain any authorities issued for a minimum of 72-hours after expiration of such authority. This minimum requirement is primarily for investigation purposes, as it gives railroad safety investigating bodies such as FRA or the NTSB an opportunity to study authority data in non-reportable accident/incident situations, and to compare it to a dispatcher or control operator's corresponding electronic authority transmission records. This requirement will also be helpful for compliance audits.

Paragraph (g) is the same as 49 CFR 229.135(e) of FRA's Railroad Locomotive Safety Standards. Section 229.135(e) governs preserving data from locomotive event recorders or other locomotive mounted recorders if there is an accident. Paragraph (g) requires railroads to preserve data from any electronic device used to display an authority for one year from the date of a reportable accident/incident under 49 CFR part 225, unless FRA or the NTSB notifies the railroad in writing the data is desired for analysis.

Paragraph (h) requires new electronic display systems implemented on or after July 1, 2017 to provide Level 3 assurance as defined by the August 2013, version of NIST Special Publication 800-63-2, "Electronic Authentication Guideline." NIST is the Federal agency that works with industry to develop and apply technology, measurements, and standards. FRA is incorporating by reference this NIST Special Publication into this paragraph. NIST Special Publication 800-63-2 provides technical guidelines for widely used methods of electronic authentication, and is reasonably available to all interested parties online at <http://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-63-2.pdf>, or by contacting NIST via the contact information in new § 214.322(h). Additionally, FRA will maintain a copy available for review.

The incorporation of NIST Special Publication 800-63-2 is a change from the NPRM proposal that referenced the earlier version of the same standard, which was issued in December 2011 (NIST Special Publication 800-63-1). The updated standard incorporated by reference in this paragraph is a limited update, and substantive changes are made only in section 5 of the document. FRA understands the changes in the more updated version are related to improvement in issuing credentials.<sup>15</sup>

Systems implemented prior to July 1, 2017 must provide at least Level 2 assurance as described in NIST Special Publication 800-63-2, and systems that do not provide Level 2 assurance or higher must be retired or updated to provide such assurance no later than July 1, 2018. These assurance levels govern the elements of the authentication process. Level 2 assurance requires some identity proofing and passwords are accepted (but not PINS). Level 3 assurance requires more stringent identity proofing and multi-factor authentication, typically a password or a biometric factor used in combination with a software or hardware token.

In the NPRM, FRA requested comment on whether existing electronic display systems in use already comply with the above requirements, to include potential cost on information. FRA received no comments in response to that request.

#### Section 214.323 Foul Time

Existing § 214.323 sets forth the requirements for establishing working limits on controlled track using foul time. In the NPRM, FRA proposed several amendments to this section. First, FRA proposed to add the words "or other on track equipment" to existing paragraph (a), which currently provides that foul time may be provided only after the relevant train dispatcher or control operator has withheld authority "of all trains" to move into or within the working limits. This change is only for consistency within this existing section, as existing paragraph (c) prohibits the movement of both trains and on-track equipment from moving into working limits while foul time is in effect. This revision also acknowledges that the incursion of on-track equipment into or within working limits while foul time is in effect

presents the same safety risk to roadway workers as train movements into or within working limits.

Consistent with the revisions made throughout this final rule, FRA also proposed to amend the reference to "roadway worker" in existing paragraph (b) to "roadway worker in charge."

In the NPRM, FRA also proposed to add a new paragraph (d) to this section. As proposed, paragraph (d) would prohibit the RWIC from permitting the movement of trains or other on-track equipment into or within working limits protected by foul time.

BMWED/BRS recommended paragraph (d) include lone workers in addition to RWICs, as lone workers are also permitted to establish foul time working limits. FRA concurs, and, as discussed above, the definition of "roadway worker in charge" in this final rule includes lone workers who establish working limits to provide on-track safety for themselves.

Although not proposed in the NPRM, in this final rule FRA is also adding "or track identifier" to paragraph (b) of this section. Existing paragraph (b) requires an RWIC receiving foul time verbally to "repeat the track number, track limits and time limits" of the foul time to the issuing employee for confirmation before the foul time is effective. FRA believes railroads and roadway workers understand existing subpart C allows them to use "a track identifier" (in addition to the track number and track limits) to positively identify the track(s) where working limits are being established. As discussed in the NPRM, AAR's post-RSAC comments to proposed § 214.324 addressing "verbal protection" also suggested adding "track identifier," and proposed § 214.324 shared much of the same language as existing § 214.323. FRA is adding "track identifier" in this section. Other than BMWED/BRS's comment, FRA received no other comments on its proposed revisions to § 214.343, so this final rule adopts the revisions to this section.

#### Section 214.325 Train Coordination

In the NPRM, FRA proposed a minor amendment to existing § 214.325. Section 214.325 governs the establishment of working limits on controlled track by train coordination (direct coordination between the RWIC or lone worker and a train crew). Unlike the other controlled track working limits provisions (§§ 214.321 and 214.323), the existing text of § 214.325 does not state it applies to working limits established on controlled track. Therefore, FRA proposed to add "on controlled tracks" to the first sentence of the introductory paragraph in § 214.325. Consistent with

<sup>15</sup> <http://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-63-2.pdf>.

revisions made elsewhere in this final rule, FRA also proposed to add the words “in charge” after “roadway worker” in the first sentence of the introductory paragraph. FRA received no comments on this NPRM proposal, other than the BMWED/BRS comment recommending the definition of “roadway worker in charge” include “lone workers.” For the reasons explained above and in the NPRM, in this final rule, FRA is adopting the proposed amendments to § 214.325.

#### Section 214.327 Inaccessible Track

Section 214.327 governs the establishment of working limits on non-controlled track.<sup>16</sup> To establish working limits on non-controlled track, § 214.327 requires the track to be made physically inaccessible and provides five methods to do so. In the NPRM, consistent with the recommendations of the Working Group, FRA proposed to add three new methods for making non-controlled track physically inaccessible.

First, proposed new paragraph (a)(6) would allow using a manned locomotive (with or without cars coupled to it) to establish a point of inaccessibility into working limits. In this final rule, FRA is adopting paragraph (a)(6) as proposed. To establish a locomotive as a point of inaccessibility under proposed § 214.327(a)(6)(i), a RWIC must communicate with the train crew in control of the locomotive and determine that: (1) He or she can see the locomotive; and (2) the locomotive is stopped. Once this initial communication and determination is made, proposed paragraph (a)(6)(ii) prohibits further movement of the locomotive except as permitted by the RWIC.<sup>17</sup> Paragraph (a)(6)(iii) prohibits the crew of the locomotive from leaving the locomotive unattended or going off duty unless the crew communicates with the RWIC and the RWIC establishes an alternate means of on track-track safety. As noted in the NPRM, “attended” means the crew is in a position to readily control the locomotive (the locomotive engineer does not need to remain at the control position for the entire time working

limits are in effect). See 49 CFR 232.103(n).<sup>18</sup> Finally, paragraph (a)(6)(iv) applies if cars are coupled to a locomotive being used to make a track inaccessible under this section. As proposed, this paragraph requires cars coupled to the end of the locomotive nearest the roadway workers to be connected to the train’s air brake system, and the air brake system must be charged with air to initiate an emergency brake application in case of unintended uncoupling. Cars coupled to the locomotive on the opposite end of the roadway workers must have sufficient braking capability to control movement.

In response to proposed paragraph (a)(6), MTA suggested that FRA not limit this proposed provision to use of locomotives only and instead allow the use of other types of on-track equipment to render track inaccessible. After considering this request, for several reasons, FRA declines to adopt MTA’s suggestion. First, the Working Group did not recommend it. Second, using other on-track equipment that may weigh substantially less than a locomotive, and might not have a similar level of positive air brake protection as provided by a locomotive, will not provide as much resistance to rolling equipment as a locomotive would. Third, another piece of on-track equipment adjacent to a roadway work group is likely part of the roadway work group and likely being used to perform roadway maintenance duties. FRA does not want to require an equipment operator engaged in the performance of substantive work to also be required to provide for the on-track safety of a roadway work group by serving as a physical block. FRA believes this could diminish the safety of the roadway workers being protected by the physical block and lead to confusion.

Consistent with the Working Group’s consensus recommendation, paragraph (a)(7) proposed to allow using a railroad’s block register territory rules as a method to render track inaccessible and establish working limits on non-controlled track.<sup>19</sup> In this final rule, FRA is adopting paragraph (a)(7)

substantially as proposed, but is specifying a RWIC or lone worker maintains the absolute right to render track physically inaccessible by an alternative method authorized by this section.

Generally, in block register territory a train can occupy a block of track only after its crew reviews a log book or register to ensure no other trains or equipment are occupying that block. After verifying that no other trains are occupying a block, a train crew wishing to occupy a particular block would then indicate in the log book their train is occupying the block. Upon exiting the block, the crew would indicate in the log book, that their train cleared the block. The Working Group recommended a RWIC or lone worker be allowed to utilize a railroad’s procedures governing block register territory to establish working limits on non-controlled track. Existing § 214.313(a) requires roadway workers to follow a railroad’s on-track safety rules and procedures.

Under this new paragraph (a)(7), working limits are established when a RWIC or lone worker complies with all applicable railroad procedures for occupying a block register territory (including making the required log entries to indicate the block is occupied). When the log indicates a roadway worker or work group is occupying a track, the railroad’s operating rules must prohibit the entry of any other trains or other on-track equipment into the block. Proposed paragraph (a)(7) provided the RWIC or lone worker with the absolute right to choose to use the procedures in paragraphs (a)(1) through (6) of this section (any of the five existing methods of establishing working limits on non-controlled track or the proposed method allowing for the use of a locomotive to make a track inaccessible) as opposed to a railroad’s block register procedures. FRA requested comment on if newly proposed paragraph (a)(8) (providing for the establishment of working limits by bulletin on non-controlled main track within yard limits or restricted limits) should be included in that list, as proposed paragraph (a)(8) would be another method to establish inaccessible track working limits authorized by § 214.327. In response, BMWED/BRS’s comment stated the regulation must allow RWICs to render non-controlled block register territory and main tracks within yard limits or restricted limits (the tracks affected by proposed paragraph (a)(8)) physically inaccessible. FRA agrees, and has adopted in this final rule a provision providing a RWIC or lone worker with

<sup>16</sup> “Non-controlled track” means “track upon which railroads are permitted by railroad rule or special instruction to move without receiving authorization from a train dispatcher or control operator.” 49 CFR 214.7.

<sup>17</sup> As FRA noted in the NPRM, these proposed requirements parallel the existing requirements of § 214.325’s train coordination provision, but this proposed procedure differs from train coordination because it is a way to establish working limits on non-controlled track (and as such additional trains could move into the same segment of track at any time).

<sup>18</sup> A remote control locomotive may be used to provide working limits under this proposal. If a remote control locomotive is used, the remote control operator must attend to (be on or near) the remote control locomotive while it is used to provide working limits.

<sup>19</sup> As discussed in the NPRM, block register territory is generally considered non-controlled track, but when a train dispatcher or other employee must authorize occupancy or movement on a track in block register territory, the track becomes controlled track and proposed paragraph (a)(7) would not apply. Instead, the on-track safety methods for controlled track under subpart C would apply (§§ 214.319, 214.321, 214.323 or 214.325).

the absolute right to use any other provision of § 214.327 to make track in a block register territory inaccessible if, for any reason, they choose to do so. This amendment provides the flexibility for the RWIC or lone worker to utilize paragraphs (a)(1)–(6) or paragraph (a)(8) of this section to establish working limits rather than utilizing this block register territory procedure.

As recommended by the Working Group, proposed paragraph (a)(8) of this section addressed establishing working limits by bulleting on non-controlled main tracks within yard and restricted limits. As proposed, paragraph (a)(8) would require railroad operating rules to ensure train or engine crew or operators of on-track equipment are notified of any working limits in effect on main track in yard limits or restricted limits before entering the limits. Under paragraph (a)(8), railroad operating rules must prohibit movements on main track within yard limits or restricted limits unless the crew or operator of the on-track equipment is first required to receive notification of any working limits in effect. Before occupying the track where any notification of working limits are in effect, the crew or operator must receive permission from the RWIC to enter the working limits. The Working Group intended this provision to apply to planned work activities (activities railroads know about and plan for in advance enabling railroads to produce bulletins or other forms of notification ahead of time to be issued to train crews or operators).

As proposed, if the maximum authorized speed is restricted speed (as defined by § 214.7), paragraph (a)(8) requires the display of red flags or signs at the limits of the roadway worker(s) working limits. As noted in the NPRM, this requirement provides an extra measure of safety by providing train crews notice to stop their movement unless they have the RWIC's permission to enter the working limits. Where restricted speed is in effect, proposed paragraph (a)(8) requires train crews or operators to stop their movement within one-half the range of vision (one-half the distance to the flag). Where the maximum authorized speed is over restricted speed, proposed paragraph (a)(8) requires advance warning flags or signs, as physical characteristics permit to ensure an approaching crew or operator is able to stop his or her train or other on-track equipment short of the working limits.

In response to this proposal, BMWED/BRS's submitted comments opposing allowing any train to operate in excess of restricted speed under paragraph (a)(8). BMWED/BRS recommended

revising paragraph (a)(8) to require a train or engine receiving notification of any working limits in effect to operate at restricted speed and prepared to stop within half the range of vision of any stop signs or flags marking working limits. BMWED/BRS also proposed amended rule text giving the RWIC or lone worker the absolute right to utilize another applicable provision of § 214.327(a) to render track inaccessible other than proposed paragraph (a)(8).

After carefully evaluating this issue and BMWED/BRS's comment, FRA is adopting paragraph (a)(8) as proposed, with a minor modification. FRA has added reference to "other on-track equipment" in addition to the Working Group's consensus reference to trains or engines in this paragraph. As discussed above in the analysis for § 214.323 (foul time), an incursion into working limits by a piece of on-track equipment that might not be part of the roadway work group presents the same hazards to roadway workers as an incursion by a train or locomotive.

FRA is not adopting BMWED/BRS's recommended modifications to paragraph (a)(8), because it is an RSAC consensus recommendation that both BMWED and BRS agreed to. Also, as discussed above, the procedure of paragraph (a)(8) is intended for use when railroads are conducting planned work activities and, as such, the procedure is comparable to longstanding existing requirements for establishing working limits on controlled track under § 214.321. The procedures of § 214.321 are proven to be safe when complied with, even though those procedures are typically used on main track over which train operate at much higher speeds than that contemplated under paragraph (a)(8) of this section. Also, under existing paragraph § 214.327(a)(1), railroads are permitted to use flagmen (without the benefit of bulletins to train crews or mandatory use of advance flags) to make non-controlled track inaccessible. Appropriately placed stop boards (or flags), designating the point at which trains or other on-track equipment may not travel any further without permission, effectively serves the same function as flagmen. Paragraph (a)(8)'s requirement that bulletins be issued to train crews before the crews can operate into a roadway worker or work group's limits, and that advance flags be placed, when possible, where speeds higher than restricted speed are authorized, represent two additional measures of safety not in § 214.327's existing provision authorizing the use of flagmen. Further, FRA believes most situations will not involve speeds

exceeding restricted speed, as U.S. railroads' operating rules traditionally require compliance with restricted speed operating rules when trains or other on-track equipment are traveling over main track within yard limits or restricted limits. Because it is not always possible (or useful) to place advance flags warning of upcoming working limits, FRA is not adopting an absolute requirement for advance flags for all movements above restricted speed. For example, if there are many entrance switches from a railroad yard to a section of non-controlled main track, advance flags might not be practical and may serve no useful purpose for a train leaving the yard track at restricted speed to enter the main track where a higher speed is authorized. Historically, railroads' own operating rules have addressed the use of advance flags, and contain specific provisions for when advance flags are not necessary (e.g., when entering a railroad's yard limits from a foreign railroad's track, where advance flags cannot be practically located).

#### Section 214.329 Train Approach Warning Provided by Watchmen/Lookouts

Section 214.329 addresses using watchmen/lookouts to provide warning of approaching trains to roadway workers in a roadway work group who foul track outside of working limits. In the NPRM, FRA proposed four amendments to this section. First, FRA proposed to amend paragraph (a) of this section to accommodate proposed new § 214.338(a)(2)(iii) regarding passenger station platform snow removal. However, as discussed above, FRA is not adopting proposed § 214.338 in this final rule. Thus, FRA is not adopting the proposed amendment to paragraph (a) of § 214.329 referencing the snow removal provision.

In the NPRM, FRA also proposed to amend paragraph (a) to change the reference to "maximum speed authorized" to "maximum authorized speed." This amendment reflects the Working Group's recommended consensus definition of "maximum authorized speed" to e clarify existing sections §§ 214.329(a) and 214.337(c)(4). FRA proposed to amend these two sections merely to properly order the words in the Working Group recommended and which FRA adopted in this final rule.

FRA also proposed to amend paragraph (a) of this section by adding a sentence to the end of the paragraph prohibiting the use of a track as a place of safety to be occupied upon the approach of a train, unless working

limits are established on that track. As explained in the NPRM, this language is already in existing § 214.337(d), which governs on-track safety procedures for lone workers. This requirement is also the subject of FRA Technical Bulletin G-05-10. As explained in that Technical Bulletin, it is expected that roadway workers would clear all tracks when given a train approach warning. Clearing onto another track where only train approach warning (or no form on-track safety) is provided presents an extremely dangerous situation which may potentially trap workers if multiple train movements occur simultaneously. FRA has long interpreted existing § 214.329 to already prohibit using another track as a place of safety, and this amendment merely codifies that interpretation.

AAR commented this proposal is infeasible for Amtrak. AAR stated that in Penn Station, roadway workers do clear to a live track protected by a watchman/lookout. AAR suggested revising this proposal in a final rule to allow such scenarios by adding “. . . or that track is protected by a watchman/lookout” to the rule text. FRA declines to alter this proposal for safety reasons. As explained above, FRA has long interpreted existing § 214.329 to already prohibit using another track as a place of safety and issued Technical Bulletin G-05-10 to address this particular situation. If a place of safety is designated as another track protected by a watchman/lookout, but a train approaches on that track (which is designated as the place of safety) while roadway workers clear toward it, the situation is the same as having no on-track safety at all. Common sense dictates that if roadway workers are given train approach warning and clear onto another track where nothing stops a train from also approaching on that track at the same time, it endangers roadway workers who are left without a place of safety to go to. Thus, a general exclusion in the regulation allowing such a situation to occur is not appropriate from a safety perspective. If a unique situation exists at a particular location such as Penn Station where roadway workers will always have an appropriate place of safety to occupy when a train approaches, FRA believes a waiver application from this safety-critical requirement could be appropriate to address such unique situations. FRA Technical Bulletin G-05-10 is supplanted upon the effective date of this final rule.

Last, FRA proposed to add a new paragraph (h) to this section. This paragraph would have prohibited the use of train approach warning as an

acceptable form of on-track safety for a roadway work group using equipment or material that cannot be readily removed by hand from the track to be cleared. FRA did not adopt this proposal in the final rule as explained in detail in section VIII.A.4 above.

While FRA did not to adopt a provision in this final rule addressing the removal of equipment or material by hand under train approach warning, FRA is addressing a related matter where questions occasionally arise under part 214. In part 214, no rule text prohibits the use of train approach warning outside working limits to provide on-track safety when on-track roadway maintenance machine foul track (except § 214.336(f), which governs when a component of a roadway maintenance machine fouls an adjacent controlled track). Such blanket rule text is not appropriate because train approach warning (or individual train detection under § 214.337) must sometimes be used when a hi-rail or other on-track machine sets on a track to begin traveling (perform roadway inspection duties) under the operating rules of the railroad. In certain instances, depending on applicable railroad operating rules and the operational conditions at a location, using train approach warning or individual train detection can be appropriate.

However, FRA notes that using train approach warning to provide on-track safety for roadway workers who are performing roadway work involving using on-track equipment would most often be in violation of existing § 214.329. In a recent example, FRA inspectors observed a roadway work group using multiple pieces of on-track equipment spread out over nearly a mile. Upon investigation, FRA learned the roadway work gang was apparently using train approach warning under § 214.329 as a form of on-track safety, with a watchman/lookout stationed at each end of the roadway work group. The location where FRA observed this violation was on non-controlled track where trains were required to travel at restricted speed. In this situation, it was not possible for the railroad to comply with § 214.329. The machine operators were operating noisy, distracting machinery that would require them to look in a particular direction at the time of the warning to receive such warning, in violation of § 214.329(e). Second, the distance the group was spread over, and the type of work being performed by the group, made it impossible for a watchman/lookout far away to be able to provide train approach warning to all members of the roadway work group,

which is also in violation of § 214.329. It appears in this instance the railroad was relying on the requirement that movements must be made at restricted speed to protect the roadway work group. As explained in the 1996 RWP final rule, the RWP regulation does not recognize restricted speed as a sole means of providing on-track safety. 61 FR 65969. The final rule stated that “unusual circumstances at certain locations where [restricted speed] might be considered sufficient would have to be addressed by the waiver process.” *Id.* at 65962. Thus, in the above-described instance, the use of qualified flagmen to establish working limits (or any other method of establishing working limits under § 214.327) rather than the use of watchman/lookouts would have been appropriate.

Aside from noise, distraction, and distance from a watchmen/lookout, using train approach warning might also not be permissible to provide on-track safety under part 214 for another reason. Roadway workers who are operating such machines under train approach warning would have to be able to stop a machine, dismount a machine, and then move to occupy a place of safety at least 15 seconds prior to the arrival of a train traveling at maximum authorized speed at the roadway workers location. In such instances, compliance with § 214.329 is not possible. An operator inside the cab of a machine requires much more time to occupy a place of safety versus a roadway worker who might merely be standing in the foul of a track and can easily move to a place of safety. In addition, where train speeds are permitted to exceed restricted speed, in almost all instances, only the establishment of working limits is appropriate to establish on-track safety. To illustrate, even assuming proper train approach warning could be given to roadway workers operating on-track machinery so they could occupy a place of safety at least 15 seconds before a train's arrival, if trains are permitted to travel in excess of restricted speed, nothing prevents a train from colliding with the on-track equipment left on the occupied track. Railroad operating rules are generally the mechanism relied upon to prevent the collision of trains and on-track roadway maintenance. However, the strict guidelines in § 214.329 and common sense dictate that, in most instances where roadway workers are performing work on an occupied track with on-track machinery, approach warning is not an appropriate or permissible method to provide on-track safety for roadway workers.

Last, as discussed in the NPRM, FRA Technical Bulletin G-05-28 addresses using portable radios and cell phones. That technical bulletin explains that under existing § 214.329, such devices cannot be used as the sole communication to provide train approach warning to roadway workers. These devices are not among those expressly listed in the existing watchman/lookout definition in § 214.7. Further, FRA believes this practice is dangerous; especially if these devices fail in any manner as a train approaches a roadway work group. While FRA has no objection to using a radio or a cell phone to supplement the equipment issued to a watchman/lookout to provide train approach warning, these devices cannot be used to provide the sole auditory warning under this part.

#### Section 214.331 Definite Train Location

In the NPRM, FRA proposed to amend § 214.331 to require railroads to discontinue using definite train location as a form of on-track safety within one year. NTSB and BMWED/BRS submitted comments supporting this proposal. Thus, FRA is adopting the proposal in this final rule.

#### Section 214.333 Informational Line-Ups of Trains

For the reasons explained in the NPRM, FRA proposed to amend § 214.333 to require railroads to discontinue using informational line-ups of trains within one year. NTSB and BMWED/BRS submitted comments supporting the NPRM proposal. Thus, FRA is adopting the proposal in this final rule.

#### Section 214.335 On-Track Safety Procedures for Roadway Work Groups, General

Section 214.335 contains the general on-track safety procedures for roadway work groups. Under this section, before a member of a roadway work group fouls a track, on-track safety must be established under subpart C. FRA proposed four amendments to this section. FRA received no comments on these proposals, and, as explained below, has adopted two of the four proposed amendments. Because FRA is not adopting proposed new § 214.324 (verbal protection) or § 214.338 (snow removal), FRA is not amending existing paragraph (a) of this section to reference those sections as proposed. In the NPRM, FRA proposed to update the list of acceptable methods to establish working limits, FRA is amending paragraph (a) to reference § 214.336 (adjacent track protections) because that

section took effect on July 1, 2014. For the reasons explained in the NPRM, FRA is also removing “and” from the existing text of paragraph (a) listing the available acceptable methods of establishing working limits and replacing it with “or.” FRA is also incorporating the new term “roadway worker in charge” in existing paragraph (b) of this section for the reasons discussed above.

#### Section 214.337 On-Track Safety Procedures for Lone Workers

Section 214.337 governs the on-track safety procedures for lone workers. In the NPRM, FRA proposed to adopt two Working Group consensus recommendations changing this section, including: (1) Amending existing paragraph (c)(3) to allow the use of individual train detection (ITD) at controlled points consisting of signals only; and (2) adding a new paragraph (g) prohibiting the use of ITD by lone workers using equipment or material that cannot be readily removed from a track by hand. In response to the proposed amendment to paragraph (c)(3), and in light of the new definitions FRA proposed for “controlled point” and “interlocking, manual” in § 214.7, both AAR and BMWED/BRS expressed concern about the effect of those definitions on § 214.337(c)(3)’s restrictions on the use of ITD by lone workers. FRA addresses these concerns in the Section-by-Section analysis of § 214.7 above.

As discussed in the NPRM, existing paragraph (c)(3) of § 214.337 prohibits lone workers from using ITD to establish on-track safety within the limits of a manual interlocking, a controlled point, or a remotely controlled hump yard facility. The Working Group recommended expanding the locations where ITD can be used by lone workers to include controlled points consisting of signals only. FRA is adopting this consensus recommendation in this final rule as proposed.

As noted above, in the NPRM, FRA also proposed to adopt the Working Group’s consensus recommendation to add a new paragraph (g) to this section. As recommended by the Working Group, new paragraph (g) would prohibit using ITD as a form of on-track safety for a lone worker using machinery, equipment, or material they cannot readily remove from a track by hand. For the reasons discussed in the NPRM, FRA is adopting this revision as proposed.

#### Section 214.339 Audible Warning From Trains

Based on the Working Group’s recommendations, in the NPRM, FRA proposed revisions to existing § 214.339’s requirement that trains sound their locomotive whistles and bells when approaching roadway workers “on or about the track.” As recommended by the Working Group, FRA proposed to require railroads to adopt and comply with written procedures providing for “effective . . . audible warning by horn and/or bell for trains and locomotives approaching any roadway workers or roadway maintenance machines . . . on the track on which the movement is occurring, or about the track if the roadway workers or roadway maintenance machines are at a risk of fouling the track.”

After considering comments received, in this final rule, FRA is adopting the revisions as proposed. As discussed in detail in the NPRM, four FRA Technical Bulletins (G-05-08, G-05-15, G-05-26, and G-05-27) currently provide guidance on the requirements of § 214.339. These technical bulletins are supplanted upon the effective date of this final rule.<sup>20</sup>

NJT, BMWED/BRS, and 3M commented on the proposed revisions to this section. 3M did not directly address the specifics of FRA’s proposed revised requirements for audible warnings of trains approaching roadway workers. Like their comments on proposed § 214.338, 3M recommended requiring roadway workers to wear high visibility safety apparel to alert approaching train crews to their presence on or near track. Referencing the NPRM’s preamble discussion of the passage of large roadway work groups, such as tie and surfacing production crews spaced out over a long distance, NJT commented the requirement that the locomotive horn be sounded upon the approach of each unit of a work crew will create quality of life complaints about noise in many municipalities. BMWED/BRS supported FRA’s proposed revisions to this section.

In response to 3M’s comment, FRA considered requiring certain roadway workers to wear highly visible clothing. See section VIII.A.1 of this preamble discussing proposed § 214.338 not

<sup>20</sup> The NPRM discussed these Technical Bulletins and various issues the bulletins addressed in detail (audible warnings during shoving movements, operation of multiple-unit passenger train equipment not equipped with a bell, audible warnings over a large work area and duration of those warnings). FRA refers the reader to the NPRM for more information. 77 FR 50324, 50354, Aug. 20, 2012.

adopted in this final rule. Although in this final rule FRA is not adopting this specific requirement, FRA obviously encourages using highly visible reflective clothing and personal protective equipment to help clearly show the presence of roadway workers on or near railroad tracks to locomotive engineers and other on-track equipment operators. FRA also notes most railroad rules already require roadway workers to wear highly visible clothing.

In response to NJT's comment, FRA understands complaints railroads receive about field noise from train horns, particularly at highway-rail grade crossings, and where a roadway work group is working at a particular point in time. FRA understands the potential sensitivity to noise of residents who live in close proximity to railroad tracks. However, providing an audible warning to roadway workers of an approaching train is a longstanding safety-critical component of the RWP regulation and any railroad's on-track safety program—even within highway-rail grade crossing quiet zones. FRA notes the amendments to this section in this final rule are not a substantive change to the particular issue raised by NJT, and FRA's discussion in the NPRM preamble merely restated FRA's longstanding expectation that trains must provide audible warning to roadway workers on or near the track upon the approach of each unit of a work crew. As explained in Technical Bulletin G-05-08 issued in 2005, existing § 214.339 requires trains to provide an audible warning when approaching each roadway worker or roadway work group located within a large scale maintenance project.

#### § 214.343 Training and Qualification, General

Existing § 214.343 sets forth the general training and qualification requirements for roadway workers. Paragraph (c) of existing § 214.343 requires railroad employees other than roadway workers associated with on-track safety procedures, and whose primary duties involve the movement and protection of trains, to be trained "to perform their functions related to on-track safety through the training and qualification procedures prescribed by the operating railroad for the primary position of the employee."

In the NPRM, FRA proposed to amend paragraph (c) to account for proposed new § 214.353 addressing training employees other than roadway workers (typically transportation employees such as conductors) who act as RWICs. MTA commented on this proposal, supporting the training and

qualification of transportation employees under the procedures the railroad prescribes for the primary position of the employee. Thus, FRA is adopting revision to paragraph (c) of this section as proposed. However, FRA did receive comments in response to the NPRM proposal for § 214.353 that implicate this section and addresses those comments in the Section-by-Section analysis for § 214.353 below.

#### § 214.345 Training for All Roadway Workers

Existing § 214.345 has the minimum training contents for roadway workers required by existing subpart C. FRA proposed to amend this section to incorporate two Working Group consensus recommendations. First, to clarify and reinforce the requirements of the existing RWP regulation, FRA proposed adding "[c]onsistent with § 214.343(b)" to the beginning of the first sentence of the existing introductory paragraph of the section. Section 214.343(b) requires employers to provide all roadway workers initial or recurrent training once every calendar year on the on-track safety rules and procedures they are required to follow. In this final rule, FRA is adopting this revision as proposed. As noted in the NPRM, Technical Bulletin G-05-16 provides guidance on existing § 214.345 and is supplanted upon the effective date of this final rule.

In the NPRM, FRA also proposed adding a new paragraph (f) to this section reflecting the Working Group's consensus recommendation requiring all roadway workers' training to include instruction on an employer's procedures governing how roadway workers should determine if it is safe to walk across railroad tracks. FRA removed that consensus item from § 214.317(b), and proposed to include it as new paragraph (f) of this section. In this final rule, FRA is adopting this requirement as proposed.

In preparing this final rule, FRA noticed in the NPRM preamble discussion, it incorrectly intermingled discussion of the periodic "qualification" of roadway workers with the existing roadway worker annual training requirement. *See* 77 FR 50330. Since the original RWP rule first took effect in 1997, it has required roadway workers to receive annual training on the on-track safety procedures they must follow. *See* 49 CFR 214.343(b). As exemplified by the inclusion of costs for annual training for all roadway workers (including lone workers, watchmen/lookouts, flagmen, and RWICs), in the RIA for the 1996 final rule, and the assessment of the paperwork burden for

annual training in the Paperwork Reduction Act information collection estimates provided by FRA in the 1996 final rule, this annual training requirement includes training for all roadway worker qualifications. Further, in 2005, FRA issued Technical Bulletin G-05-16, clarifying that the required time frame for the unspecified "periodic" qualification for additional roadway worker qualifications is separate from the annual training requirement of § 214.345 and applies across all the additional roadway worker qualifications. The existing definition of the term "watchmen/lookout" also states it means an employee who has been annually trained and qualified to provide warning to roadway workers of approaching trains or on-track equipment. Technical Bulletin G-05-16 further explained that because subpart C does not specify a timeframe for the required "periodic qualification" of roadway workers, determining an appropriate timeframe is at the discretion of individual railroads and should be specified in each railroad's on-track safety program. Therefore, the annual training requirement existing since the RWP regulations were promulgated is unchanged by this final rule.

#### § 214.347 Training and Qualification for Lone Workers

Section 214.347 sets forth the training and qualification requirements applicable to lone workers and requires the initial and "periodic" qualification of lone workers to be "evidenced by demonstrated proficiency." In the NPRM, FRA proposed to amend this section by incorporating the Working Group's consensus recommendation to require the training of lone workers on alternative means to access the information in a railroad's on-track safety manual when his or her duties make it impractical to carry the manual. In this final rule, FRA is adopting this provision substantially as proposed. FRA is making minor adjustments to the language in response to BMWED/BRS's comment on § 214.309 noting that lone workers are not literally required to "carry" the on-track safety manual at all times, but rather that the manual must be readily available to them at all times. FRA is also correcting a typographical error in the rule text of this proposed revision by removing the extra word "to" in proposed paragraph (a)(5).

In the NPRM, FRA also asked for comment on two additional issues on the training and qualification of lone workers. First, FRA noted the Working Group's consensus recommendation to

require requalification of roadway workers every 24 months, and recurrent lone worker training every calendar year, did not parallel the separate RSAC recommendation resulting from the mandate of Section 401 of the Rail Safety Improvement Act of 2008 (Section 401) for FRA to set minimum training standards for “each class and craft of safety-related railroad employee.”<sup>21</sup> Thus, FRA asked for comment on how to proceed regarding an appropriate time interval for “periodic” qualification in a final rule. Second, FRA asked if it should require a physical characteristics qualification for lone workers.

Since publication of the NPRM, based on the recommendations of the RSAC Training Standards Working Group, FRA published a final rule addressing the mandate of Section 401. 79 FR 66460, Nov. 7, 2014 (Training Standards Rule; part 243). The rule includes minimum training standards for roadway workers and extensive refresher qualification requirements for roadway workers.

In response to this request for comment, SEPTA, BMWED/BRS, AAR, and two individuals submitted comments. SEPTA suggested that in this final rule, FRA should defer to the three-year interval for training and qualification in the Training Standards Rule. SEPTA asked why, when under the Training Standards Rule, training and re-certification for safety-critical positions such as conductors, engineers, and train dispatchers only has to occur every three years, roadway workers would be treated differently and trained annually. SEPTA asserted existing § 217.9 (requiring operational testing of employees) and § 243.205 (Training Standards Rule training and qualification interval) are adequate to ensure employees know how to perform their work properly.

Noting that at the time of its comment 44 roadway worker fatalities had occurred since 1997, BMWED/BRS supported an annual training and qualification requirement for all roadway workers, and opposed FRA not adopting the Working Group’s consensus recommendation for a 24-month periodic qualification interval.

Consistent with SEPTA’s comment, AAR asserted no basis exists for determining more frequent refresher training or qualification should be required for roadway workers than for other safety-related employees under the Training Standards Rule. Pointing to FRA’s RIA for the Training Standards

NPRM, AAR also expressed the view that the Working Group’s consensus recommendation could not be justified from a cost-benefit perspective due to lack of a safety benefit from more frequent training.

Individual commenters supported the Working Group’s consensus recommendation to require annual training and periodic qualification every 24 months, stating generally that more frequent refresher training will have better results. These commenters believe the benefits of more frequent refresher programs would outweigh the cost of the programs’ development and implementation. The individual commenters pointed to OSHA’s training standards as a model, and urged FRA to adopt a uniform standard of appropriate time intervals for refresher training. The comment did note that implementing programs similar to OSHA’s would be burdensome.

As stated in the discussion of § 214.343 above, in this final rule FRA is not amending the existing annual training requirements of subpart C. FRA did not intend this rulemaking to decrease the training roadway workers receive via existing requirements, and believes it reasonable to continue the existing annual training requirement. Because subpart C already requires annual training for roadway workers, this approach will not result in any additional costs.

In this final rule, FRA is, however, adding a new paragraph § 214.347(b) requiring lone workers to be qualified under part 243 and to be based on evidence of a lone worker’s demonstrated proficiency. Part 243 requires covered employees to be qualified at least every three calendar years. The costs for this qualification requirement are already accounted for in the Training Standards Rule. Although FRA encourages railroads to conduct refresher qualifications more often than the minimum of once every three calendar years under part 243, FRA agrees with AAR that from a cost-benefit basis, the evidence does not support a more frequent qualification requirement for roadway workers than other safety-critical employees subject to part 243 (e.g., locomotive engineers). FRA also agrees with SEPTA that existing § 217.9’s requirements for operational testing already provide a much more frequent opportunity for observations by railroad officials to determine employee proficiency with rules’ compliance than does either a two- or three-year required interval for determining qualification via demonstrated proficiency.

A lone worker’s “demonstrated proficiency” under this new paragraph (b) refers to the longstanding requirement FRA explained in the original 1996 RWP rule. In that rule, FRA stated a roadway worker must show

sufficient understanding of the subject that the employee can perform the duties for which qualification is conferred in a safe manner. Proficiency may be demonstrated by successful completion of a written or oral examination, an interactive training program using a computer, a practical demonstration of understanding and ability, or an appropriate combination of these.

61 FR 65972.

Many of part 243’s requirements will not take effect for a number of years, depending on a railroad’s total employee work hours. See 49 CFR 243.101(a). In the interim, FRA encourages railroads to comply with part 243’s requirements as soon as possible, and, consistent with Technical Bulletin G–05–16, continue to specify in their on-track safety programs the interval at which “periodic” roadway work qualifications will take place. Upon the relevant applicability date of part 243’s requirements for a particular railroad, that railroad must comply with part 243’s qualification requirements (and the requalification of roadway workers must be at least every three calendar years).

Last, as discussed in section VIII.A above, in the NPRM, FRA asked if it should require physical characteristics qualification for lone workers. For the reasons explained in section VIII.A, FRA is not adopting this requirement in this final rule.

#### § 214.349 Training and Qualification for Watchmen/Lookouts

Section 214.349 sets forth the training and qualification requirements applicable to watchmen/lookouts and, consistent with existing § 214.347 applicable to lone workers, requires the initial and “periodic” qualification of lone workers to be “evidenced by demonstrated proficiency.” In the NPRM, FRA requested comment on how to address the Working Group’s consensus recommendation to require requalification of roadway workers, including watchmen/lookouts, every 24 months. For the reasons discussed in the Section-by-Section analysis of § 214.347 above, FRA is not adopting this consensus recommendation in this final rule. Instead, this final rule requires periodic qualification for watchmen/lookouts to be performed consistent with the Training Standards Rule (every three calendar years) and be

<sup>21</sup> Public Law 110–432, Division A, 122 Stat. 4848 (codified at 49 U.S.C. 20162).

based on evidence of demonstrated proficiency.

Consistent with its request for comment on § 214.347 discussed above, FRA asked if it should require a physical characteristics qualification for watchmen/lookouts. For the reasons explained in section VIII.A above, FRA is not adopting such a requirement in this final rule.

#### § 214.351 Training and Qualification for Flagmen

Section 214.351 sets forth the training and qualification requirements applicable to flagmen and, consistent with existing § 214.347 applicable to lone workers and § 214.349 applicable to watchmen/lookouts, requires the initial and “periodic” qualification of flagmen to be “evidenced by demonstrated proficiency.” In the NPRM, FRA requested comment on how to address the Working Group’s consensus recommendation to require requalification of roadway workers, including flagmen, every 24 months. For the reasons discussed in the Section-by-Section analysis of § 214.347 above, FRA is not adopting this consensus recommendation in this final rule. Instead, this final rule is requiring that periodic qualification for watchmen/lookouts be performed consistent with the Training Standards Rule (every three calendar years) and be based on evidence of demonstrated proficiency.

#### Section 214.353 Training and Qualification of Each Roadway Worker in Charge

Existing § 214.353 is titled “Training and qualification of roadway workers who provide on-track safety for roadway work groups.” Paragraph (a) of existing § 214.353 lists the minimal contents of RWIC training and paragraph (b) specifies that a RWICs initial and periodic qualification must be evidenced by a “recorded examination.” In the NPRM, FRA proposed several changes to this section. BMWED/BRS and AAR submitted comments responding to some of the proposed changes.

First, to reflect the new term “roadway worker in charge,” FRA proposed to change the title of this section to “[t]raining and qualification of each roadway worker in charge.” FRA received no comments on proposals and in this final rule is amending the title as proposed.

Second, consistent with the Working Group’s recommendation, FRA proposed to add a new paragraph (a)(5) to this section. Proposed paragraph (a)(5) would require RWICs to be trained on procedures ensuring they remain

immediately accessible to the roadway workers working within the working limits they establish. This paragraph parallels new § 214.315(a)(5) requiring on-track safety job briefings conducted by RWICs to include information on the accessibility of the RWIC, and on alternate procedures if the RWIC is no longer accessible to members of the roadway work group. FRA received no comments on this NPRM proposal, and in this final rule is adopting new paragraph (a)(5) as proposed.

In its comment, BMWED/BRS recommended adding a new paragraph to this section requiring RWICs to be trained on the content and application of the railroad rules governing the resolution of good faith challenges. BMWED/BRS noted that regardless of class or craft of a RWIC, RWICs must understand the good faith challenge procedures and their responsibility to promptly and equitably resolve the challenges. FRA concurs with BMWED/BRS’s statement that RWICs must understand the good faith challenge procedures and their responsibility to resolve such challenges, but believes the existing regulations already require RWICs to be trained on a railroad’s good faith challenge procedures. Under existing §§ 213.311–214.313, good faith challenges may be raised by roadway workers and must be promptly and equitably resolved. Indeed, under those sections, railroads must adopt procedures to address such good faith challenges. Existing § 214.343(b) requires recurrent training every calendar year for the on-track safety rules and procedures each roadway worker is required to follow, and this includes a railroad’s rules and procedures on good faith challenges for a RWIC. *See also* § 214.353(b) (RWIC training requirements).

Nonetheless, FRA believes BMWED/BRS’s comment has merit because the RWIC is typically involved in resolving roadway workers’ good faith challenges. As noted in the NPRM, Technical Bulletin G–05–04 specifies that persons acting as RWICs must be qualified on good faith challenge procedures, but the text of part 214 does not expressly state such. Given the importance of ensuring RWICs are trained in a railroad’s good faith challenge procedures, FRA believes good faith challenge procedures should be included as a required training and qualification topic in paragraph (a) of § 214.353. Thus, in this final rule FRA is adding the words “including the railroad’s procedures governing good faith challenges in §§ 214.311(b) and (c) and 214.313(d)” to existing paragraph (a)(1). While another railroad employee or supervisor other

than a RWIC may ultimately resolve a roadway worker’s good faith challenge to the on-track safety provided, an a RWIC is typically involved in that resolution and must at least know the railroad’s procedures governing the handling of such a challenge.

BMWED/BRS’s comment also suggested FRA amend paragraph (b) of this section to require all RWICs, regardless of craft, to be annually trained and qualified. As discussed further below, FRA believes the amendments already made to paragraph (a) of this section, and to § 214.343 as discussed above, address this issue. As amended by this final rule, § 214.353 clarifies that all RWICs, regardless of craft, must be trained annually on the items in § 214.353. As discussed in the Section-by-Section analysis for §§ 214.343, 214.345, 214.347, and 214.351 above, FRA is deferring to the training standards rulemaking’s three-year qualification interval for all roadway worker qualifications.

In the NPRM, FRA proposed an additional amendment to existing paragraph (a) of this section to address situations where employees other than roadway workers act as RWICs. FRA proposed to expressly require in paragraph (a) that any employee acting as a RWIC (e.g., a conductor or a brakemen), who provides for the on-track safety of roadway workers through the establishment of working limits or the assignment and supervision of watchmen/lookouts or flagmen be trained and qualified consistent with § 214.353. BMWED/BRS submitted a comment supporting this proposal and FRA is adopting it, as proposed, in this final rule. For a detailed discussion of this change, see the preamble to the NPRM. 77 FR 50356–50357.

Regarding the training and qualification requirements of paragraph (b) of this section, for the reasons explained in the Section-by-Section analysis of § 214.347 above, FRA is addressing the frequency of training and qualification requirements for RWICs the same way as the requirements applicable to lone workers, flagmen, and watchmen/lookouts (§§ 214.347, 214.349, and 214.351). While annual training for RWICs is still required under the existing regulation, the periodic qualification of RWICs will be controlled by the Training Standards Rule, which requires recurrent qualification every three calendar years.

Also related to the training and qualification requirements applicable to RWICs, in the NPRM, FRA requested comment on the practice of bifurcating certain RWIC duties (i.e., splitting of RWIC duties between two individuals).

Specifically, in the NPRM FRA indicated it was contemplating whether it should continue to be allow bifurcation of RWIC duties, such as when one employee obtains a track permit for another employee who is acting as the RWIC. FRA was considering adopting a requirement that would only permit the splitting of qualifications in situations where a conductor or other railroad employee serves as a pilot to a RWIC (or employee acting as a RWIC) who was not qualified on the physical characteristics of a particular territory where work was being performed. FRA considered such because every roadway work group already must have a RWIC, and under the amendment to paragraph (a) in this final rule discussed above, any employee acting as a roadway worker in charge must be trained on the substantive requirements listed in § 214.353.

AAR commented on this proposal suggesting another situation where the bifurcating of RWIC duties should be acceptable. AAR suggested that in situations where one employee obtains a working limits authority for a roadway work group, but is not responsible for any other aspect of the group's on-track safety, requiring the employee to be trained and tested on all the responsibilities of a RWIC would not serve any purpose. Consistent with AAR's comment, FRA notes existing Technical Bulletin G-05-04 allows one employee to obtain a track permit for another employee who is acting as the RWIC. FRA can also envision other operating situations where one employee's ability to obtain authority on behalf of an RWIC is desirable and necessary. For example, in the case of a large system gang, a local track inspector may obtain authority from the dispatcher for the system gang's RWIC. The BMWED/BRS comment also addressed this topic, indicating that since each roadway work group must have a RWIC qualified on physical characteristics under § 214.353, bifurcation was unnecessary and could cause confusion.

After further evaluating this issue and considering the comments, FRA concludes bifurcation of RWIC duties can be safely done in the two limited scenarios discussed above involving physical characteristics qualifications (pilot) and when obtaining track authority for an RWIC. FRA will continue to allow the practice of splitting RWIC duties in these scenarios. For gangs working across a large system, FRA recognizes it may not always be possible for an RWIC to be qualified on the physical characteristics, and using a

pilot who is qualified on the physical characteristics can help safely facilitate compliance with this section. As discussed more fully in the NPRM and Technical Bulletin G-05-04, FRA also does not take exception to providing a "limited" qualification for a RWIC who would only perform certain RWIC duties in certain situations. For example, a RWIC who was performing such duties on a railroad consisting entirely of non-controlled track could have a limited qualification only involving the RWIC being trained and qualified to establish working limits via the inaccessible track procedures (in addition to being trained on all other §§ 214.343, 214.345, and 214.353 requirements).

#### § 214.355 Training and Qualification in On-Track Safety for Operators of Roadway Maintenance Machines

Section 214.355 sets forth the on-track safety training and qualification requirements for roadway maintenance machine operators. In the NPRM, FRA requested comment on one potential change to this existing section in the final rule on how best to proceed regarding the appropriate time interval for "periodic" qualification under existing paragraph (b). The Working Group recommended consensus amendments that would have expressly required recurrent qualification every 24 months for roadway maintenance machine operators. As discussed in the preamble above for § 214.347, however, the RSAC consensus recommendation does not parallel the refresher qualification requirements in the statutorily mandated Training Standards Rule (minimum three calendar year interval).

FRA received comments in response to this request from SEPTA, BMWED/BRS, AAR, and two individuals. Those comments are summarized above in the preamble discussion for § 214.347. For the reasons also explained above, in this final rule, the Training Standards Rule requiring recurrent qualification at a minimum of every three calendar years will control.

FRA notes the Training Standards Rule included a provision addressing the training and qualification for operators of roadway maintenance machines equipped with a crane. 79 FR 66501. Those requirements are in a new § 214.357. FRA directs the public to the Training Standards Rule preamble's Section-by-Section analysis for an explanation of new § 214.357's requirements. *Id.* at 66474–66476.

#### Appendix A to Part 214—Schedule of Civil Penalties

FRA is amending appendix A of this part to add guidance on penalties for violations of new and amended sections of subpart C in this final rule. Appendix A specifies the civil penalty FRA will ordinarily assess for the violation of a particular provision of this rule. However, consistent with 49 CFR part 209, appendix A, FRA's Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws, FRA reserves the right to assess a penalty up to the statutory maximum. Further, a penalty may be assessed against an individual only for a willful violation. FRA did not solicit public comment on appendix A as it is a statement of FRA policy.

#### X. Regulatory Impact and Notices

##### A. Executive Order 12866, Executive Order 13563 and DOT Regulatory Policies and Procedures

This final rule has been evaluated consistent with existing policies and procedures and determined to be a non-significant regulatory action under Executive Orders 12866 and 13563 and DOT policies and procedures. *See* 44 FR 11034, Feb. 26, 1979. FRA prepared and placed a RIA addressing the economic impact of this final rule in the Docket (No. FRA-2008-0086). Document inspection and copying facilities are available at Room W12-140 on the Ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC 20590.

As part of the RIA, FRA assessed quantitative measurements of the cost and benefit streams expected to result from the implementation of the final rule. Overall, the final rule would result in safety benefits and expected business benefits for the railroad industry. It would also, however, generate an additional burden on railroads mainly due to the additional requirements for job briefings under certain circumstances and various training requirements.

Table 1 summarizes the quantified costs and benefits expected to accrue over a 20-year period. It presents costs associated with expanded job briefing requirements under § 214.315 Supervision and Communication, the identification and implementation of redundant protections under § 214.319 Working Limits, Generally, railroad policy change under § 214.339 Audible Warning from Trains, and training of various types of employees under §§ 214.318, 214.345, 214.347, and 214.353.

The RIA also presents the quantified benefits expected to accrue over a 20-year period. These benefits are primarily cost savings or business benefits. They largely accrue due to time savings because of the proposed amendments, including the new exception for on-track snow blowing and weed spraying operations under § 214.317, new methods of using inaccessible track under § 214.327, and using individual train detection under § 214.337. Savings will also accrue due to the additional

flexibility provided by new § 214.318 allowing mechanical employees to utilize blue signal protection in some instances. All other amendments result in no cost or benefits because they represent current industry practice and/or the adoption of current FRA Technical Bulletins.

For the 20-year period analyzed, the estimated quantified costs to the railroad industry total \$20,965,962, discounted to \$11,491,330 (present value (PV), 7 percent) and \$15,832,099

(PV, 3 percent). For the same 20-year period, the estimated quantified benefits total \$53,109,702, discounted to \$28,132,247 (PV, 7 percent) and \$39,506,913 (PV, 3 percent). Net benefits total \$32,143,740, discounted to \$16,640,917 (PV, 7 percent) and \$23,674,814 (PV, 3 percent). This analysis demonstrates that the benefits for this final rule would exceed the costs.

**Table 2. Summary of Quantified Costs and Benefits**

Costs		Year 1	2 - 20	Total 20 year	7% PV	3% PV
214.315	Job Briefings	\$179,468	\$179,468	\$3,589,356	\$1,901,284	\$2,670,028
214.318	Training for Locom. & Car Shop Areas	226,601	226,601	4,532,015	2,400,612	3,371,247
214.319	Working Limits, generally	611,658	509,091	7,725,127	4,465,867	5,975,983
214.339	Audible Warning from Trains	29,105	0	29,105	27,200	28,257
214.345	Training on Safe Crossing of Tracks	90,640	90,640	1,812,806	960,245	1,348,499
214.347	Training on Access to Manual	13,596	13,596	271,921	144,037	202,275
214.353	Training RWIC	150,282	150,282	3,005,632	1,592,086	2,235,811
<b>Total</b>		<b>\$1,301,349</b>	<b>\$1,169,678</b>	<b>\$20,965,962</b>	<b>\$11,491,330</b>	<b>\$15,832,099</b>
Benefits		Year 1	2 - 20	Total 20 year	7% PV	3% PV
214.317	Track Snow Removal	367,093	367,093	7,341,864	3,888,991	5,461,420
214.318	Locomotive Service & Shop Areas	1,964,466	1,964,466	39,289,322	20,811,582	29,226,295
214.327	Inaccessible Track	255,946	255,946	5,118,911	2,711,491	3,807,823
214.337	ITD	67,980	67,980	1,359,605	720,183	1,011,374
<b>Total:</b>		<b>\$2,655,485</b>	<b>\$2,655,485</b>	<b>\$53,109,702</b>	<b>\$28,132,247</b>	<b>\$39,506,913</b>
<b>NET BENEFITS</b>		<b>\$1,354,136</b>	<b>\$1,485,807</b>	<b>\$32,143,740</b>	<b>\$16,640,917</b>	<b>\$23,674,814</b>

**Note:** Dollars are discounted over a 20-year period.

*B. Regulatory Flexibility Act and Executive Order 13272; Initial Regulatory Flexibility Assessment*

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and Executive Order 13272 (67 FR 53461, Aug. 16, 2002) require agency review of proposed and final rules to assess their impacts on small entities. FRA developed the final rule consistent with Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking, and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) to ensure potential impacts of

rules on small entities are properly considered.

The Regulatory Flexibility Act requires an agency to review regulations to assess their impact on small entities. An agency must conduct a threshold analysis to determine if the proposed rule will or may have a significant economic impact on a substantial number of small entities (SEISNOSE) or not. Then, it must prepare an initial regulatory flexibility analysis (IRFA) unless it determines and certifies a rule is not expected to have a SEISNOSE.

As discussed earlier, FRA is amending its regulations on railroad

workplace safety to resolve interpretative issues that have arisen since the 1996 promulgation of the original RWP regulation. In particular, this final rule adopts certain terms, resolves miscellaneous interpretive issues, codifies certain FRA Technical Bulletins, adopts new requirements governing redundant signal protections and the movement of roadway maintenance machinery over signalized non-controlled track, amends certain qualification requirements for roadway workers, and codifies FAST Act mandates. FRA is also deleting three incorporations by reference of industry

standards in existing sections of part 214, subpart B that address Bridge Worker Safety Standards and instead is referencing existing OSHA regulations.

The small entity segment of the railroad industry faces little in the way of intramodal competition. Small railroads generally serve as “feeders” to the larger railroads, collecting carloads in smaller numbers and at lower densities than would be economical for the larger railroads. They transport those cars over relatively short distances and then turn them over to the larger systems which transport them relatively long distances to their ultimate destination, or for handoff back to a smaller railroad for final delivery. Although the relative interests of various railroads may not always coincide, the relationship between the large and small entity segments of the railroad industry are more supportive and co-dependent than competitive.

It is also extremely rare for small railroads to compete with each other. Small railroads generally serve smaller, lower-density markets and customers. They exist, and often thrive, doing business in markets where there is not enough traffic to attract the larger carriers designed to handle large volumes over distance at a profit. As there is usually not enough traffic to attract service by a large carrier, there is also not enough traffic to sustain more than one smaller carrier. In combination with the huge barriers to entry in the railroad industry (due to the need to own the right-of-way, build track, purchase a fleet, etc.), small railroads rarely find themselves in competition with each other. Thus, even to the extent the proposed rule may have an economic impact, it should have no impact on the intramodal competitive position of small railroads.

#### 1. Description of Regulated Entities and Impacts

The “universe” of the entities under consideration includes only those small entities that can reasonably be expected to be directly affected by the provisions of this rule. For the rule there is only one type of small entity that is affected: small railroads.

“Small entity” is defined in 5 U.S.C. 601. Section 601(3) defines a “small entity” as having the same meaning as “small business concern” under section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated, and is not dominant in its field of operation. Section 601(4) likewise includes within the definition of “small entities” not-for-profit enterprises that are independently

owned and operated, and are not dominant in their field of operations.

The U.S. Small Business Administration (SBA) has authority to regulate issues related to small businesses, and stipulates in its size standards that a “small entity” in the railroad industry is a for profit “line-haul railroad” that has fewer than 1,500 employees, a “short line railroad with fewer than 500 employees, or a “commuter rail system” with annual receipts of less than seven million dollars. See “Size Eligibility Provisions and Standards,” 13 CFR part 121, subpart A.

Federal agencies may adopt their own size standards for small entities in consultation with SBA and in conjunction with public comment. Under that authority, FRA published a final statement of agency policy that formally establishes “small entities” or “small businesses” as being railroads, contractors, and hazardous materials shippers that meet the revenue requirements of a Class III railroad as set forth in 49 CFR 1201.1–1, which is \$20 million or less in inflation-adjusted annual revenues, and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less. See 68 FR 24891, May 9, 2003, codified at appendix C to 49 CFR part 209. The \$20 million limit is based on the Surface Transportation Board’s (STB) revenue threshold for a Class III railroad carrier. Railroad revenue is adjusted for inflation by applying a revenue deflator formula in accordance with 49 CFR part 1201. The same dollar limit on revenues is established to determine whether a railroad shipper or contractor is a small entity. FRA is using this definition for this rulemaking. FRA received no comments pertinent to its use in response to the NPRM.

Included in the entities impacted by this final rule are governmental jurisdictions or transit authorities—most of which are not small for purposes of this certification. There are two privately owned commuter railroads that would be considered small entities. However, both entities are owned by Class III freight railroads and, therefore, are already considered small entities for purposes of this certification.

#### Railroads

There are approximately 729 small railroads.<sup>22</sup> Class III railroads do not report to the STB, and the precise number of Class III railroads is difficult

<sup>22</sup> FRA data for 2014 shows there are 779 Railroads. Thus, 779 Total Railroads—7 Class I Railroads—12 Class II Railroads (includes Alaska RR)—31 Commuter/Amtrak (non-small) = 729 Small Railroads.

to ascertain due to conflicting definitions, conglomerates, and even seasonal operations. Potentially all small railroads (a substantial number) could be impacted by this regulation. However, because of certain characteristics these railroads typically have, there should be very little impact on most, if not all of them. A large number of these small railroads only have single-track operations. Some small railroads, such as the tourist and historic railroads, operate on the lines of other railroads that would bear the burden or impact of the final rule’s requirements. Finally, other small railroads, if they do have more than a single track, typically have operations infrequent enough such that the railroads have generally always performed the pertinent trackside work with the track and right-of-way taken out of service, or is conducted during hours that the track is not used.

Almost all commuter railroads do not qualify as small entities. This is likely because almost all passenger/commuter railroad operations in the United States are part of larger governmental entities whose jurisdictions exceed 50,000 in population. As noted above, two of these commuter railroads are privately owned and would be considered small. However, they are already considered to be small because they are owned by a Class III freight railroad. FRA is uncertain how many contractor companies would be involved with this issue. FRA is aware that some railroads hire contractors to conduct some of the functions of roadway workers on their properties. However, the costs for the burdens associated with the requirements of this final rule would get passed on to the pertinent railroad. Most likely the contracts would be written to reflect that, and the contractor would bear no additional burden for the proposed requirements. Since contractors would not be the entities directly impacted by any burdens, it is not necessary to assess them in the certification.

No other small businesses (non-railroads) will be impacted by this final rule.

The process used to develop most of this final rule provided outreach to small entities in two ways. First, the RSAC Working Group had at least one representative from a small railroad association, namely, ASLRRRA. Second, members of the RSAC itself include the ASLRRRA and other organizations that represent small entities. Thus, FRA concludes that small entities had an opportunity for input as part of the process to develop a consensus-based

RSAC recommendation made to the FRA Administrator.

#### Impacts

The impacts from this regulation are primarily a result of the requirements for certain changes to the existing roadway worker protection regulations, particularly regarding job briefings and training of roadway workers.

The RIA for this rulemaking estimates that for the 20-year period analyzed, the estimated quantified costs to the railroad industry total \$20,965,962, discounted to \$11,491,330 (present value (PV), 7 percent) and \$15,832,099 (PV, 3 percent). FRA believes nearly all of this cost will fall to railroads other than small railroads. Short line railroads, the vast majority of which are Class III railroads, represent an estimated 8 percent of the railroad industry. Since small railroads generally collect carloads in such small numbers

and low densities, at low speeds, they require much less track maintenance. Also, several parts of the new regulation do not apply to Class III railroads. Furthermore, generally, small railroads have single tracks that are not active around the clock. As such, road work can be done when the track is not active, greatly reducing the burden of having to provide roadway worker protection. As such, the cost of this rulemaking is very minimal to the small railroad segment of the industry. Eight percent of the total 20-year cost is \$1,677,277 (an average annual cost of \$115 per small railroad).<sup>23</sup> Although the rule may impact a substantial number of small entities, FRA is confident that this final rule does not impose a significant burden.

#### 2. Certification

Under the Regulatory Flexibility Act (5 U.S.C. 605(b)), FRA certifies this final

rule will not have a significant economic impact on a substantial number of small entities. FRA invited all interested parties to submit data and information regarding the potential economic impact that will result from the proposals in the NPRM. FRA did not receive any comments concerning this certification in the public comment process.

#### C. Paperwork Reduction Act

The information collection requirements in this final rule are being submitted upon publication in the **Federal Register** for Office of Management and Budget (OMB) approval under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections that contain the new and current information collection requirements and the estimated time to fulfill each requirement are as follows:

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
Form FRA F 6180.119—Part 214 Railroad Workplace Safety Violation Report.	350 Safety Inspectors ..	120 forms .....	4 hours .....	480
214.307—Railroad On-Track Safety Programs ( <b>Revised Requirements</b> )—RR Programs that comply with this Part + copies at System/Division Headquarters.	722 Railroads .....	722 programs + 851 copies.	2 hours + 2 minutes .....	1,472
—RR Notification to FRA not less than one month before on-track safety program takes effect.	722 Railroads .....	825 notices .....	20 minutes .....	275
—RR Amended On-Track Safety Programs after FRA Disapproval.	722 Railroads .....	34 programs .....	4 hours .....	136
—RR Written Response in Support of Disapproved Program.	722 Railroads .....	2 written responses .....	40 hours .....	80
214.309— <b>New Requirements</b> —On-Track Safety Manual.	722 Railroads .....	722 provisions .....	60 minutes .....	722
—RR Provisions for Alternative Access to Information in On-Track Safety Manual.	60 Railroads .....	100 bulletins/notices ....	60 minutes .....	100
—RR Publication of Bulletins/Notices reflecting changes in on-track safety manual.				
214.311—RR Written Procedure to achieve prompt and equitable resolution of Good Faith Employee Challenges.	50 New Railroads .....	25 generic procedures + 25 developed procedures.	30 minutes + 24 hours	613
214.313—Good Faith Challenges to On-Track Safety Rules.	20 Railroads .....	80 challenges .....	8 hours per challenge ..	640
214.315/335—Supervision +communication .....	50,000 Rdwy Workers	16,350,000 brf .....	2 minutes .....	545,000
—Job Briefings.				
—Adjacent-Track Safety Briefings .....	24,500 Rdwy Workers	2,403,450 brf. ....	30 seconds .....	20,029
—Information on Accessibility of Roadway Worker in Charge (RWIC) and Alternative Procedures in Event RWIC is No Longer Accessible to Work Gang ( <b>New Requirement</b> ).	300 Roadway Work Gangs (10 Employees in each gang × 59,400 briefings).	594,000 briefings .....	20 seconds .....	3,300
214.317—On-Track Procedures for Snow Removal ( <b>New Requirements</b> ).	20 Railroads .....	20 operating .....	60 minutes .....	20
—On-Track Procedures for Weed Spray Equipment.	722 Railroads .....	722 operating procedures.	60 minutes .....	722
—Roadway Worker in Charge (RWIC) Designation of alternative place of safety other than tunnel niche or clearing bay.	722 Railroads .....	25 designation .....	5 minutes .....	2

<sup>23</sup> \$20,965,962 \* .08 = \$1,677,277/20 years/729 small railroads = \$115 per year per small railroad.

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
214.318—Procedures established by Railroads for workers to perform duties incidental to those of inspecting, testing, servicing, or repairing rolling equipment ( <b>New Requirement</b> ).	722 Railroads .....	722 rules/procedures ...	3 hours .....	2,166
214.319(b)(1)—New Requirements—Class I & II Railroads evaluation of its on-track safety program and identification of appropriate method to provide redundant protections for roadway work groups.	47 Railroads .....	47 On-track program evaluations.	40 hours + 16 hours ....	1,568
(b)(2)—Implementing redundant protections—safety briefings.	47 Railroads .....	77,394 safety briefings	4 minutes .....	5,160
(c) Railroad written request to FRA requesting exemption from requirements of section 214.319(b) for each segment of track governed by Positive Train Control.	47 Railroads .....	5 written requests .....	60 minutes .....	5
214.320—Roadway Maintenance Machines Movement over Signalized Non-controlled Track—RR request to FRA for equivalent level of protection to that of Working Limits( <b>New Requirement</b> ).	722 Railroads .....	5 requests .....	4 hours .....	20
214.322— <b>New Requirements</b> ) Exclusive Track Occupancy, Electronic Display—Written Authorities/Printed Authority Copy If Electronic Display Fails or Malfunctions.	3 Class I Railroads .....	500 written authorities ..	10 minutes .....	83
—On-Track Safety Briefings in Event Written Authority/Printed Authority Copy Cannot Be Obtained.	722 Railroads .....	100 briefings .....	6 minutes .....	10
—Data File Records Relating to Electronic Display Device Involved in Part 225 Reportable Accident/Incident.	3 Class I Railroads .....	25 data file records .....	2 hours .....	50
—Request to FRA for NIST Publication 800–63–2, “Electronic Authentication Guideline”.	722 Railroads .....	3 requests + 3 copies ..	30 minutes + 2 minutes	2
214.325—Train Coordination ( <b>Revised Requirement</b> )—Working Limits Established on Controlled Track through Train Coordination: Verbal communication by roadway worker establishing working limits.	50,000 Roadway Workers.	36,500 verbal messages.	15 seconds .....	152
214.327—Inaccessible Track—Working Limits Established by Locomotive With/Without Cars to Prevent Access—Communication by RWIC with Locomotive Crew Member ( <b>New Requirement</b> ).	10 Railroads .....	9,125 talks/messages ..	10 minutes .....	1,521
—Notification to Train or Engine Crew on Any Working Limits in Effect That Prohibit Train Movement until RWIC gives permission to enter Working Limits ( <b>New Requirement</b> ).	10 Railroads .....	1,750 notices .....	60 minutes .....	1,750
—Working Limits on Non-controlled Track: Notifications.	722 Railroads .....	50,000 notifications .....	10 minutes .....	8,333
214.329—Train Approach Warning Provided by Watchmen/Lookouts—Communications.	722 Railroads .....	795,000 non- yard messages + 79,500 yard messages.	30 seconds + 10 seconds.	6,846
—Written Designation of Watchmen/Lookouts.	722 Railroads .....	26,250 designations .....	30 seconds .....	219
214.336— <i>Procedures for Adjacent-Track Movements Over 25 mph</i> —Notifications/Watchmen/Lookout Warnings.	100 Railroads .....	10,000 notices .....	15 seconds .....	42
—Roadway Worker Communication with Train Engineers or Equipment Operators.	100 Railroads .....	3,000 talks .....	1 minute .....	50
— <i>Procedures for Adjacent-Track Movements 25 mph or less</i> —Notifications/Watchmen/Lookout Warnings.	100 Railroads .....	3,000 notices .....	15 seconds .....	13
—Roadway Worker Communication with Train Engineers or Equipment Operators.	100 Railroads .....	1,500 talks .....	1 minute .....	25
—Exceptions to the requirements in paragraphs (a), (b), and (c) for adjacent—controlled-track on-track safety: Work activities involving certain equipment and purposes—On-Track Job Safety Briefings.	100 Railroads .....	2,403,450 briefings .....	15 seconds .....	10,014
214.337—On-Track Safety Procedures for Lone Workers: Statements by Lone Workers.	722 Railroads .....	2,080,000 statements ..	30 seconds .....	17,333

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
—Statement of On-Track Safety Using Individual Train Detection on Track Outside Manual Interlocking, a Controlled Point, or a Remotely Controlled Hump Yard Facility.	722 Railroads .....	200 statements .....	30 seconds .....	2
214.339—Audible Warning from Trains ( <b>Revised Requirement</b> )—Written Procedures That Prescribe Effective Requirements for Audible Warning by Horn and/or Bell for Trains.	44 Railroads .....	44 written procedures ..	13 hours .....	572
214.343/345/347/349/351/353/355—Annual Training for All Roadway Workers (RWs) ( <b>New/Revised Requirements</b> ).	50,000 Rdwy Workers	50,000 tr. RW .....	4.5 hours .....	225,000
—Training of Trainmen (Conductors & Brakemen) to Act as RWIC and Training of Station Platform Work Coordinators ( <b>New Requirement</b> ).	810 RR Workers .....	810 trained workers .....	2 hours .....	1,620
—Additional adjacent on-track safety training for Roadway Workers.	35,000 Rdwy Workers	35,000 tr. RW .....	5 minutes .....	2,917
—Records of Training .....	50,000 Roadway Workers.	50,000 records .....	2 minutes .....	1,667
214.503—Good Faith Challenges; Procedures for Notification and Resolution—Notifications for Non-Compliant Roadway Maintenance Machines or Unsafe Condition.	50,000 Rdwy Workers	125 notices .....	10 minutes .....	21
—Resolution Procedures .....	644 Railroads/200 contractors.	10 procedures .....	2 hours .....	20
214.505—Required Environmental Control and Protection Systems For New On-Track Roadway Maintenance Machines with Enclosed Cabs.	644 Railroads/200 contractors.	500 lists .....	1 hour .....	500
—Designations/Additions to List .....	644 Railroads/200 contractors.	150 additions/designations.	5 minutes .....	13
214.507—A-Built Light Weight on New Roadway Maintenance Machines.	644 Railroads/200 contractors.	1,000 stickers/stencils ..	5 minutes .....	83
214.511—Required Audible Warning Devices For New On-Track Roadway Maintenance Machines.	644 Railroads/200 contractors.	3,700 identified mechanisms.	5 minutes .....	308
214.513—Retrofitting of Existing On-Track Roadway Maintenance Machines.				
—Identification of Triggering Mechanism—Horns.	703 Railroads/200 contractors.	200 I.D. mechanisms ...	5 minutes .....	17
214.515—Overhead Covers For Existing On-Track Roadway Maintenance Machines.	644 Railroads/200 contractors.	500 requests + 500 responses.	10 minutes; 20 minutes	250
214.517—Retrofitting of Existing On-Track Roadway Maintenance Machines Manufactured On or After Jan. 1, 1991.	644 Railroads/200 contractors.	500 stencils/displays ...	5 minutes .....	42
214.518—Safe and Secure Position for riders ....	644 Railroads/200 contractors.	1,000 stencils .....	5 minutes .....	83
—Positions identified by stencilings/markings/notices.				
214.523—Hi-Rail Vehicles .....	644 Railroads/200 contractors.	2,000 records .....	60 minutes .....	2,000
—Non-Complying Conditions .....	644 Railroads/200 contractors.	500 tags + 500 reports	10 minutes + 15 minutes.	208
214.527—Inspection for Compliance; Repair Schedules.	644 Railroads/200 contractors.	550 tags + 550 reports	5 minutes + 15 minutes	184
214.533—Schedule of Repairs; Subject to Availability of Parts.	644 Railroads/200 contractors.	250 records .....	15 minutes .....	63

All estimates include the time to review instructions; search existing data sources; gather or maintain the needed data; and review the information. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, FRA Office of Safety, Information Clearance Officer, at 202–493–6292, or Ms. Kim Toone, FRA Office of Information Technology,

Information Clearance Officer, at 202–493–6132.

OMB must make a decision concerning the collection of information requirements this final rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

FRA is not authorized to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number. If required, FRA will obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action before the effective date of the final rule. The OMB control number, when assigned, will be

announced by separate notice in the **Federal Register**.

#### *D. Federalism Implications*

Executive Order 13132, “Federalism” (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” are defined in the Executive Order to include regulations 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.” Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

This final rule has been analyzed consistent with the principles and criteria in Executive Order 13132. This final rule would not have a substantial effect on the States or their political subdivisions; it would not impose any compliance costs; and it would not affect the relationships between the Federal government and the States or their political subdivisions, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

However, this final rule could have preemptive effect by operation of law under certain provisions of the Federal railroad safety statutes, specifically the former Federal Railroad Safety Act of 1970, repealed and recodified at 49 U.S.C. 20106. Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation,

or order qualifies under the “essentially local safety or security hazard” exception to section 20106.

In sum, FRA has analyzed this final rule consistent with the principles and criteria in Executive Order 13132. As explained above, FRA has determined that this final rule has no federalism implications, other than the possible preemption of State laws under Federal railroad safety statutes, specifically 49 U.S.C. 20106. Accordingly, FRA has determined preparation of a federalism summary impact statement for this final rule is not required.

#### *E. Environmental Impact*

FRA has evaluated this final rule under the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), other environmental statutes, related regulatory requirements, and its “Procedures for Considering Environmental Impacts” (FRA’s Procedures) (64 FR 28545, May 26, 1999). FRA has determined this final rule is categorically excluded from detailed environmental review under section 4(c)(20) of FRA’s Procedures, “Promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions of air or water pollutants or noise or increased traffic congestion in any mode of transportation.” *See* 64 FR 28547. Categorical exclusions (CEs) are actions identified in an agency’s NEPA implementing procedures that do not normally have a significant impact on the environment and, thus, do not require either an environmental assessment (EA) or environmental impact statement (EIS). *See* 40 CFR 1508.4.

In analyzing the applicability of a CE, the agency must also consider whether extraordinary circumstances are present that would warrant a more detailed environmental review through the preparation of an EA or EIS. *Id.* Under section 4(c) and (e) of FRA’s Procedures, FRA has further concluded no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. The purpose of this rulemaking is to finalize a number of railroad worker safety practices developed by the RSAC, some required by the FAST Act, and additional rules to decrease railroad worker accidents and injuries. FRA does not anticipate any environmental impacts from these requirements and finds that there are no extraordinary circumstances present in connection with this final rule.

#### *F. Executive Order 12898 (Environmental Justice)*

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and DOT Order 5610.2(a) (91 FR 27534, May 10, 2012) require DOT agencies to achieve environmental justice as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations. The DOT Order instructs DOT agencies to address compliance with Executive Order 12898 and requirements within the DOT Order in rulemaking activities, as appropriate. FRA evaluated this final rule under Executive Order 12898 and the DOT Order and has determined it would not cause disproportionately high and adverse human health and environmental effects on minority or low-income populations.

#### *G. Executive Order 13175 (Tribal Consultation)*

FRA evaluated this final rule under the principles and criteria in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, dated November 6, 2000. The final rule would not have a substantial direct effect on one or more Indian tribes, would not impose substantial direct compliance costs on Indian tribal governments, and would not preempt tribal laws. Therefore, the funding and consultation requirements of Executive Order 13175 do not apply, and a tribal summary impact statement is not required.

#### *H. Unfunded Mandates Reform Act of 1995*

Under Section 201 of the Unfunded Mandates Reform Act of 1995 (Public Law 104–4, 2 U.S.C. 1531), each Federal agency “shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).” Section 202 of the Act (2 U.S.C. 1532) further requires that

before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in 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 1

year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement

detailing the effect on State, local, and tribal governments and the private sector. This final rule will not result in the expenditure, in the aggregate, of \$155,000,000 or more (adjusted annually for inflation) in any one year. Thus, preparation of such a statement is not required.

#### I. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any "significant energy action." 66 FR 28355, May 22, 2001. Under the Executive Order, a "significant energy action" is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA evaluated this final rule consistent with Executive Order 13211. FRA has determined this final rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy, and, thus, is not a "significant energy action" under Executive Order 13211.

#### J. Trade Impact

The Trade Agreements Act of 1979 19 U.S.C. 2501 *et seq.*) prohibits Federal agencies from engaging in any standards setting or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. FRA has assessed the potential effect of this final rule on foreign commerce and believes its requirements are consistent with the Trade Agreements Act. The requirements imposed are safety standards, which, as noted, are not considered unnecessary obstacles to trade.

#### K. Privacy Act

Interested parties should be aware that anyone can search the electronic

form of all written comments received into any agency docket by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** (65 FR 19477–19478, Apr. 11, 2000) or you may visit <http://www.dot.gov/privacy.html>.

#### L. Analysis Under 1 CFR Part 51

As 1 CFR 51.5 requires, FRA has summarized the standard incorporated by reference and shown its reasonable availability in the Section-by-Section analysis above.

#### List of Subjects in 49 CFR Part 214

Bridges, Incorporation by reference, Occupational safety and health, Penalties, Railroad safety, Reporting and recordkeeping requirements.

#### The Rule

For the reasons discussed in the preamble, FRA amends part 214 of chapter II, subtitle B of title 49, Code of Federal Regulations, as follows:

#### PART 214—[AMENDED]

- 1. The authority citation for part 214 is revised to read as follows:

**Authority:** 49 U.S.C. 20102–20103, 20107, 21301–21302, 21304, 28 U.S.C. 2461, note; and 49 CFR 1.89.

#### Subpart A—General

- 2. Amend § 214.7 as follows:
  - a. Add the definitions, in alphabetical order, for "controlled point", "interlocking, manual", "maximum authorized speed", "on-track safety manual", "roadway worker in charge";
  - b. Revise the definitions for "effective securing device" and "watchman/lookout".

The additions and revisions read as follows:

#### § 214.7 Definitions.

\* \* \* \* \*

**Controlled point** means a location where signals and/or other functions of a traffic control system are controlled from the control machine.

\* \* \* \* \*

**Effective securing device** means a vandal and tamper resistant lock, keyed for application and removal only by the roadway worker(s) for whom the protection is provided. In the absence of a lock, it is acceptable to use a spike driven firmly into a switch tie or a switch point clamp to prevent the use of a manually operated switch. It is also acceptable to use portable derails secured with specifically designed

metal wedges. Securing devices without a specially keyed lock shall be designed in such a manner that they require railroad track tools for installation and removal and the operating rules of the railroad must prohibit removal by employees other than the class, craft, or group of employees for whom the protection is being provided. Regardless of the type of securing device, the throwing handle or hasp of the switch or derail shall be uniquely tagged. If there is no throwing handle, the securing device shall be tagged.

\* \* \* \* \*

**Interlocking, manual** means an arrangement of signals and signal appliances operated from an interlocking machine and so interconnected by means of mechanical and/or electric locking that their movements must succeed each other in proper sequence, train movements over all routes being governed by signal indication.

\* \* \* \* \*

**Maximum authorized speed** means the highest speed permitted for the movement of trains permanently established by timetable/special instructions, general order, or track bulletin.

\* \* \* \* \*

**On-track safety manual** means the entire set of on-track safety rules and instructions maintained together in one manual designed to prevent roadway workers from being struck by trains or other on-track equipment. These instructions include operating rules and other procedures concerning on-track safety protection and on-track safety measures.

\* \* \* \* \*

**Roadway worker in charge** means a roadway worker who is qualified under § 214.353 to establish on-track safety for roadway work groups, and lone workers qualified under § 214.347 to establish on-track safety for themselves.

\* \* \* \* \*

**Watchman/lookout** means an employee who has been trained and qualified to provide warning to roadway workers of approaching trains or on-track equipment. Watchmen/lookouts shall be properly equipped to provide visual and auditory warning such as whistle, air horn, white disk, red flag, lantern, fuse. A watchman/lookout's sole duty is to look out for approaching trains/on-track equipment and provide at least fifteen seconds advanced warning to employees before arrival of trains/on-track equipment.

\* \* \* \* \*

■ 3. Revise § 214.113(b) to read as follows:

**§ 214.113 Head protection.**

\* \* \* \* \*

(b) Helmets required by this section shall conform to the requirements of 29 CFR 1910.135(b), as established by the U.S. Department of Labor, Occupational Safety and Health Administration.

■ 4. Revise § 214.115(b) to read as follows:

**§ 214.115 Foot protection.**

\* \* \* \* \*

(b) Foot protection equipment required by this section shall conform to the requirements of 29 CFR 1910.136(b), as established by the U.S. Department of Labor, Occupational Safety and Health Administration.

■ 5. Revise § 214.117(b) to read as follows:

**§ 214.117 Eye and face protection.**

\* \* \* \* \*

(b) Eye and face protection equipment required by this section shall conform to the requirements of 29 CFR 1910.133(b), as established by the U.S. Department of Labor, Occupational Safety and Health Administration.

\* \* \* \* \*

**Subpart C—Roadway Worker Protection**

■ 6. Revise § 214.301(c) to read as follows:

**§ 214.301 Purpose and scope.**

\* \* \* \* \*

(c) This subpart prescribes safety standards related to the movement of roadway maintenance machines where such movements affect the safety of roadway workers. Except as provided for in § 214.320, this subpart does not otherwise affect movements of roadway maintenance machines that are conducted under the authority of a train dispatcher, a control operator, or the operating rules of the railroad.

**§ 214.302 [Removed and Reserved]**

■ 7. Remove and reserve § 214.302.

**§ 214.305 [Removed and Reserved]**

■ 8. Remove and reserve § 214.305.

■ 9. Revise § 214.307 to read as follows:

**§ 214.307 On-track safety programs.**

(a) Each railroad subject to this part shall maintain and have in effect an on-track safety program which complies with the requirements of this subpart. New railroads must have an on-track safety program in effect by the date on which operations commence. The on-track safety program shall be retained at

a railroad's system headquarters and division headquarters, and shall be made available to representatives of the FRA for inspection and copying during normal business hours. Each railroad to which this part applies is authorized to retain its program by electronic recordkeeping in accordance with §§ 217.9(g) and 217.11(c) of this chapter.

(b) Each railroad shall notify, in writing, the Associate Administrator for Safety and Chief Safety Officer, Federal Railroad Administration, RRS-15, 1200 New Jersey Avenue SE., Washington, DC 20590, not less than one month before its on-track safety program becomes effective. The notification shall include the effective date of the program and the name, title, address and telephone number of the primary person to be contacted with regard to review of the program. This notification procedure shall also apply to subsequent changes to a railroad's on-track safety program.

(c) Upon review of a railroad's on-track safety program, the FRA Associate Administrator for Railroad Safety and Chief Safety Officer may, for cause stated, may disapprove the program. Notification of such disapproval shall be made in writing and specify the basis for the disapproval decision. If the Associate Administrator for Railroad Safety and Chief Safety Officer disapproves the program:

(1) The railroad has 35 days from the date of the written notification of such disapproval to:

(i) Amend its program and submit it to the Associate Administrator for Railroad Safety and Chief Safety Officer for approval; or

(ii) Provide a written response in support of its program to the Associate Administrator for Railroad Safety and Chief Safety Officer.

(2) FRA's Associate Administrator for Railroad Safety and Chief Safety Officer will subsequently issue a written decision either approving or disapproving the railroad's program.

(3) Failure to submit to FRA an amended program or provide a written response in accordance with this paragraph will be considered a failure to implement an on-track safety program under this subpart.

■ 10. Revise § 214.309 to read as follows:

**§ 214.309 On-track safety manual.**

(a) The applicable on-track safety manual (as defined by § 214.7) shall be readily available to all roadway workers. Each roadway worker in charge responsible for the on-track safety of others, and each lone worker, shall be

provided with and shall maintain a copy of the on-track safety manual.

(b) When it is impracticable for the on-track safety manual to be readily available to a lone worker, the employer shall establish provisions for such worker to have alternative access to the information in the manual.

(c) Changes to the on-track safety manual may be temporarily published in bulletins or notices. Such publications shall be retained along with the on-track safety manual until fully incorporated into the manual.

■ 11. In § 214.315, revise paragraphs (a)(3), (a)(4), (b), the first sentence of paragraphs (c) through (e) and add paragraph (a)(5) to read as follows:

**§ 214.315 Supervision and communication.**

(a) \* \* \*

(3) Information about any adjacent tracks, on-track safety for such tracks, if required by this subpart or deemed necessary by the roadway worker in charge, and identification of any roadway maintenance machines that will foul such tracks;

(4) A discussion of the nature of the work to be performed and the characteristics of the work location to ensure compliance with this subpart; and

(5) Information on the accessibility of the roadway worker in charge and alternative procedures in the event the roadway worker in charge is no longer accessible to the members of the roadway work group.

(b) A job briefing for on-track safety shall be deemed complete only after the roadway worker(s) has acknowledged understanding of the on-track safety procedures and instructions presented.

(c) Every roadway work group whose duties require fouling a track shall have one roadway worker in charge designated by the employer to provide on-track safety for all members of the group. \* \* \*

(d) Before any member of a roadway work group fouls a track, the roadway worker in charge designated under paragraph (c) of this section shall inform each roadway worker of the on-track safety procedures to be used and followed during the performance of the work at that time and location. \* \* \*

(e) Each lone worker shall communicate at the beginning of each duty period with a supervisor or another designated employee to receive an on-track safety job briefing and to advise of his or her planned itinerary and the procedures that he or she intends to use for on-track safety. \* \* \*

■ 12. Revise § 214.317 to read as follows:

**§ 214.317 On-track safety procedures, generally.**

(a) Each employer subject to the provisions of this part shall provide on-track safety for roadway workers by adopting a program that contains specific rules for protecting roadway workers that comply with the provisions of §§ 214.319 through 214.337.

(b) Roadway workers may walk across any track provided that they can safely be across and clear of the track before a train or other on-track equipment would arrive at the crossing point under the following circumstances:

(1) Employers shall adopt, and roadway workers shall comply with, applicable railroad safety rules governing how to determine that it is safe to cross the track before starting across;

(2) Roadway workers shall move directly and promptly across the track; and

(3) On-track safety protection is in place for all roadway workers who are actually engaged in work, including inspection, construction, maintenance or repair, and extending to carrying tools or material that restricts motion, impairs sight or hearing, or prevents an employee from detecting and moving rapidly away from an approaching train or other on-track equipment.

(c) On non-controlled track, on-track roadway maintenance machines engaged in weed spraying or snow removal may proceed under the provisions of § 214.301(c), under the following conditions:

(1) Each railroad shall establish and comply with an operating procedure for on-track snow removal and weed spray equipment to ensure that:

(i) All on-track movements in the affected area are informed of such operations;

(ii) All on-track movements shall operate at restricted speed as defined in § 214.7, except on other than yard tracks and yard switching leads, where all on-track movements shall operate prepared to stop within one-half the range of vision but not exceeding 25 mph;

(iii) A means for communication between the on-track equipment and other on-track movements is provided; and

(iv) Remotely controlled hump yard facility operations are not in effect, and kicking of cars is prohibited unless agreed to by the roadway worker in charge.

(2) Roadway workers engaged in such snow removal or weed spraying operations subject to this section shall retain an absolute right to use the provisions of § 214.327 (inaccessible track).

(3) Roadway workers assigned to work with this equipment may line switches (or derrails operated via a switch stand) for the machine's movement but shall not engage in any roadway work activity unless protected by another form of on-track safety.

(4) Each roadway maintenance machine engaged in snow removal or weed spraying under this provision shall be equipped with and utilize:

(i) An operative 360-degree intermittent warning light or beacon;

(ii) Work lights, if the machine is operated during the period between one-half hour after sunset and one-half hour before sunrise or in dark areas such as tunnels, unless equivalent lighting is otherwise provided;

(iii) An illumination device, such as a headlight, capable of illuminating obstructions on the track ahead in the direction of travel for a distance of 300 feet under normal weather and atmospheric conditions;

(iv) A brake light activated by the application of the machine braking system, and designed to be visible for a distance of 300 feet under normal weather and atmospheric conditions; and

(v) A rearward viewing device, such as a rearview mirror.

(d) Tunnel niches or clearing bays in existence prior to April 1, 2017 that are designed to permit roadway workers to occupy a place of safety when trains or other on-track equipment pass the niche or clearing bay, but are less than four feet from the field side of the nearest rail, may continue to be used as a place of safety provided:

(1) Such niches or clearing bays are visually inspected by the roadway worker in charge or lone worker prior to making the determination that the niche or clearing bay is suitable for use as a place of safety;

(2) There is adequate sight distance to permit a roadway worker or lone worker to occupy the place of safety in the niche or clearing bay at least 15 seconds prior to the arrival of a train or other on-track equipment at the work location in accordance with §§ 214.329 and 214.337; and

(3) The roadway worker in charge or lone worker shall have the absolute right to designate a place of safety as a location other than that of a tunnel niche or clearing bay described by this paragraph (d), or to establish working limits.

■ 13. Add § 214.318 to read as follows:

**§ 214.318 Locomotive servicing and car shop repair track areas.**

(a) In lieu of the requirements of this subpart, workers (as defined by § 218.5

of this chapter) within the limits of locomotive servicing and car shop repair track areas (as both are defined by § 218.5 of this chapter) may utilize procedures established by a railroad in accordance with part 218, subpart B, of this chapter (Blue Signal Protection) to perform duties incidental to inspecting, testing, servicing, or repairing rolling equipment when those incidental duties involve fouling a track that is protected by Blue Signal Protection. A railroad utilizing Blue Signal Protection in lieu of the requirements of this subpart must have rules in effect governing the applicability of those protections to the incidental duties being performed.

(b) Paragraph (a) of this section applies to employees of a contractor to a railroad if such incidental duties are performed under the supervision of a railroad employee qualified (as defined by § 217.4 of this chapter) on the railroad's rules and procedures implementing the Blue Signal Protection requirements.

(c) Any work performed within the limits of a locomotive servicing or car shop repair track area with the potential of fouling a track which requires a person qualified under § 213.7 of this chapter to be present to inspect or supervise such work must be performed in accordance with the requirements of this subpart.

■ 14. Revise § 214.319 to read as follows:

**§ 214.319 Working limits, generally.**

Working limits established on controlled track shall conform to the provisions of § 214.321 Exclusive track occupancy, § 214.323 Foul time, or § 214.325 Train coordination. Working limits established on non-controlled track shall conform to the provision of § 214.327 Inaccessible track.

(a) Working limits established under any procedure shall, in addition, conform to the following provisions:

(1) Only a roadway worker in charge who is qualified in accordance with § 214.353 shall establish or have control over working limits for the purpose of establishing on-track safety.

(2) Only one roadway worker in charge who is qualified in accordance with § 214.353 shall have control over working limits on any one segment of track.

(3) All affected roadway workers shall be notified before working limits are released for the operation of trains. Working limits shall not be released until all affected roadway workers have either left the track or have been afforded on-track safety through train approach warning in accordance with § 214.329.

(b) Each Class I or Class II railroad or each railroad providing regularly scheduled intercity or commuter rail passenger transportation that utilizes controlled track working limits as a form of on-track safety (under §§ 214.321 through 214.323) in signalized territory shall:

(1) By July 1, 2017, evaluate its on-track safety program and identify an appropriate method(s) of providing redundant signal protections for roadway work groups who depend on a train dispatcher or control operator to provide signal protection in establishing controlled track working limits. For purposes of this section, redundant signal protections means risk mitigation measures or safety redundancies adopted to ensure the proper establishment and maintenance of signal protections for controlled track working limits until such working limits are released by the roadway worker in charge. Appropriate redundant protections could include the use of various risk mitigation measures (or a combination of risk mitigation measures) such as technology, training, supervision, or operating-based procedures; or could include use of redundant signal protection, such as shunting, designed to prevent signal system-related incursions into established controlled track working limits; and

(2) By January 1, 2018, specifically identify, implement, and comply with the method(s) of providing redundant protections in its on-track safety program.

(c) Upon a railroad's request, FRA will consider an exemption from the requirements of paragraph (b) of this section for each segment of track(s) for which operations are governed by a positive train control system under part 236, subpart I, of this chapter. A request for approval to exempt a segment of track must be submitted in writing to the FRA Associate Administrator for Railroad Safety and Chief Safety Officer. The FRA Associate Administrator for Railroad Safety and Chief Safety Officer will review a railroad's submission and will notify a railroad of its approval or disapproval in writing within 90 days of FRA's receipt of a railroad's written request, and shall specify the basis for any disapproval decision.

■ 15. Add § 214.320 to read as follows:

**§ 214.320 Roadway maintenance machine movements over signalized non-controlled track.**

Working limits must be established for roadway maintenance machine movements on non-controlled track equipped with automatic block signal

systems over which trains are permitted to exceed restricted speed (for purposes of this section, on-track movements prepared to stop within on-half the range of vision but not exceeding 25 mph). This section applies unless the railroad's operating rules protect the movements of roadway maintenance machines in a manner equivalent to that provided for by limiting all train and locomotive movements to restricted speed, and such equivalent level of protection is first approved in writing by FRA's Associate Administrator for Railroad Safety and Chief Safety Officer.

■ 16. In § 214.321, revise paragraphs (a) introductory text, (b) introductory text, (b)(2), and (d) and add paragraphs (b)(4) and (e) to read as follows:

**§ 214.321 Exclusive track occupancy.**

\* \* \* \* \*

(a) The track within working limits shall be placed under the control of one roadway worker in charge by either:

\* \* \* \* \*

(b) An authority for exclusive track occupancy given to the roadway worker in charge of the working limits shall be transmitted on a written or printed document directly, by relay through a designated employee, in a data transmission, or by oral communication, to the roadway worker in charge by the train dispatcher or control operator in charge of the track.

\* \* \* \* \*

(2) The roadway worker in charge of the working limits shall maintain possession of the written or printed authority for exclusive track occupancy while the authority for the working limits is in effect. A data transmission of an authority displayed on an electronic screen may be used as a substitute for a written or printed document required under this paragraph. Electronic displays of authority shall comply with the requirements of § 214.322.

\* \* \* \* \*

(4) An authority shall specify a unique roadway work group number, an employee name, or a unique identifier. A railroad shall adopt procedures that require precise communication between trains and other on-track equipment and the roadway worker in charge or lone worker controlling the working limits in accordance with § 214.319. The procedures may permit communications to be made directly between a train or other on-track equipment and a roadway worker in charge or lone worker, or through a train dispatcher or control operator.

\* \* \* \* \*

(d) Movements of trains and roadway maintenance machines within working limits established through exclusive track occupancy shall be made only under the direction of the roadway worker in charge of the working limits. Such movements shall be at restricted speed unless a higher authorized speed has been specifically authorized by the roadway worker in charge of the working limits.

(e) Working limits established by exclusive track occupancy authority may occur behind designated trains moving through the same limits in accordance with the following provisions:

(1) The authority establishing working limits will only be considered to be in effect after it is confirmed by the roadway worker in charge or lone worker that the affected train(s) have passed the point to be occupied or fouled by:

(i) Visually identifying the affected trains(s); or

(ii) Direct radio contact with a crew member of the affected train(s); or

(iii) Receiving information about the affected train from the train dispatcher or control operator.

(2) When utilizing the provisions of paragraph (e)(1)(i) of this section, a railroad's operating rules shall include procedures prohibiting the affected train(s) from making a reverse movement into or within the limits being fouled or occupied.

(3) After the roadway worker in charge or lone worker has confirmed that the affected trains(s) have passed the point to be occupied or fouled, the roadway worker in charge shall record on the authority the time of passage and engine number(s) of the affected trains(s). If the confirmation is by direct communication with the train(s), or through confirmation by the train dispatcher or control operator, the roadway worker in charge shall record the time of such confirmation and the engine number(s) of the affected trains on the authority.

(4) A separate roadway work group afforded on-track safety by the roadway worker in charge of authority limits, and that is located away from the roadway worker in charge of authority limits, shall:

(i) Occupy or foul the track only after receiving permission from the roadway worker in charge to occupy the working limits after the roadway worker charge has fulfilled the provisions of paragraph (e)(1) of this section; and

(ii) Be accompanied by an employee qualified to the level of a roadway worker in charge who shall also have a copy of the authority and who shall

independently execute the required communication requirements of paragraphs (e)(1) and (3) of this section.

(5) Any subsequent train or on-track equipment movements within working limits after the passage of the affected train(s) shall be governed by paragraph (d) of this section.

■ 17. Add § 214.322 to read as follows:

**§ 214.322 Exclusive track occupancy, electronic display.**

(a) While it is in effect, all the contents of an authority electronically displayed shall be readily viewable by the roadway worker in charge that is using the authority to provide on-track safety for a roadway work group.

(b) If the electronic display device malfunctions, fails, or cannot display an authority while it is in effect, the roadway worker in charge shall either obtain a written or printed copy of the authority in accordance with § 214.321 (except that on-track roadway maintenance machine and hi-rail movements must stop) or establish another form of on-track safety without delay. In the event that a written or printed copy of the authority cannot be obtained or another form of on-track safety cannot be established after failure of an electronic display device, the roadway worker in charge shall instruct all roadway workers to stop work and occupy a place of safety and conduct an on-track safety job briefing to determine the safe course of action with the roadway work group.

(c) All authorized users of an electronic display system shall be uniquely identified to support individual accountability. A user may be a person, a process, or some other system that accesses or attempts to access an electronic display system to perform tasks or process an authority.

(d) All authorized users of an electronic display system must be authenticated prior to being granted access to such system. The system shall ensure the confidentiality and integrity of all internally stored authentication data and protect it from access by unauthorized users. The authentication scheme shall utilize algorithms approved by the National Institute of Standards and Technology (NIST), or any similarly recognized and FRA approved standards body.

(e) The integrity of all data must be ensured during transmission/reception, processing, and storage. All new electronic display systems implemented on or after July 1, 2017 shall utilize a Message Authentication Code (MAC) to ensure that all data is error free. The MAC shall utilize algorithms approved by NIST, or any similarly recognized

and FRA approved standards body. Systems implemented prior to July 1, 2017 may utilize a Cyclical Redundancy Code (CRC) to ensure that all data is error free provided:

(1) The collision rate for the CRC check utilized shall be less than or equal to 1 in  $2^{32}$ . Systems implemented prior to July 1, 2017 that do not utilize a CRC with a collision rate less than or equal to 1 in  $2^{32}$  must be retired or updated to utilize a MAC no later than July 1, 2018.

(2) MAC and CRC checks shall only be used to verify the accuracy of an electronic authority data message and shall not be used in an error correction reconstruction of the data. An authority must fail if the MAC or CRC checks do not match.

(f) Authorities transmitted to each electronic display device shall be retained in the device's non-volatile memory for not less than 72 hours.

(g) If any electronic display device used to obtain an authority is involved in an accident/incident that is required to be reported to FRA under part 225 of this chapter, the railroad or employer that was using the device at the time of the accident shall, to the extent possible, and to the extent consistent with the safety of life and property, preserve the data recorded by each such device for analysis by FRA. This preservation requirement permits the railroad or employer to extract and analyze such data, provided the original downloaded data file, or an unanalyzed exact copy of it, shall be retained in secure custody and shall not be utilized for analysis or any other purpose except by direction of FRA or the National Transportation Safety Board. This preservation requirement shall expire one (1) year after the date of the accident unless FRA or the National Transportation Safety Board notifies the railroad in writing that the data are desired for analysis.

(h) New electronic display systems implemented on or after July 1, 2017 shall provide Level 3 assurance as defined by NIST Special Publication 800-63-2, Electronic Authentication Guideline, "Computer Security," August 2013. Systems implemented prior to July 1, 2017 shall provide Level 2 assurance. Systems implemented prior to July 1, 2017 that do not provide Level 2 or higher assurance must be retired, or updated to provide Level 2 assurance, no later than July 1, 2018. The incorporation by reference of this NIST Special Publication was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy of the incorporated document from the

National Institute of Standards and Technology, 100 Bureau Drive, Stop 8930, Gaithersburg, MD 20899-8930, <http://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-63-2.pdf>. You may inspect a copy of the document at the Federal Railroad Administration, Docket Clerk, 1200 New Jersey Avenue SE., Washington, DC, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741-6030, or go to: [http://www.archives.gov/federal\\_register/code\\_of\\_federal\\_regulations/ibr\\_locations.html](http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html).

■ 18. In § 214.323, revise paragraphs (a), (b), and (c) and add paragraph (d) to read as follows:

**§ 214.323 Foul time.**

\* \* \* \* \*

(a) Foul time may be given orally or in writing by the train dispatcher or control operator only after that employee has withheld the authority of all trains or other on-track equipment to move into or within the working limits during the foul time period.

(b) Each roadway worker in charge to whom foul time is transmitted orally shall repeat the track number or identifier, track limits and time limits of the foul time to the issuing employee for verification before the foul time becomes effective.

(c) The train dispatcher or control operator shall not permit the movement of trains or other on-track equipment into working limits protected by foul time until the roadway worker in charge who obtained the foul time has reported clear of the track.

(d) The roadway worker in charge shall not permit the movement of trains or other on-track equipment into or within working limits protected by foul time.

■ 19. In § 214.325, revise the introductory text to read as follows:

**§ 214.325 Train coordination.**

Working limits established on controlled track by a roadway worker in charge through the use of train coordination shall comply with the following requirements:

\* \* \* \* \*

■ 20. In § 214.327, add paragraphs (a)(6), (7), and (8) to read as follows:

**§ 214.327 Inaccessible track.**

(a) \* \* \*

(6) A locomotive with or without cars placed to prevent access to the working limits at one or more points of entry to the working limits, provided the following conditions are met:

(i) The roadway worker in charge who is responsible for establishing working limits communicates with a member of the crew assigned to the locomotive and determines that:

(A) The locomotive is visible to the roadway worker in charge that is establishing the working limits; and  
(B) The locomotive is stopped.

(ii) Further movements of the locomotive shall be made only as permitted by the roadway worker in charge controlling the working limits;

(iii) The crew of the locomotive shall not leave the locomotive unattended or go off duty unless communication occurs with the roadway worker in charge and an alternate means of on-track safety protection has been established by the roadway worker in charge; and

(iv) Cars coupled to the locomotive on the same end and on the same track as the roadway workers shall be connected to the train line air brake system and such system shall be charged with compressed air to initiate an emergency brake application in case of unintended uncoupling. Cars coupled to the locomotive on the same track on the opposite end of the roadway workers shall have sufficient braking capability to control their movement.

(7) A railroad's procedure governing block register territory that prevents trains and other on-track equipment from occupying the track when the territory is under the control of a lone worker or roadway worker in charge. The roadway worker in charge or lone worker shall have the absolute right to render block register territory inaccessible under the other provisions of paragraph (a) of this section.

(8) Railroad operating rules that prohibit train or engine or other on-track equipment movements on a main track within yard limits or restricted limits until the train or engine or on-track equipment receives notification of any working limits in effect and prohibit the train or engine or on-track equipment from entering working limits until permission is received by the roadway worker in charge. Such working limits shall be delineated with stop signs (flags), and where speeds are in excess of restricted speed and physical characteristics permit, also with advance signs (flags).

\* \* \* \* \*

■ 21. Amend § 214.329 by revising paragraph (a) to read as follows:

**§ 214.329 Train approach warning provided by watchmen/lookouts.**

\* \* \* \* \*

(a) Train approach warning shall be given in sufficient time to enable each

roadway worker to move to and occupy a previously arranged place of safety not less than 15 seconds before a train moving at the maximum authorized speed on that track can pass the location of the roadway worker. The place of safety to be occupied upon the approach of a train may not be on a track, unless working limits are established on that track.

\* \* \* \* \*

■ 22. In § 214.331, add paragraph (e) to read as follows:

**§ 214.331 Definite train location.**

\* \* \* \* \*

(e) Each on-track safety program that provides for the use of definite train location shall discontinue such use by June 12, 2017.

■ 23. Revise § 214.333(c) to read as follows:

**§ 214.333 Informational line-ups of trains.**

\* \* \* \* \*

(c) Each on-track safety program that provides for the use of informational line-ups shall discontinue such use by June 12, 2017.

■ 24. Revise § 214.335 to read as follows:

**§ 214.335 On-track safety procedures for roadway work groups, general.**

(a) No employer subject to the provisions of this part shall require or permit a roadway worker who is a member of a roadway work group to foul a track unless on-track safety is provided by either working limits, train approach warning, or definite train location in accordance with the applicable provisions of § 214.319, § 214.321, § 214.323, § 214.325, § 214.327, § 214.329, § 214.331, or § 214.336.

(b) No roadway worker who is a member of a roadway work group shall foul a track without having been informed by the roadway worker in charge of the roadway work group that on-track safety is provided.

■ 25. In § 214.337, revise paragraph (c)(3) and add paragraph (g) to read as follows:

**§ 214.337 On-track safety procedures for lone workers.**

\* \* \* \* \*

(c) \* \* \*

(3) On track outside the limits of a manual interlocking, a controlled point (except those consisting of signals only), or a remotely controlled hump yard facility;

\* \* \* \* \*

(g) Individual train detection shall not be used to provide on-track safety for a

lone worker using a roadway maintenance machine, equipment, or material that cannot be readily removed by hand.

■ 26. Revise § 214.339 to read as follows:

**§ 214.339 Audible warning from trains.**

(a) Each railroad shall have in effect and comply with written procedures that prescribe effective requirements for audible warning by horn and/or bell for trains and locomotives approaching any roadway workers or roadway maintenance machines that are either on the track on which the movement is occurring, or about the track if the roadway workers or roadway maintenance machines are at risk of fouling the track. At a minimum, such written procedures shall address:

- (1) Initial horn warning;
- (2) Subsequent warning(s); and
- (3) Alternative warnings in areas where sounding the horn adversely affects roadway workers (e.g., in tunnels and terminals).

(b) Such audible warning shall not substitute for on-track safety procedures prescribed in this part.

■ 27. Revise § 214.343(c) to read as follows:

**§ 214.343 Training and qualification, general.**

\* \* \* \* \*

(c) Except as provided for in § 214.353, railroad employees other than roadway workers, who are associated with on-track safety procedures, and whose primary duties are concerned with the movement and protection of trains, shall be trained to perform their functions related to on-track safety through the training and qualification procedures prescribed by the operating railroad for the primary position of the employee, including maintenance of records and frequency of training.

\* \* \* \* \*

■ 28. In § 214.345, revise the introductory text and add paragraph (f) to read as follows:

**§ 214.345 Training for all roadway workers.**

Consistent with § 214.343(b), the training of all roadway workers shall include, as a minimum, the following:

\* \* \* \* \*

(f) Instruction on railroad safety rules adopted to comply with § 214.317(b).

■ 29. In § 214.347, add paragraph (a)(5) and revise paragraph (b) to read as follows:

**§ 214.347 Training and qualification for lone workers.**

\* \* \* \* \*

(a) \* \* \*

(5) Alternative means to access the information in a railroad's on-track safety manual when a lone worker's duties make it impracticable for the on-track safety manual to be readily available.

(b) Initial and periodic (as specified by § 243.201 of this chapter) qualification of a lone worker shall be evidenced by demonstrated proficiency.

■ 30. Revise § 214.349(b) to read as follows:

**§ 214.349 Training and qualification of watchmen/lookouts.**

\* \* \* \* \*

(b) Initial and periodic (as specified by § 243.201 of this chapter) qualification of a watchman/lookout shall be evidenced by demonstrated proficiency.

■ 31. Revise § 214.351(b) to read as follows:

**§ 214.351 Training and qualification of flagmen.**

\* \* \* \* \*

(b) Initial and periodic (as specified by § 243.201 of this chapter) qualification of a flagman shall be evidenced by demonstrated proficiency.

■ 32. In § 214.353, revise the section heading and paragraphs (a) introductory text, (a)(1), and (b) and add paragraph (a)(5) to read as follows:

**§ 214.353 Training and qualification of each roadway worker in charge.**

(a) The training and qualification of each roadway worker in charge, or any other employee acting as a roadway worker in charge (e.g., a conductor or a brakeman), who provides for the on-track safety of roadway workers through establishment of working limits or the assignment and supervision of watchmen/lookouts or flagmen shall include, at a minimum:

(1) All the on-track safety training and qualification required of the roadway workers to be supervised and protected, including the railroad's procedures governing good faith challenges in §§ 214.311(b) and (c) and 214.313(d).

\* \* \* \* \*

(5) The procedures required to ensure that the roadway worker in charge of the on-track safety of group(s) of roadway workers remains immediately accessible and available to all roadway workers being protected under the working limits or other provisions of on-track

safety established by the roadway worker in charge.

(b) Initial and periodic (as specified by § 243.201 of this chapter) qualification of a roadway worker in charge shall be evidenced by demonstrated proficiency.

■ 33. In § 214.355, revise the section heading and paragraph (b) to read as follows:

**§ 214.355 Training and qualification of each roadway worker in on-track safety for operators of roadway maintenance machines.**

\* \* \* \* \*

(b) Initial and periodic (as specified by § 243.201 of this chapter) qualification of a roadway worker to operate roadway maintenance machines shall be evidenced by demonstrated proficiency.

■ 34. In appendix A to part 214, add footnote number 2 to the table heading "Section" and, under subpart C, revise the entries for §§ 214.303(b), 214.307, 214.309, 214.315(a), 214.317, 214.319, 214.329(a), 214.339, and 214.353 and add entries for §§ 214.318, 214.320, 214.321(b)(4) and (e), 214.322, 214.323(c) and (d), 214.331(e), and 214.337(g) to read as follows:

**APPENDIX A TO PART 214—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>**

	Section <sup>2</sup>	Violation	Willful violation
* * * * *			
<b>Subpart C—Roadway Worker Protection Rule</b>			
214.303 Railroad on-track safety programs, generally:			
(b) Failure of a railroad to include and use internal monitoring procedure .....		5,000	10,000
* * * * *			
214.307 On-track safety programs:			
(a)(i) Failure to adopt On-Track Safety Program .....		10,000	13,000
(ii) Failure to provide On-Track Safety Program to FRA upon request .....		1,000	5,000
(b) Failure to notify FRA of adoption or change to On-Track Safety Program .....		1,000	5,000
(c) Failure to amend or provide written response after disapproval of On-track Safety Program .....		10,000	20,000
214.309 On-track safety manual:			
(a) On-track Safety Manual not provided to prescribed employees .....		2,000	5,000
(b) Failure to establish provision for lone worker to have alternative access to On-track Safety Manual .....		5,000	10,000
(c) Failure to maintain entire set of on-track safety rules and instructions, including updates temporarily published in bulletins or notices, in one On-Track Safety Manual .....		2,000	5,000
* * * * *			
214.315 Supervision and communication:			
(a)(1) Complete failure of employer to provide on-track safety job briefing .....		5,000	10,000
(2)–(5) Partial failure of employer to provide on-track safety job briefing .....		2,000	4,000
* * * * *			
214.317 On-track safety procedures, generally:			
(a) On-track safety rules conflict with this part .....		5,000	10,000
(b) Failure to adopt or comply with rules governing safe crossing of track .....		2,000	5,000
(3) Failure to establish on-track safety if required .....		2,000	5,000
(c)(1) Failure to adopt or comply with operating procedure if this section is utilized in lieu of establishing working limits .....		3,000	5,000
(2) Failure to grant absolute right to establish working limits if requested by RWIC or lone worker .....		3,000	5,000

APPENDIX A TO PART 214—SCHEDULE OF CIVIL PENALTIES <sup>1</sup>—Continued

Section <sup>2</sup>	Violation	Willful violation
(3) Except as permitted, roadway worker fouling track without on-track safety .....	3,000	5,000
(4) Roadway maintenance machine not properly equipped or utilized .....	3,000	5,000
(d)(1) Failure to inspect tunnel niche or clearing bay .....	3,000	5,000
(2) Lack of adequate sight distance .....	3,000	5,000
(3) Failure to grant absolute right to establish other place of safety or to establish working limits if requested by RWIC or lone worker .....	5,000	10,000
214.318 Locomotive servicing and car shop repair track areas:		
(a)–(c) .....	3,000	5,000
214.319 Working limits, generally:		
(a)(1) Non-qualified RWIC of working limits .....	5,000	10,000
(a)(2) More than one RWIC of working limits on the same track segment .....	2,000	5,000
(a)(3)(i) Working limits released without notifying all affected roadway workers .....	5,000	10,000
(a)(3)(ii) Working limits released before all affected roadway workers are otherwise protected .....	5,000	10,000
(b)(1) Failure to adopt redundant protections in on-track safety program .....	5,000	10,000
(b)(2) Failure to comply with redundant protections identified in on-track safety program when controlled track working limits are established .....	5,000	10,000
214.320 Roadway maintenance machine movements over signalized non-controlled track .....	5,000	7,500
214.321 Exclusive track occupancy:		
* * * *		*
(b) * * *		
(4) (i) Failure to specify unique roadway work group number, employee name, or unique identifier .....	3,000	5,000
(ii) Failure to adopt procedure requiring precise communication between RWIC or lone worker and trains or other on-track equipment .....	3,000	5,000
* * * *		*
(e)(1)–(4) Failure to comply with occupancy behind requirements .....	5,000	10,000
214.322 Exclusive track occupancy, electronic display:		
(a) Contents of authority electronically displayed not readily viewable .....	3,000	5,000
(b) Failure to timely obtain written/printed authority or occupy place of safety if electronic display fails while authority is in effect .....	3,000	5,000
(c)–(h) .....	2,000	4,000
214.323 Foul time:		
* * * *		*
(c) Train dispatcher or control operator permitting movement of trains or other on-track equipment into working limits prior to RWIC reporting clear of track .....	5,000	10,000
(d) RWIC permitting movement of trains or on-track equipment into or within working limits .....	5,000	10,000
* * * *		*
214.329 Train approach warning provided by watchmen/lookouts:		
(a)(i) Failure to give timely warning of approaching train .....	5,000	10,000
(ii) Failure to use maximum authorized speed in formulating sight distance .....	3,000	5,000
(iii) Use of another track as a place of safety without establishing working limits on that track .....	3,000	5,000
* * * *		*
214.331 Definite train location:		
* * * *		*
(e) Failure to discontinue use of definite train location by required date .....	9,500	13,000
* * * *		*
214.337 On-track safety procedures for lone workers:		
* * * *		*
(g) Use of individual train detection while using machine, equipment, or material that cannot be readily removed by hand .....	2,000	4,000
214.339 Audible warning from trains:		
(a)–(b) Failure to adopt or comply with audible warning procedures .....	2,000	4,000
* * * *		*
214.353 Training and qualification of roadway workers in charge .....	2,000	4,000
* * * *		*

<sup>1</sup> A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$105,000 for any violation where circumstances warrant. See 49 CFR part 209, appendix A. Failure to observe any condition(s) of an exception set forth in paragraph (e) of §214.336 deprives the railroad or contractor of the benefit of the exception and makes the railroad or contractor, and any responsible individuals, liable for penalty under the particular regulatory provision(s) from which the exception would otherwise have granted relief.

<sup>2</sup>The penalty schedule uses section numbers from 49 CFR part 214. If more than one item is listed as a type of violation of a given section, each item is also designated by a “penalty code,” which is used to facilitate assessment of civil penalties, and which may or may not correspond to any subsection designation(s). For convenience, penalty citations will cite the CFR and the penalty code, if any. FRA reserves the right, should litigation become necessary, to substitute in its complaint the CFR citation in place of the combined CFR and penalty code citation, should they differ.

Issued in Washington, DC, on May 26,  
2016.

**Sarah E. Feinberg,**

*Administrator.*

[FR Doc. 2016–13057 Filed 6–6–16; 8:45 am]

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## Part IV

## Department of Transportation

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Federal Railroad Administration

49 CFR Part 219

Control of Alcohol and Drug Use: Coverage of Maintenance of Way (MOW) Employees and Retrospective Regulatory Review-Based Amendments; Final Rule

**DEPARTMENT OF TRANSPORTATION****Federal Railroad Administration****49 CFR Part 219**

[Docket No. FRA–2009–0039, Notice No. 3]

RIN 2130–AC10

**Control of Alcohol and Drug Use: Coverage of Maintenance of Way (MOW) Employees and Retrospective Regulatory Review-Based Amendments**

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** In response to Congress' mandate in the Rail Safety Improvement Act of 2008 (RSIA), FRA is expanding the scope of its drug and alcohol regulation to cover MOW employees. This rule also codifies guidance from FRA compliance manuals, responds to National Transportation Safety Board (NTSB) recommendations, and adopts substantive amendments based upon FRA's regulatory review of 30 years of implementation of this part.

The final rule contains two significant differences from FRA's July 28, 2014 Notice of Proposed Rulemaking (NPRM). First, it adopts part 214's definition of "roadway worker" to define "MOW employee" under this part. Second, because FRA has withdrawn its proposed peer support requirements, subpart K contains a revised version of the troubled employee identification requirements previously in subpart E.

**DATES:** This rule is effective June 12, 2017. Petitions for reconsideration must be received on or before August 9, 2016. Petitions for reconsideration will be posted in the docket for this proceeding. Comments on any submitted petition for reconsideration must be received on or before September 13, 2016.

**ADDRESSES:** Petitions for Reconsideration related to Docket No. FRA–2009–0039 may be submitted by any of the following methods: Web site: The Federal eRulemaking Portal, <http://www.regulations.gov>. Follow the online instructions for submitting comments. Fax: 202–493–2251.

Mail: Docket Management Facility, U.S. DOT, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.

Hand Delivery: Room W12–140 on the Ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and docket

number or Regulatory Identification Number (RIN) for this rulemaking. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

*Docket:* For access to the docket to read background documents or comments received, go to [www.regulations.gov](http://www.regulations.gov) or to Room W12–140 on the Ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

A complete version of part 219 as amended in this final rule is available for review in the public docket of this rulemaking (docket no. FRA–2009–0039). Interested persons can review this document to learn how this rule affects part 219 as a whole.

**FOR FURTHER INFORMATION CONTACT:** Gerald Powers, Drug and Alcohol Program Manager, Office of Safety Enforcement, Federal Railroad Administration, 1200 New Jersey Avenue SE., Mail Stop 25, Washington, DC 20590 (telephone 202–493–6313), Patricia V. Sun, Trial Attorney, Office of Chief Counsel, Federal Railroad Administration, 1200 New Jersey Avenue SE., Mail Stop 10, Washington, DC 20590 (telephone 202–493–6060), [patricia.sun@dot.gov](mailto:patricia.sun@dot.gov); or Elizabeth A. Gross, Trial Attorney, Office of Chief Counsel, Federal Railroad Administration, 1200 New Jersey Avenue SE., Mail Stop 10, Washington, DC 20590 (telephone 202–493–1342), [elizabeth.gross@dot.gov](mailto:elizabeth.gross@dot.gov).

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**I. Executive Summary**

In the first major updating of its drug and alcohol regulation (49 CFR part 219) since its inception in 1985, FRA is expanding the scope of part 219 to cover Maintenance-of-Way (MOW) employees. Historically, FRA has conducted only post-mortem post-accident toxicological (PAT) testing of MOW employees, since an MOW employee, unlike a covered service employee, has been subject to part 219 testing only when he or she has died as the result of a reportable railroad accident or incident. Even in this comparatively small sample of post-mortem results, however, FRA found a disproportionately high level of positive test results among deceased MOW employees compared to the PAT testing and random testing results of covered employees who are already wholly subject to part 219.

Congress, in the Rail Safety Act of 2008 (RSIA), recognized the substance abuse problem among MOW employees by directing FRA to make them fully subject to the policies and protections of part 219. Partly in response to comments received, FRA is adopting the definition of roadway worker in part 214 of this chapter to define who is an MOW employee for purposes of part 219. FRA will introduce MOW employees to random drug and alcohol testing at the same initial minimum random testing rates it initially applied to covered employees. FRA is also adding a new definition, "regulated employee," to encompass both covered and MOW employees.

In this rule, FRA is making MOW employees subject to all part 219 testing, namely, random testing, PAT testing, reasonable suspicion testing, reasonable cause testing, pre-employment testing, return-to-duty testing, and follow-up testing. Because many MOW employees work for multiple contractors or contract for short-term jobs, FRA is addressing not only the roles and responsibilities of railroads with respect to those employees who directly

perform MOW activities for them, but also the roles and responsibilities of contractors and subcontractors who provide MOW services to railroads on a contract basis. As has been its practice, FRA is holding railroads, contractors, and subcontractors equally responsible for ensuring that their employees who perform MOW activities are in compliance with the requirements of this rule. FRA is also continuing its practice of counting only a railroad's total number of covered employees to determine whether that railroad qualifies for certain exceptions as a small entity.

In addition, FRA has used this lookback at part 219 to conduct a complete retrospective regulatory review of the rule. As a result, FRA has largely restructured and rewritten large sections of this rule and incorporated longstanding compliance guidance, to

make part 219's requirements easier to read, find, and implement.

Finally, in response to widespread opposition from commenters, FRA is not adopting its proposal to require peer support programs. FRA is instead transferring part 219's requirements for troubled employee programs to a new subpart in a revised, expanded, and clarified format.

#### Costs and Benefits of Final Rule

The final rule will impose costs that are outweighed by the quantified safety benefits. For the 20-year period analyzed, the estimated costs that will be imposed on industry total approximately \$24.3 million (undiscounted), with discounted costs totaling \$14.2 million (Present Value (PV), 7 percent) and \$18.9 million (PV, 3 percent). The estimated quantified benefits for this 20-year period total approximately \$115.8 million

(undiscounted), with discounted benefits totaling \$57.4 million (PV, 7 percent) and \$83.6 million (PV, 3 percent).

The costs will primarily be derived from implementation of the statutory mandate to expand the scope of part 219 to cover MOW employees. The benefits will primarily accrue from the expected injury, fatality, and property damage avoidance resulting from the expansion of part 219 to cover MOW employees, as well as the PAT testing threshold increase. The table below summarizes the quantified costs and benefits expected to accrue over a 20-year period from adoption of the final rule and identifies the statutory costs and benefits (those required by the RSIA mandate to expand part 219 to MOW employees) and the discretionary costs and benefits (those that are due to the non-RSIA requirements).

	Statutory	Discretionary	Total
<b>Costs (20 year)</b>			
PAT Testing—Adding MOW .....	\$ 52,000 .....		\$ 52,000
PAT Testing—Impact Def + Xing .....		\$241,974 .....	241,974
Reasonable Suspicion Testing .....	842,398 .....		842,398
Pre-Employment Testing—Adding MOW .....	673,897 .....		673,897
Pre-Employment Testing—Sm, RR .....		29,904 .....	29,904
Random Testing .....	20,863,074 .....		20,863,074
Annual Reporting .....	160,911 .....		160,911
Recordkeeping Requirement .....	1,397,840 .....		1,397,840
Costs Subtotal .....	23,990,120	271,878	24,261,998
<b>Benefits (20 year)</b>			
Accident Reduction .....	115,369,281 .....		115,369,281
PAT Testing Threshold Reduction .....		388,295 .....	388,295
Benefits Subtotal .....	115,369,281	388,295	115,757,576
Net Benefit .....	91,379,161	116,417	91,495,578

## II. Rulemaking Proceedings

On July 28, 2014, in response to a Congressional mandate (*see* sec. 412 of the RSIA (Pub. L. 110–432, October 16, 2008)) and NTSB recommendation R–08–07, FRA published an NPRM (79 FR 48380) which proposed to expand the scope of part 219 to cover MOW employees. *See* 79 FR 43830. FRA also proposed to modify its post-accident toxicology (PAT) testing criteria and to replace its subpart E programs addressing troubled employees with a peer support program in new subpart K. The NPRM also proposed to adopt longstanding program guidance, and to clarify and restructure part 219 to make its requirements easier to understand and implement.

On September 15, 2014, in a jointly filed petition, the American Public Transportation Association (APTA), American Short Line and Regional Railroad Association (ASLRRA), Association of American Railroads (AAR), and National Railroad Construction and Maintenance Association, Inc. (NRCMA), requested a 60 day extension of the NPRM's comment period, which had been scheduled to close on September 26, 2014. FRA agreed to this request, and published a notice allowing commenters until November 25, 2014, to submit comments. (September 25, 2014, 79 FR 57495).

FRA received 16 comments during this extended comment period, including an AAR/ASLRRA (hereinafter referred to as the “Associations”) joint

submission, as well as comments from APTA, the NRCMA, the NTSB, SMART (the American Train Dispatchers Association, Brotherhood of Locomotive Engineers and Trainmen, Brotherhood of Maintenance of Way Employees Division, International Brotherhood of Electrical Workers; and Sheet Metal, Air, Rail and Transportation), Twin Cities & Western Railroad Company (TC&W), Drug Abuse Program Administrators Administration Worldwide (SAPAA), Pacific Southwest Railway Museum (PSRM), SAPlist.com, and Southeastern Pennsylvania Transportation Authority (SEPTA). Six individuals also submitted comments. (Although SMART had requested a public hearing in its November 28, 2014 comment, the deadline for filing such a request was 30 days after the

publication of the NPRM, or August 27, 2014).

In this final rule, FRA will not address comments that raised issues outside the scope of, or not specific to, the proposals in the NPRM, or comments submitted after the extended comment period had closed. In addition, the NPRM proposed to make this part more user-friendly, by reorganizing sections, re-designating paragraphs, updating terms, and amending language for consistency. Because FRA received no comment on these minor edits, FRA is not repeating the NPRM's discussion of them.

### III. Effective Date

FRA received only one comment concerning the rule's effective date. The Associations requested that the final rule become effective two years after its publication, to allow for the implementation of new testing policies and procedures, and for the creation of random testing pools for MOW employees. FRA notes, however, that many MOW employees are already subject to drug and alcohol testing under Federal authority, company authority, or both. For example, any MOW employee whose duties require the holding of a Commercial Driver's License (CDL) is subject to Federal Motor Carrier Safety Administration (FMCSA) testing requirements. MOW employees may also be subject to testing under company authority, often in a "look-alike" (a company testing program that mirrors FRA standards and procedures) program. This familiarity with drug and alcohol programs will facilitate the implementation of part 219 requirements for MOW employees.

Moreover, railroads have thirty years of experience implementing part 219 requirements for their covered service employees; while employers who are newly subject to part 219, such as contractors who provide MOW service to railroads, have service agents (e.g., random testing consortia and third party administrators) readily available to facilitate adoption and compliance with this part. Given the experience and resources railroads and contractors have to draw on, FRA believes a one year implementation window is reasonable for the requirements in this rule.

### IV. Maintenance-of-Way Employees and Contractors

#### A. Definitions

As proposed, FRA is expanding the scope of part 219 to cover employees and contractors who perform MOW activities. This rule also adopts FRA's proposal to define the term "employee"

to include employees, volunteers, and probationary employees of railroads and contractors (including subcontractors) to railroads, and to adopt the term "regulated service" to encompass both covered service and MOW activities. Performance of regulated service makes an individual a "regulated employee" subject to part 219, regardless of whether the individual is employed by a railroad or a contractor to a railroad.

In the NPRM, FRA requested comment on who should be subject to the expanded scope of this part. As alternatives, FRA asked whether part 219's definition of MOW employee should: (1) Be identical to the roadway worker definition in part 214, Roadway Workplace Safety; (2) include all employees subject to disqualification under 49 CFR 209.303, as recommended by the NTSB; or (3) incorporate a modified version of part 214's definition of roadway worker which would include certain roadway worker functions but not others, as proposed in the NPRM. Of those who commented on FRA's proposed definition of MOW activities, SEPTA stated that the definition of MOW activities in part 219 should be consistent with the definition of roadway worker duties in part 214. While the Associations supported FRA's proposed exclusions from MOW activities, they agreed with SEPTA's view that part 219's definition of MOW activities and § 214.7's definition of roadway worker duties should be consistent. SMART, however, commented that FRA's proposed MOW activities definition was both too inclusive and too exclusive, while the NRCMA unqualifiedly supported the proposed definition.

In its comments, the NTSB continued to advocate for adoption of Recommendation R-08-07, which recommended that FRA expand the scope of part 219 to include all employees subject to § 209.303. No other commenter supported so wide an expansion. As noted in the NPRM, § 209.303 encompasses many employees besides those who perform covered service and MOW activities, no matter how such activities are defined. As examples, § 209.303 includes employees who conduct tests and training, and mechanics who maintain locomotives, and freight and passenger cars, among others.

In *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989), the Supreme Court held that an alcohol or drug test conducted under FRA authority is a Fourth Amendment search, and in its determination of who should be subject to part 219 testing, FRA must carefully balance public

safety interests against individual privacy rights. FRA has done so, and can find no overriding safety interest that would justify making every employee covered by § 209.303 subject to part 219 testing. In its comment to the NPRM, the NTSB cited no accidents or data to support adoption of R-08-07. To date, FRA has no data suggesting that the functions of testers, trainers, and mechanics are of such a safety-sensitive nature that employees who perform these functions should be subject to drug and alcohol testing. FRA therefore finds no compelling reason to expand the scope of part 219 to equal that of § 209.303.

Upon consideration of the other comments, however, FRA has reevaluated its proposed definition of MOW employee. Almost all commenters pointed out that an employee who performs activities on or near a railroad's roadbed or track is by definition one who performs work that could pose risks to the safety of both the employee and the public. As demonstrated by the high positive rate among MOW employee fatalities (detailed in the NPRM), the misuse of drugs or alcohol by these employees can have disastrous consequences. Congress determined when it enacted the RSIA, that an employee who performs MOW activities performs work that is sufficiently safety-sensitive to trigger FRA's drug and alcohol requirements. Adoption of the NPRM's proposed definition of MOW employee would have required railroads to maintain fine distinctions among MOW activities, since the performance of certain activities would make an employee subject to both parts 214 and 219, while the performance of others would make an employee subject only to part 214 or to part 219.

FRA's proposed MOW definition could have potentially required a railroad or contractor to establish three different categories of coverage, with the attendant administrative burdens necessary to sort and maintain such categories. In contrast, because the term "roadway worker" has been long established by part 214, the railroad industry is already familiar with its meaning and application. FRA is therefore adopting, for its definition of MOW employee, § 214.7's definition of roadway worker, which includes "any employee of a railroad or a contractor to a railroad, whose duties include inspection, construction, maintenance or repair of roadway track; bridges, roadway, signal and communications systems, electric traction systems, roadway facilities or roadway maintenance machinery on or near track

or with the potential of fouling a track, and flagmen and watchmen/lookouts as defined in this section.” By doing so, FRA is adopting the recommendation of the majority of commenters, who asserted that an individual subject to roadway worker protection under part 214 should also be a MOW employee subject to drug and alcohol testing under part 219.

#### *B. MOW Employees and the Small Railroad Exception*

Since the inception of its alcohol and drug program in 1985, FRA has counted the number of covered employees a railroad has (including covered service contractors and volunteers) as one factor in determining the railroad’s risk of alcohol and drug-related accidents. See 50 FR 31529, Aug. 2, 1985. Historically, a small railroad, defined by FRA as one that has 15 or fewer covered employees and no joint operations with other railroads, has proven less likely to have a drug and alcohol-related accident than a larger railroad. Therefore, FRA has always required a larger railroad (defined as one that has 16 or more covered employees or is engaged in joint operations) to implement all of part 219, while § 219.3 previously excepted a small railroad from the requirements of subpart D (reasonable suspicion and reasonable cause testing), subpart E (previously identification of troubled employees), subpart F (pre-employment testing), and subpart G (random alcohol and drug testing); these exceptions lessened part 219’s regulatory burden on small railroads.

As proposed, FRA is continuing its longstanding approach of counting only a railroad’s covered employees for purposes of determining whether the railroad qualifies for the small railroad exception (the railroad also cannot participate in any joint operations) because FRA believes this is the best measure of the risks posed by the railroad’s operations. FRA received no objections to this proposal.

#### *C. MOW Contractors and the Small Railroad Exception*

With respect to a contractor who performs MOW activities for a railroad, FRA is amending § 219.3 to apply part 219 to an MOW contractor to the same extent as it applies to the railroad for which the MOW contractor performs regulated service. As proposed, a contractor’s level of part 219 compliance will be determined by the size of the railroad for which it is performing regulated service, regardless of the size of the contractor itself. New language in the small railroad exception states that a contractor who performs

MOW activities exclusively for small railroads that are excepted from full compliance with part 219 will also be excepted from full compliance. For example, an MOW contractor with five employees who perform regulated service for a large railroad must implement a full part 219 program if the railroad for which it performs regulated service must do so, while an MOW contractor with 20 employees does not have to implement a full part 219 program if it performs regulated service for a small railroad that is excepted from full compliance with part 219.

FRA recognizes that an MOW contractor may perform regulated service for multiple railroads, some of which may not be required to comply fully with part 219. To simplify application, FRA is adding new language to the small railroad exception requiring an MOW contractor who performs regulated service for multiple railroads to implement a full part 219 program if the contractor performs regulated service for at least one large railroad fully subject to part 219. If an MOW contractor performs regulated service for at least one large railroad, it must incorporate all of its regulated employees into a full part 219 program, even if only some of these employees perform regulated service for large railroads, regardless of whether or not a particular employee is currently performing regulated service for a large or a small railroad. This approach allows an MOW contractor to flexibly allocate its employees between small and large railroads. To ensure that it does not encourage the hiring of MOW contractors in lieu of MOW employees, FRA is excluding both contractor employees who perform MOW activities and railroad employees who perform MOW activities, for purposes of the employee count to determine whether a railroad qualifies as a small railroad. Labor supported FRA’s decision.

#### *D. Railroad and Contractor Responsibility for Compliance*

FRA is adopting its proposal to hold both a railroad and its contractor(s) responsible for ensuring that any contractor employees who perform regulated service for the railroad are in compliance with part 219. In their comments, the Associations objected that the RSIA mandated that part 219 cover contractors who perform regulated service, but did not make railroads responsible for ensuring that compliance, and that a contractor who performs regulated service for more than one railroad would be required to comply with the drug and alcohol training requirements of multiple

railroads. The TC&W commented that FRA should audit the drug and alcohol compliance of contractors who perform regulated service.

FRA notes that making a railroad responsible for its contractor’s compliance, and making a contractor who performs regulated service responsible for its own compliance, are not new requirements, because existing § 219.9 makes every person—including a railroad, an independent contractor and an employee of an independent contractor—who violates or causes a violation of a part 219 requirement subject to a civil penalty. To avoid confusion, FRA is discussing a contractor’s options to ensure part 219 compliance for its regulated employees below, while the corresponding railroad options to ensure that its contractor employees who perform regulated service are in compliance will be discussed below in the section-by-section analysis of § 219.609.

A contractor who must establish a random testing program for its regulated service employees may do so through any of the following methods. As discussed in the NPRM, a contractor may choose to:

- Establish its own part 219 program and provide the railroad with documentation of its compliance with part 219. If a contractor chooses this option, FRA will not audit the contractor but will instead require the railroad to maintain the contractor’s documentation for FRA audit purposes. If the contractor’s documentation or program contains a deficiency or violation that the railroad could not have reasonably detected, FRA may use its enforcement discretion to take action solely against the contractor. As discussed earlier in the preamble, the extent of a regulated service contractor’s responsibilities will be determined by the size of the railroad(s) with which it contracts.

- Contract with a consortium to administer its part 219 program. The consortium may either place the contractor’s regulated employees in a stand-alone random testing pool or in a random testing pool with the regulated employees of other regulated service contractors. The contractor must then submit documentation of its membership in the consortium and its compliance with part 219 to the contracting railroad. As with the option described above, if the contractor’s documentation or program contains a deficiency or violation that the railroad could not have reasonably detected, FRA may use its enforcement discretion to take action only against the contractor. Upon request, FRA will

assist a railroad in reviewing the part 219 documentation of its regulated service contractors.

- Ensure that any employees who perform regulated service for a railroad are incorporated into the railroad's part 219 program.

To facilitate part 219 implementation for railroads and contractors, FRA has developed two sets of model drug and alcohol plans (including testing plans); a set for an entity subject to all of part 219 and another for an entity that qualifies for the small railroad exception. Both sets are currently available at FRA's Web site: <http://www.fra.dot.gov/Page/P0345>.

FRA had proposed an alternative two-pronged approach, which would require a contractor to provide a railroad with: (1) Written certification that all of its regulated employees are in compliance with part 219, and (2) a summary of its part 219 data at least every six months. The NRCMA commented that it was unnecessary to require certification of compliance with part 219, noting that railroad contracts routinely require a contractor to certify compliance with all relevant Federal, state, and local laws and regulations. The NCRMA also objected to providing summary data, commenting that this was both unnecessary and an undue administrative burden. FRA agrees, and has decided not to adopt these proposed requirements.

A railroad has the additional option of accepting a contractor's plan for random testing, regardless of whether that plan is managed by the contractor or by a consortium/third party administrator (C/TPA). If a railroad adopts this approach, the contractor must:

- Certify in writing to the railroad that all of its regulated employees are subject to part 219 (including, as applicable, random testing under subpart G, pre-employment drug testing under subpart F, and a previous employer background check as required by § 40.25); and

- Report, in an FRA model format, summary part 219 testing data to the railroad at least every six months.

The railroad should review this summary data since it remains responsible for monitoring the contractor's compliance.

#### *E. Pre-Employment Drug Testing of MOW Employees*

As proposed, FRA is exempting all current MOW employees from subpart F pre-employment drug testing (with certain limitations, pre-employment alcohol testing is authorized but not required). Only MOW employees hired after the effective date of this rule must

have a negative DOT pre-employment drug test result before performing regulated service for the first time. As with its initial minimum random testing rates, FRA used a similar approach to exempt current covered employees from pre-employment drug testing in 1986. Although these employees do not have to be pre-employment drug tested, current MOW employees are subject to FRA's initial minimum random drug testing rate of 50%.

FRA realizes that a large percentage of MOW employees may already have a negative pre-employment drug test result under the alcohol and drug testing regulations of another DOT agency; usually these MOW employees are required by their employers to hold a Commercial Driver's License (CDL), and are therefore subject to the regulations of both FRA and FMCSA. To hold a CDL, an individual must have a negative FMCSA pre-employment drug test. *See* § 382.301. To ease the compliance burden on both employees and employers, an employing railroad may use a negative pre-employment drug test conducted under the rules and regulations of another DOT agency to satisfy FRA's pre-employment drug test requirements for employees initially transferring into regulated service after the effective date of this rule. This amendment adopts previous FRA guidance on pre-employment drug testing.

#### *F. Initial MOW Employee Random Testing Rates*

This rule makes MOW employees subject to FRA random testing, with the exception of those who perform regulated service solely for a small railroad. For covered employees, FRA has annually set minimum random drug and alcohol testing rates determined by the overall railroad random testing violation rates for covered employees. FRA determines this overall rate from program data that railroads submit to its Management Information System (MIS). *See* 49 CFR 219.602 and 219.608. When FRA first established minimum random testing rates for covered employees, it set the initial minimums for drugs and alcohol at the top end of their respective ranges, at 50 percent for drugs and 25 percent for alcohol. At that time, FRA had no rail industry random testing data because the MIS had been newly established. FRA later lowered both minimum annual random testing rates to the bottom of their ranges after MIS data showed consistently low overall random testing violation rates for covered employees. These minimum rates, which have been unchanged since

2000, are 25 percent for drugs and 10 percent for alcohol in 2016.

Similarly, because MOW employees are being introduced to random testing, FRA has no overall railroad random testing violation rate data for these employees. To develop this data, FRA is setting the initial minimum random testing rates for MOW employees at 50 percent for drugs and 25 percent for alcohol, as it initially did for covered employees. A railroad must therefore create and maintain a separate random testing pool for its MOW employees, both to allow these employees to be tested at their own minimum random testing rates and, from those railroads required to file an MIS report, to establish a separate database. As it did with covered employees, FRA could lower these minimum random testing rates in the future if the data for MOW employees show consistently low overall random testing violation rates.

#### *G. MOW Employee Minimum Random Testing Pool Size*

As proposed, to maintain the deterrent effect of random testing for very small railroads and contractors, FRA is requiring each individual random testing pool established under subpart G to select and randomly test at least one entry per quarter, even if fewer tests are needed to meet FRA's minimum random testing rates. Conversely, the requirement to conduct at least four tests throughout the year does not excuse a railroad (or contractor to a railroad, or a C/TPA) from complying with FRA's minimum random testing rates. For example, a railroad that maintains a pool of 16 MOW employees must conduct at least eight, not four, random drug tests in a year to comply with a minimum random drug testing rate of 50%.

### **V. Restructuring of Part 219**

#### *A. Division of Reasonable Suspicion and Reasonable Cause Testing Into Subparts D and E*

Previously, the requirements for both reasonable suspicion and reasonable cause testing were found in subpart D. Because of their similar names and their location in the same subpart, railroads and employees often confused the two types of testing, even though reasonable suspicion and reasonable cause testing have very different requirements. To clarify the substantive differences between the two, the requirements for reasonable suspicion testing will remain in subpart D, while the requirements for reasonable cause testing have been moved to subpart E, which formerly addressed voluntary referral and co-

worker report policies (“Identification of Troubled Employees,” now found in subpart K). This differentiation is important since small railroads are required to conduct reasonable suspicion testing, but not reasonable cause testing. FRA received no objections to its proposal to divide reasonable suspicion and reasonable cause testing into two distinct subparts.

#### *B. Transfer of Revised and Retitled Troubled Employee Requirements to Subpart K*

To accommodate the placement of reasonable cause testing into subpart E, FRA has transferred a revised and retitled version of the “Identification of Troubled Employees” requirements previously in subpart E to new subpart K. (As noted above, this is in lieu of FRA’s proposal to require peer support programs in subpart K, which, for the reasons discussed below, FRA is not adopting).

#### **VI. Section-by-Section Analysis**

As discussed earlier, throughout most of part 219 FRA is substituting “regulated employee” and “regulated service” where the terms “covered employee” and “covered service” formerly appeared. “Regulated employee” and “regulated service” are terms-of-art encompassing all individuals and duties subject to part 219, including both covered service and MOW activities. The terms “covered employee” and “covered service,” however, are retained where necessary, such as in § 219.12, which addresses issues of overlap between part 219 and the HOS laws that apply only to covered employees.

#### **Authority Citation**

The authority citation for part 219 adds a reference to Section 412 of the RSIA, which mandated the expansion of part 219 to cover all employees of railroads and contractors or subcontractors to railroads who perform MOW activities.

#### **Subpart A—General**

##### *Section 219.1—Purpose and Scope*

This section now includes a reference to the new definition of “employee” in § 219.5, which includes any individual (including a volunteer or a probationary employee) who performs regulated activities for a railroad or a contractor to a railroad.

##### *Section 219.3—Application*

The small railroad exception in § 219.3(b)(2) has provided, in part, that a railroad with 15 or fewer covered employees that does not engage in joint

operations with another railroad is not subject to the requirements for reasonable suspicion or reasonable cause testing (both previously found in subpart D), identification of troubled employees (previously subpart E), pre-employment drug testing (subpart F), or random testing (subpart G).

FRA is modifying the small railroad exception so that small railroads are no longer excepted from the reasonable suspicion testing requirements of subpart D. Subpart D requires a railroad to conduct Federal reasonable suspicion testing whenever one or more trained supervisors reasonably suspects that an employee has violated an FRA prohibition against the use of alcohol or drugs. *See* § 219.300(a). FRA’s decision not to authorize small railroads to conduct FRA-authority reasonable cause testing (moved to subpart E of this rule) remains unchanged, however.

FRA is also amending the small railroad exception so that small railroads are no longer excepted from subpart F. As is already required for larger railroads, a small railroad must conduct a pre-employment drug test and obtain a negative result before allowing an individual to perform regulated service for the first time. *See* § 219.501(a). As with larger railroads, this requirement applies only to those regulated employees hired by a small railroad after the effective date of this final rule, because all regulated employees hired before the effective date of this rule are exempted from pre-employment drug testing.

FRA received no comments on the clarifications in this section, which are adopted without further comment.

#### *Section 219.5—Definitions*

As proposed, FRA is amending this section by adding, clarifying, and deleting definitions. Additional or clarified definitions include:

##### **Administrator**

FRA is defining “Administrator” to include the Administrator of the FRA or the Administrator’s delegate.

##### **Associate Administrator**

FRA is clarifying that “Associate Administrator” means both the FRA’s Associate Administrator for Railroad Safety and the Associate Administrator’s delegate.

##### **Contractor**

As proposed, FRA’s new definition of “contractor” includes both a contractor and a subcontractor performing functions for a railroad.

##### **DOT-Regulated Employee**

A “DOT-regulated employee” means a person who is subject to drug or alcohol testing, or both, under any DOT agency regulation, including an individual currently performing DOT safety-sensitive functions and an applicant for employment subject to DOT pre-employment drug testing.

##### **DOT Safety-Sensitive Duty or DOT Safety-Sensitive Function**

The performance of a “DOT safety-sensitive duty” or “DOT safety-sensitive function” makes a person subject to the drug testing and/or alcohol testing requirements of a DOT agency. The performance of regulated service is a DOT safety-sensitive duty or function under this part.

##### **Drug and Alcohol Counselor or DAC**

FRA is adopting this part’s definition for “Drug and Alcohol Counselor” or “DAC” from § 242.7 of its conductor certification rule.

##### **Employee**

An “employee” is any person, including a volunteer, and a probationary employee, who performs activities for a railroad or a contractor to a railroad.

##### **Evacuation**

Under § 219.201(a)(1)(ii)(A), one of the criteria for a “major train accident” requiring PAT testing is an evacuation. To qualify as an evacuation, an event must involve the relocation of at least one person who is not a railroad employee to a safe area to avoid exposure to a hazardous material release. This relocation would normally be ordered by local authorities and could be either mandatory or voluntary. This definition does not include the closure of public roadways for hazardous material spill containment purposes, unless that closure was accompanied by an evacuation order.

##### **Flagman or Flagger**

FRA is adopting its proposal to define a “flagman” (also known as a “flagger”) and “watchman/lookout” in § 219.5 as those terms are currently defined in § 214.7.

##### **Highway-Rail Grade Crossing**

FRA is adopting the definition of “highway-rail grade crossing” found in § 225.5 of its accident and incident reporting regulation, which includes all crossing locations within industry and rail yards, ports, and dock areas.

### Highway-Rail Grade Crossing Accident/ Incident

This definition is essentially identical to the description of highway-rail grade crossing impacts found in the definition for “accident/incident” in FRA’s accident and incident reporting regulation. See 49 CFR 225.5.

### Joint Operations

The phrase “rail operations” in this definition encompasses dispatching and other types of operations. As examples, even if Railroad A has fewer than sixteen covered employees, Railroad A is engaged in joint operations with Railroad B if it either dispatches trains for Railroad B and/or enters Railroad B’s yard to perform switching operations. Railroad A is also engaged in joint operations with Railroad B if they operate over the same track at different times of the day.

Railroad A is *not*, however, engaged in joint operations with Railroad B, if they operate over the same track but are physically separated (e.g., through a split rail derail or the removal of a section of rail), since this separation prevents Railroad A’s operations from overlapping with those of Railroad B. FRA is also excluding from joint operations certain minimal operations on the same track for the purposes of interchange, so long as these operations: (1) Do not exceed 20 mph; (2) are conducted under restricted speed; (3) proceed no more than three miles; (4) and, if extending into another railroad’s yard(s), operate into another railroad’s yard(s) solely to set out or pick up cars on a designated interchange track. FRA is excluding these minimal operations from its new “joint operations” definition because of their comparatively lesser safety risk.

### On-Track or Fouling Equipment

This new definition includes any railroad equipment positioned on or over the rails or fouling a track.

### Other Impact Accident

An “other impact accident” includes any accident/incident involving contact between on-track or fouling equipment that is not otherwise classified as another type of collision (e.g., a head-on collision, rear-end collision, side collision, raking collision, or derailment collision). This new definition also includes an impact in which a single car or cut of cars is damaged during operations involving switching, train makeup, setting out, etc.

### Person

As amended, this definition adopts the existing language in § 219.9 and

adds an independent contractor who provides goods or services to a railroad to the scope of whom or what is considered a “person” under this part (e.g., a service agent such as a collection site or laboratory) See 49 CFR part 40, subpart Q—Roles and Responsibilities of Service Agents. Service agents are already required to comply with both part 219 and part 40, so this amendment is a clarification that makes no substantive changes.

### Plant Railroad

For clarification, FRA has added language defining when an entity’s operations do *not* qualify for plant railroad status.

### Raking Collision

As newly defined, a “raking collision” occurs when there is a collision between parts, with the lading of a train on an adjacent track, or with a structure such as a bridge. A collision that occurs at a turnout is not a raking collision.

### Regulated Employee and Regulated Service

A regulated employee is any employee subject to this part: a covered employee, an MOW employee, and an employee of a railroad or a contractor to a railroad who performs covered service or MOW activities. Correspondingly, regulated service is any duty which makes an employee subject to this part.

### Side Collision

A side collision occurs when one consist strikes the side of another consist at a turnout, including a collision at a switch or at a railroad crossing at grade.

### Tourist, Scenic, Historic, or Excursion Operation That Is Not Part of the General Railroad System of Transportation

To be considered not part of the general railroad system of transportation, a tourist, scenic, historic, or excursion operation must be conducted only on track used exclusively for that purpose (i.e., there are no freight, intercity passenger, or commuter passenger railroad operations on the track).

### Watchman/Lookout

This definition is identical to that in § 214.7, subpart C of part 214, roadway worker protection.

Revised definitions include:

### Covered Employee

As revised, a “person” includes an employee, volunteer, and probationary

employee. FRA has also updated the reference to the hours of service laws (49 U.S.C. ch. 211). Neither change is substantive.

### Covered Service

FRA is adding examples of covered service and a reference to appendix A to 49 CFR part 228, Requirements of the Hours of Service Act: Statement of Agency Policy and Interpretation. No substantive changes are intended.

### FRA Representative

As proposed, the definition of “FRA representative” is amended to include the oversight contractor for FRA’s Drug and Alcohol Program and the staff of FRA’s Associate Administrator for Railroad Safety.

### Impact Accident

In its initial implementation of this part, FRA excepted derailment and raking collisions from its definition of “impact accident” because it formerly believed these types of collisions were not caused by human factors. (See 50 FR 31539 and 31542, Aug. 2, 1985 and 54 FR 39647, Sep. 27, 1989). FRA is removing these exceptions after learning that human factors such as fatigue and impairment can and do contribute to both derailment and raking collisions.

As additional clarification, FRA is excluding the impact of rail equipment with “naturally-occurring obstructions such as fallen trees, rock or snow slides, livestock, etc.” from its definition of an impact accident. FRA is also incorporating guidance stating that an impact with a derail does not qualify as an “impact with a deliberately-placed obstruction, such as a bumping post,” since bumping posts are usually permanently placed at the end of a line, while derails can easily be moved from place to place.

### Medical Facility

As amended, a “medical facility” is an independent (i.e., not maintained by the railroad) site which is able to collect blood and urine specimens for PAT testing and, if necessary, treat an employee who has been injured in a PAT testing event.

### Railroad Property Damage or Damage to Railroad Property

As proposed, the amended definition of “railroad property damage or damage to railroad property” means damage to railroad property, including damage to on-track equipment, signals, track, track structure, or roadbed; and labor costs, including hourly wages, transportation costs, and hotel expenses; but excluding damage to lading and the cost of

clearing a wreck; *except that* the cost of contractor services, of renting and operating machinery, and of any additional damage caused while clearing the wreck *is* included when calculating railroad property damage to determine whether PAT testing is required under FRA's regulations. These clarifications are meant to enable easier compliance with this part, and no substantive changes are intended.

#### Train Accident

As amended, the definition of "train accident" refers to rail equipment accidents under § 225.19(c) which include, but are not limited to, collisions, derailments, and other events involving the operation of on-track or fouling equipment.

#### Train Incident

As amended, a "train incident" is defined as an event involving the operation of on-track or fouling equipment that results in a casualty, but does not result in damage to railroad property exceeding the applicable reporting threshold.

#### Deleted Definitions

As proposed, FRA is deleting the definitions of "General Railroad System of Transportation," and "Train," since these terms have been superseded by newly added definitions and amendments in this rule. FRA received no comments on these deletions.

#### Section 219.11—General Conditions for Chemical Tests

In its comments, the NCRMA asked FRA to impose conditions on urine specimen collections conducted under this part (*e.g.*, that FRA require a railroad to transport an employee to a company owned or contracted facility, or that drinking water not be used during the urine specimen collection process). With the exception of its PAT testing program, which is discussed below, FRA is prohibited from doing so, because the Department's Procedures for Workplace Drug and Alcohol Testing Programs (49 CFR part 40 or part 40) control the procedures and facilities used in FRA (non-PAT) and other DOT agency testing. FRA is authorized to enforce railroad compliance with part 40 requirements, but may not impose new requirements of its own. Therefore, for example, FRA cannot specify that only non-drinking water sources be used during random testing, because part 40 already regulates collection site conditions.

Because it predates part 40, FRA PAT testing is exempt from part 40's requirements. FRA therefore has the

authority to set its own PAT testing protocols, which are found in appendix C to this part. PAT testing blood and urine specimens must be collected at an independent medical facility, such as a hospital or physician's office. By definition an independent medical facility cannot be railroad owned or controlled, and it meets the NCRMA's requests for privacy, heat, and sanitation during specimen collection.

New paragraph (a)(2) clarifies that a regulated employee who is required to participate in Federal testing under part 219 must be on duty and subject to performing regulated service at the time of a breath alcohol test or urine specimen collection. This requirement does not apply to pre-employment drug testing of applicants for regulated service positions.

#### Paragraph (b)

Paragraph (b)(1) clarifies that regulated employees must participate in Federal testing as required by part 219 and as implemented by a representative of the railroad or an employing contractor.

As proposed, in paragraph (b)(2), FRA is replacing the phrase "has sustained a personal injury" with "is suffering a substantiated medical emergency," to allow treatment for medical emergencies that do not involve a personal injury (*e.g.*, a stroke) to take priority over required FRA testing. A medical emergency must be an acute medical condition requiring immediate medical care, and a railroad may require an employee to submit proof that that he or she had experienced one by providing, within a reasonable time period after, verifiable documentation of the emergency from a credible outside professional.

#### Paragraph (g)

In addition to the PAT testing requirements of subpart C and the signs and symptoms of drug and alcohol influence, intoxication, and misuse, paragraph (g) now requires a supervisor to be trained on the signs and symptoms of certain prescription drugs that can have acute behavioral and apparent physiological effects. To facilitate this training, FRA is developing a module for both supervisors and employees that will cover the required material and be made available on its Web site. In lieu of the previous minimum of three hours of training, FRA is requiring a supervisor to be able to demonstrate an understanding of the course material, usually through a written or oral examination at the end of the course.

#### PAT and Reasonable Suspicion Testing

Paragraph (a) adopts FRA's long-established guidance that a railroad may exceed employee HOS limitations if all three of the following conditions are met: (1) The excess service was necessary and solely caused by the railroad's completion of PAT or reasonable suspicion testing; (2) the railroad used due diligence to minimize the excess service; and (3) the railroad collected the PAT or reasonable suspicion specimens within the time limits of § 219.203(d) (for PAT testing) or § 219.305 (for reasonable suspicion testing). The railroad must still submit an excess service report, however.

#### Reasonable Cause Testing

Reasonable cause testing, like PAT and reasonable suspicion testing, is triggered by the occurrence of a specified but unpredictable event (in this case, a train accident, train incident, or rule violation, the cause or severity of which may be linked to a safety issue involving alcohol or drug use by a regulated employee). For this reason, FRA will not pursue an HOS violation if any excess service was caused solely by a railroad's decision to conduct reasonable cause testing, provided the railroad used reasonable due diligence to complete the test and did so within the time limitations of § 219.407 (*i.e.*, within eight hours of the observation, event or supervisory notification that was the basis for the test). However, because reasonable cause testing, unlike both PAT and reasonable suspicion testing, is authorized, but not required by part 219, paragraph (b) correspondingly authorizes, but does not require, a railroad to exceed HOS limitations to complete reasonable cause testing. As with mandatory PAT and reasonable suspicion testing, a railroad must file an excess service report if it decides to exceed HOS limitations to conduct optional reasonable cause testing.

#### Random Testing

As proposed, paragraph (c) adopts FRA's longstanding guidance that completion of a random test does *not* excuse compliance with a regulated employee's HOS limits, *unless* the circumstances of the employee's test require the employee to provide a directly observed urine specimen. A directly observed urine collection must be performed whenever an employee's previous test results or current behavior indicate the possibility of specimen tampering (see § 40.67). As with PAT, reasonable suspicion, and reasonable cause tests, the occurrence of such

circumstances is unpredictable. FRA will therefore not pursue an HOS violation provided the railroad conducts the random test with due diligence and files an excess service report.

Paragraph (d)

As proposed, paragraph (d) clarifies that because follow-up tests, like random tests, are scheduled by the railroad, follow-up testing must be completed within a covered employee's HOS limits. A railroad may place an employee on duty solely for the purpose of a follow-up *drug* test any time the employee is subject to being called for duty; a railroad may place an employee on duty for a follow-up *alcohol* test only if the employee's return-to-duty agreement requires total abstinence from alcohol use, since legitimate alcohol use is allowed so long as it is in compliance with the prohibitions of § 219.101. A railroad that chooses to place an employee on duty solely for the purpose of follow-up testing must document why it did so and provide the documentation to FRA upon request.

Paragraph (c)

As proposed, a railroad can make this part's required educational materials available to its regulated employees by posting them continuously in an easily visible location at a designated reporting place, provided the railroad also supplies a copy to each labor organization representing a class or craft of regulated employees (if applicable). Alternatively, a railroad can make these materials available by posting them on a Web site accessible to all regulated employees; any distribution method that can ensure the accessibility of these materials to all regulated employees is acceptable.

For MOW employees only, however, FRA is initially requiring distribution of individual hard copies of educational materials, since these employees are being introduced to the requirements of part 219. This individual distribution requirement applies for three years after the effective date of this final rule, although it does not apply to an applicant for a regulated service position who refuses a pre-employment test or has a pre-employment test result indicating a part 219 violation.

*Section 219.25—Previous Employer Drug and Alcohol Checks*

This new section reminds railroads and contractors that they must comply with § 40.25, which requires an employer to conduct a search (for non-negative test results, e.g., positives, substitutions, and adulterations) of a new hire's past two years of drug and

alcohol test records before that individual can perform any DOT safety-sensitive functions. This requirement applies only to the railroad or contractor's direct employees (e.g., a railroad has no responsibility to conduct a background check on a contractor's direct employees, since that responsibility belongs to the contractor). A railroad must also comply with the prior drug and alcohol conduct requirements of § 240.119(c) for certified locomotive engineers and § 242.115(e) for certified conductors.

**Subpart B—Prohibitions**

*Section 219.101—Alcohol and Drug Use Prohibited*

Paragraph (a)(1)

In the NPRM, FRA had asked for comment on whether it should remove part 219.101's prohibitions against the on-duty possession of alcohol and controlled substances. FRA modeled these prohibitions after those in Rule G, a longstanding railroad operating rule which originally prohibited the on-duty use and possession of alcohol, and was later amended to include controlled substances as well. *See* 49 FR 24266, June 12, 1984.

Many commonly prescribed drugs, such as muscle relaxants and pain relievers, are controlled substances. As strictly read, § 219.101 prohibits the on-duty possession of not only illicit drugs but many prescription drugs with legitimate medical uses (with the exception of any controlled substance prescribed in accordance with § 219.103). Similarly, because § 219.101 prohibits the on-duty possession of alcohol, if strictly read, this section also bans the on-duty possession of any over-the-counter cough and cold remedy that contains alcohol. In the NPRM, FRA asked for comment on whether it should remove § 219.101's prohibitions against on-duty possession of controlled substances and alcohol because they could be construed to prohibit the possession of legal drugs and remedies on railroad property. FRA noted that no other DOT agency prohibits the on-duty possession of both controlled substances and alcohol, and that a railroad remains free to impose discipline for such possession under its own authority.

Labor commented that FRA should clarify its policy on prescription use, as did the NTSB. The NTSB opposed FRA's proposal to remove 219.101's prohibitions against the on-duty possession of controlled substances and alcohol, without explanation.

As proposed, FRA is therefore retaining but clarifying this prohibition, which, as amended, prohibits the use or

possession of controlled substances and alcohol by a regulated employee while “on duty and subject to performing regulated service for a railroad.” This prohibition applies not only when a regulated employee is actually performing regulated service, but also when the employee is subject to performing regulated service.

Paragraph (a)(4)

Paragraph (a)(4) prohibits an employee whose Federal test indicates an alcohol concentration of 0.02 or greater, but less than 0.04, from performing covered service until the start of his or her next regularly scheduled duty period, but not less than eight hours from the administration of the test. However, since an alcohol concentration of 0.02 or greater but less than 0.04 is not a violation of § 219.101, an alcohol test result in this range may not be used for locomotive engineer or conductor certification purposes under part 240 or part 242.

As proposed, FRA is adding new paragraph (a)(4)(ii) to clarify that a railroad is not prohibited from taking further action under its own authority against an employee whose Federal test result indicates an alcohol concentration 0.02 or greater but less than 0.04, since a result in this range indicates the presence of alcohol in the employee's system. Although Labor opposed allowing a railroad to impose discipline under its own authority in this circumstance, this is not a substantive change, since FRA guidance has long allowed this narrow exception.

Paragraph (a)(5)

Paragraph (a)(5) states that a Federal test result with an alcohol concentration below 0.02 is a negative result that a railroad may not use as evidence of alcohol misuse, either as evidence in a company proceeding or as a basis for subsequent testing under company authority. A railroad may conduct additional company testing only if it has an independent basis for doing so.

As proposed, FRA is amending this paragraph to adopt its previously stated policy that a railroad has an independent basis for a subsequent company authority alcohol test only when an employee continues to exhibit signs and symptoms of alcohol use after having had a negative FRA reasonable suspicion alcohol test result. If a railroad has an independent basis to conduct a subsequent alcohol test under company authority, the company test result stands independent of the prior FRA test result.

### Section 219.103—Use of Prescription and Over-the-Counter Drugs

In the NPRM, FRA asked railroads to submit comments on their 30 years of administering this section, which has been unchanged since the inception of part 219 in 1985. The NTSB, the sole responder, commented that this section did not adequately address the safety concerns raised by the use of prescription and over-the-counter (OTC) drugs, particularly diphenhydramine and other sedating antihistamines that could impair performance. In its comment, the NTSB reiterated R-13-01, in which it recommended that FRA address employees' underlying medical conditions by developing medical certification regulations, a recommendation that is beyond the scope of this rule.

In response to the NTSB's other concerns, however, FRA is developing a training module which will cover the more commonly used prescription and OTC drugs that could have adverse effects, including diphenhydramine. This module, which will be downloadable for free on FRA's Web site, will also contain general information on the best practices to follow when using prescription and OTC drugs. FRA will inform its regulated entities when this module is available for distribution.

### Section 219.104—Responsive Action

FRA is amending this section to clarify that: (1) With the exception of the right to a hearing, an applicant for regulated service who has refused to take a pre-employment test is entitled to all of the protections of this part; (2) the notice a railroad must provide to a regulated employee before removing him or her from regulated service must be in writing; and (3) a regulated employee is entitled to request a hearing under this section following an alleged violation of § 219.101 or § 219.102.

#### Paragraph (a)

Paragraph (a)(2) emphasizes that none of the requirements in this section apply to tests conducted under company authority. FRA is also removing the word "mandatory" because it is inaccurate, since neither reasonable cause nor pre-employment alcohol testing are mandated by part 219. If, however, a railroad does decide to conduct a reasonable cause or pre-employment alcohol test under FRA authority, a regulated employee or applicant for regulated service who refuses the test is subject to the consequences for refusals found in this section.

#### Paragraph (b)

Previously, paragraph (b) required a railroad, before "withdrawing" an employee from covered service, to provide notice to the employee of the reason for his or her withdrawal. This notice must be in writing, although a railroad may first notify an employee verbally, if the railroad provides written notice to the employee as soon as practicable. In its written removal notice, the railroad must include a statement prohibiting the employee from performing any DOT safety-sensitive functions until he or she has successfully completed the evaluation, referral, and treatment processes required for return-to-duty under part 40. FRA believes receipt of this information will discourage an employee from job hopping in an effort to avoid compliance with part 40's return-to-duty requirements. A railroad may use this notice to comply with § 40.287's requirement to provide each employee who violates a DOT drug and alcohol regulation with a listing of SAPs who are both readily available to the employee and acceptable to the railroad, by providing the contact information (name, address, telephone number, and, if applicable, email address) for each SAP on its list. (Of course, a railroad may also provide this information separately.)

#### Paragraph (c)

Previously, paragraph (c)(1) allowed an employee to request a hearing if the employee denied "that the test result is valid evidence of alcohol or drug use prohibited by this subpart." FRA has removed this phrase because the removal from duty and hearing procedures in this section also apply to violations of § 219.101 or § 219.102 that have *not* been detected through testing (e.g., a refusal or a violation of the prohibition against possessing alcohol). An employee may demand a hearing for any violation of § 219.101 or § 219.102, regardless of whether the alleged violation was based on a test result.

Similarly, FRA is amending paragraph (c)(4) to clarify that its statement that part 219 does not limit any procedural rights or remedies available (e.g., at common law or through an applicable bargaining agreement) to an employee, applies to all violations of part 219, not just those based on test results.

#### Paragraph (d)

As stated above, FRA PAT testing pre-dates part 40 and has always been excepted from DOT's testing procedures. Because the primary purpose of FRA PAT testing is accident

investigation, FRA has always tested a wider variety of specimens (*i.e.*, blood, post-mortem tissue specimens) for a wider variety of substances (e.g., barbiturates and benzodiazepines) than part 40 testing does. A regulated employee can therefore have a PAT test with a positive result that would not be detectable or duplicable under DOT procedures (e.g., a positive PAT blood test result for benzodiazepines). With respect to responsive action, however, PAT testing follows part 40 requirements, by requiring a negative return-to-duty test and a minimum of six negative follow-up tests for the substance of the original positive in the first 12 months after returning to regulated service (certified locomotive engineers and conductors have different follow-up testing minimums, *see* §§ 240.119(d)(2) and 242.115(f)(2)).

To ensure that any regulated employee who has had a positive PAT test result is in compliance with FRA's return-to-duty and follow-up requirements, in addition to Part 40 tests, FRA is allowing company tests to fulfill these requirements where necessary. If and only if, the substance of the employee's original PAT positive is not a drug listed in § 40.5's definition of "Drug," a railroad may conduct return-to-duty and follow-up tests for that substance under its own authority, provided the railroad's procedures mirror those of part 40 and the substance is on the company test's panel. FRA is allowing company testing in this limited circumstance because of the important role return-to-duty and follow-up tests play in maintaining an employee's abstinence from substance abuse in the first year following the employee's return to performing regulated service.

#### Paragraph (e)

FRA is adding new paragraph (e) to clarify when § 219.104's requirements do *not* apply.

The language formerly in paragraph (a)(3)(i), which stated that the requirements of this section do not apply to actions based on alcohol or drug testing that is not conducted under part 219, can now be found in paragraph (e)(1).

Paragraph (e)(2) clarifies that this section's requirements do *not* apply to Federal alcohol tests with a result less than 0.04. As mentioned above in FRA's discussion of § 219.101(a)(4), a Federal test result that is .02 or greater but less than .04 proves that an employee has recently used alcohol, but not that the employee is impaired. Because an employee who has a test result in this range is not in violation of § 219.101,

the only consequence allowed under this part is the removal of the employee from regulated service for a minimum of eight hours. All other actions following an alcohol test result below .04, including the administration of return-to-duty or follow-up tests, must therefore be conducted under a railroad's own authority.

Paragraph (e)(3) clarifies that although parts 240 and 242 require a substance abuse evaluation for a locomotive engineer or conductor who has had an off-duty conviction for, or a completed state action to, cancel, revoke, suspend, or deny a motor vehicle-driver's license for operating while under the influence of or impaired by alcohol or a controlled substance, an off-duty conviction or completed state action is not a violation of § 219.101 or § 219.102.

Paragraph (e)(4) clarifies that this section does not apply to an applicant who declines to participate in pre-employment testing before the test begins.

Similarly, paragraph (e)(5) clarifies that the hearing procedures in paragraph (c) of this section do not apply to an applicant who tests positive or refuses a DOT pre-employment test.

In contrast, paragraph (e)(6) clarifies that an applicant who has tested positive or refused a DOT pre-employment test must complete the return-to-duty requirements in paragraph (d) before performing DOT safety-sensitive functions subject to the drug and alcohol regulation of any DOT agency. Section 40.25(j) prohibits an employee who has tested positive or refused a test from performing any DOT safety-sensitive functions until and unless the employee documents successful completion of part 40's return-to-duty process.

#### *Section 219.105—Railroad's Duty To Prevent Violations*

##### *Paragraph (a)*

Paragraph (a) of this section provides that a railroad may not with "actual knowledge" permit an employee to remain or go on duty in covered service in violation of either § 219.101 or § 219.102. FRA is clarifying that a railroad's "actual knowledge" of such a violation is limited to the knowledge of a railroad manager or supervisor in the employee's chain of command. A manager or supervisor is considered to have actual knowledge of a violation when he or she: (1) Personally observes an employee violating part 219 by either using or possessing alcohol, or by using drugs (observing potential signs and symptoms of alcohol/drug use does not by itself constitute actual knowledge);

(2) learns from a § 40.25 background check of a previous employer's drug and alcohol records that an employee had a § 219.101 or § 219.102 violation and did not complete

§ 219.104's return-to-duty requirements; or (3) receives an employee's admission of prohibited alcohol possession or misuse or drug abuse.

##### *Paragraph (b)*

FRA is not amending paragraph (b) of this section. Instead, as guidance FRA is reprinting the 1989 preamble discussion which, in proposing this section, explained its purpose as:

to describe the limitations on railroad liability with respect to the prevention of the violations of the Subpart B prohibitions. . . . In summary, the provisions require the railroad to exercise a high degree of care to prevent violations, but do not impose liability where, despite such efforts, an individual employee uses alcohol or drugs in a manner that is prohibited (and the railroad is not aware of the conduct).

54 FR 39649, Sep. 27, 1989. While this paragraph places an affirmative duty on a railroad to use due diligence to prevent violations of § 219.101 or § 219.102, a railroad that can show it has done so has only limited liability under this part for violations of its prohibitions by individual employees. Since what constitutes due diligence under this provision varies on a case-by-case basis, a railroad that is uncertain about its applicability in a given situation should contact FRA for guidance.

##### *Paragraph (c)*

New paragraph (c) prohibits the design and implementation of any railroad drug and/or alcohol education, prevention, identification, intervention, or rehabilitation program or policy that circumvents or otherwise undermines the requirements of part 219. A railroad must make all documents, data, or other records related to such programs or policies available to FRA upon request.

##### *Paragraph (d)*

##### *Rule G Observations*

In its guidance, FRA required a railroad's supervisors to make and record each quarter a total number of "Rule G" observations equivalent, at a minimum, to the railroad's total number of covered employees. Each Rule G observation should be made sufficiently close to an employee to enable the supervisor to determine whether the employee was displaying signs and symptoms of impairment requiring a reasonable suspicion test.

In the NPRM, FRA requested comment on whether § 219.105 should adopt this guidance by requiring a specific number of Rule G observations; FRA was particularly interested in the safety benefits versus the costs and paperwork burdens of such a requirement. In response, the Associations commented that FRA's requirement for each supervisor to be trained in signs and symptoms of drug and alcohol abuse already ensured that railroad supervisors were automatically aware of what to look for when observing an employee's demeanor and behavior. Therefore, according to the Associations, requiring a specific number of what were essentially constant supervisory observations to be systematically recorded would be a paperwork exercise that added nothing to safety.

Because reasonable suspicion and reasonable cause testing share the same check box on DOT's drug and alcohol chain of custody forms, FRA's MIS data does not distinguish between tests conducted under mandatory reasonable suspicion authority and tests conducted under discretionary reasonable cause. While there is no direct correlation showing that Rule G observations increase or result in reasonable suspicion tests, FRA believes that each year's consistently low total of reasonable suspicion tests indicates the continuing need to focus supervisory attention on the use and importance of reasonable suspicion testing as deterrence. To make Rule G observations both more meaningful and less burdensome, new paragraph (d) adopts FRA's previous guidance requirements but: (1) Decreases the minimum annual number of observations supervisors must make and record from four to two times a railroad's total number of covered employees, and (2) requires each observation to be sufficiently up close and personal to determine if a covered employee is displaying signs and symptoms indicative of a violation of the prohibitions in this part. The latter requirement is intended to ensure that supervisory observations are of individuals rather than collective sweeps of multiple employees.

#### *Section 219.107—Consequences of Refusal*

This section requires an employee who has refused to provide breath or body fluid specimens when required by part 219 to be disqualified from performing covered service for nine months. As suggested by SAPlist.com, FRA is deleting the word "unlawful" from the title of this section, since it

implies that there are “lawful” refusals. This is not a substantive change.

#### Paragraph (b)

Paragraph (b) requires a railroad, before withdrawing an employee from regulated service, to provide notice to the employee of the reason for the withdrawal and the procedures in § 219.104(c) under which the employee may request a hearing. As proposed, FRA is clarifying that this notice must be in writing, although a railroad may initially provide an employee with verbal notice if the railroad provides written notice to the employee as soon as practicable.

#### Paragraph (c)

This section prohibits a railroad with notice that an employee has been withdrawn from regulated service from authorizing or permitting the employee to perform any regulated service on its behalf. The railroad may, however, authorize or permit the employee to perform non-regulated service.

### Subpart C—Post-Accident Toxicological Testing

#### Section 219.201—Events for Which Testing Is Required

#### Paragraph (a)

This section defines the types of accidents or incidents for which PAT testing is required and states that a railroad must make a good faith determination as to whether an event meets the criteria for PAT testing. Specifically, existing paragraph (a) requires a railroad to conduct PAT testing after the following qualifying events: (1) Major train accidents; (2) impact accidents; (3) fatal train incidents; and (4) passenger train accidents. As proposed, FRA is amending the definitions of these qualifying events and adding a new qualifying event that requires PAT testing, “Human-Factor Highway-rail Grade Crossing Accident/Incident.”

#### • Major Train Accidents

As proposed, FRA is clarifying that the fatality criteria for a major train accident is met by the death of “any person,” including an individual who is not an employee of the railroad.

Also as proposed, FRA is increasing the property damage threshold for major train accidents from \$1,000,000 to \$1,500,000 to account for inflation since January 1, 1995, when FRA last raised the damages threshold for major train accidents from \$500,000 to \$1,000,000. As noted by the AAR in its comment supporting this amendment, reducing the number of events qualifying as

major train accidents correspondingly reduces the number of employees subject to PAT testing, which reduces such railroad costs as lost opportunities and wages.

#### • Impact Accidents

See discussion in § 219.5 above.

#### Human-Factor Highway-Rail Grade Crossing Accident/Incident

In § 219.201(b), FRA prohibits PAT testing after a highway-rail grade crossing accident. FRA carved out this PAT testing exception after concluding that there was no justification for testing members of the train crew since they could not have played any role in the cause or severity of the highway-rail grade crossing accident. By the time a train crew spots a vehicle or other obstruction on the track, the weight and momentum of the train prevent the crew from stopping in time to avoid a collision.

FRA continues to believe that the members of a train crew should be excepted from PAT testing after the occurrence of a highway-rail grade crossing accident. As proposed, however, FRA is narrowing this blanket exception by adding a new qualifying event, “Human-factor highway-rail grade crossing accident/incident” in paragraph (a)(5), to allow the PAT testing of a signal maintainer, flagman, or other employee only if a railroad’s preliminary investigation indicates that the employee may have played a role in the cause or severity of the accident. This amendment responds to NTSB Recommendation R-01-17, in which the NTSB had recommended that FRA narrow its exception for highway-rail grade crossing accidents to require PAT testing of any railroad signal, maintenance, or other employee whose actions at or near a grade crossing may have contributed to the cause or severity of a highway-rail grade crossing accident.

New paragraph (a)(5)(i) contains the criteria for a “human-factor highway-rail grade crossing accident/incident.” This paragraph requires PAT testing after a highway-rail grade crossing accident/incident whenever there is reason to believe that a regulated employee has interfered with the normal functioning of a grade crossing signal system, in testing or otherwise, without first providing for the safety of highway traffic that depends on the normal functioning of such a system. Because this language is adapted from the prohibition against such interference in FRA’s grade crossing regulation (see 49 CFR 234.209), a grade crossing accident/incident involving a § 234.209

violation qualifies as a human-factor highway-rail grade crossing accident/incident for purposes of PAT testing.

Under paragraphs (a)(5)(ii) and (iii), PAT testing after a highway-rail grade crossing accident/incident is also required if the event involved violations of the flagging duties found in FRA’s grade crossing regulation. See 49 CFR 234.105(c), 234.106, and 234.107(c)(1)(i). The sections referenced in these paragraphs permit trains to operate through malfunctioning grade crossings if an appropriately equipped flagger, law enforcement officer, or crewmember provides warning for each direction of highway traffic. For example, when a false activation occurs, § 234.107(c)(1)(i) requires flagging by an appropriately equipped flagger if one is available. Under paragraphs (a)(5)(ii) and (iii), an employee who fails to comply with this flagging requirement is subject to PAT testing if a highway-rail grade crossing accident/incident then occurs. Under paragraph (a)(5)(iv), FRA is further narrowing its PAT testing exception for highway-rail grade crossing accident/incidents by requiring PAT testing if a fatality of a regulated employee is involved. As with fatal train incidents, a deceased regulated employee is subject to post-mortem PAT testing regardless of whether the employee was at fault. For example, a regulated employee who died while operating an on-rail truck that collided with a motor vehicle at a highway-rail grade crossing is subject to post-mortem PAT testing regardless of who was at fault for the collision.

Similarly, paragraph (a)(5)(v) requires PAT testing after a highway-rail grade crossing accident/incident if a violation of an FRA regulation or railroad operating rule by a regulated employee may have played a role in the cause or severity of the accident/incident. While paragraphs (a)(5)(i)–(iv) of this section specify the circumstances under which PAT testing is required for highway-rail grade crossing accidents/incidents involving human-factor errors, paragraph (a)(5)(v) serves as a catch-all provision that requires PAT testing for highway-rail grade crossing accidents/incidents that involve human-factor errors other than those specified in paragraphs (a)(5)(i)–(iv).

#### Paragraph (b)

As discussed above, FRA is narrowing this grade crossing exception to allow PAT testing for human-factor highway-rail grade crossing accident/incidents, and is amending the language in this paragraph accordingly.

SEPTA had asked FRA to clarify whether the contributing action of a

motor vehicle operator within a grade crossing could trigger the PAT testing of a MOW employee. Any employee involved in a highway-rail grade crossing accident is excepted from PAT testing *unless* a railroad's preliminary investigation indicates that the employee's actions may have contributed to the occurrence or severity of the accident; this general exception applies to all regulated employees and is not affected by the addition of MOW employees to this part.

*Section 219.203—Responsibilities of Railroads and Employees*

Paragraph (a)(1)

Paragraph (a)(1) requires a regulated employee whose actions may have played a role in the cause or severity of a PAT testing qualifying event (*e.g.*, an operator, dispatcher, or signal maintainer) to provide blood and urine samples for PAT testing, regardless of whether the employee was present or on-duty at the time or location of the qualifying event, as required by FRA's amended PAT testing recall provisions in paragraph (e) of this section.

Paragraph (a)(2)

Paragraph (a)(2) specifies that the remains of an on-duty employee who has been fatally injured in a qualifying PAT testing event must undergo post-mortem PAT testing if the employee dies within 12 hours of the event. This requirement applies regardless of whether the employee was performing regulated service, was at fault, or was a direct employee, volunteer, or contractor to a railroad. Part 219 already requires such fatality testing. *See* §§ 219.11(f) and 219.203(a)(4)(ii).

Paragraph (a)(3)

Paragraph (a)(3) specifies which regulated employees must be tested for major train accidents. In paragraph (a)(3)(i), FRA requires all crew members of *on-track equipment* involved in a major train accident to be PAT tested, regardless of fault—a requirement that already applies to all train crew members involved in a major train accident. *See* § 219.203(a)(3). In addition, paragraph (a)(3)(ii) requires a regulated employee who is not an assigned crew member of an involved train or other on-track equipment to be PAT tested, if it can be immediately determined that the regulated employee may have played a role in the cause or severity of the major train accident.

Paragraph (a)(4)

In paragraph (a)(4), which applies specifically to fatal train incidents, FRA proposed that an individual must die

within 12 hours of the incident to qualify for post-mortem PAT testing. The NTSB suggested that FRA instead define a PAT testing fatality as one that occurred within 30 days of the incident, to match its own definition and that of FMCSA's. FRA's proposed 12-hour time limit applies to the post-mortem *testing* of a fatality, however, not to the *reporting* of its occurrence, as the NTSB and FMCSA time limits do. The result of a post-mortem PAT test conducted up to 30 days later would fail to indicate an individual's condition at the time of an incident, and would have no probative value because any alcohol and most controlled substances present in the individual when the accident occurred would have metabolized long before the test was conducted. FRA is therefore adopting its proposal that post-mortem PAT testing is required only if an individual dies within 12 hours of an incident.

Paragraph (a)(5)

Paragraph (a)(5) specifies which regulated employees must be PAT tested following human-factor highway-rail grade crossing accidents/incidents. Under § 219.201(a)(5)(i), only a regulated employee who interfered with the normal functioning of a grade crossing signal system and whose actions may have contributed to the cause or severity of the event must be PAT tested. Paragraphs (a)(5)(ii) and (iii) clarify the testing requirements for human-factor highway-rail grade crossing accidents/incidents under § 219.201(a)(5)(ii) and (iii). If a grade crossing activation failure occurs, these paragraphs require PAT testing of a regulated employee responsible for flagging (either flagging highway traffic or acting as an appropriately equipped flagger as defined in § 234.5), if the employee either fails to flag or to ensure that the required flagging occurs, or if the employee contributes to the cause or severity of the accident/incident.

Paragraph (a)(5)(iv) states that only the remains of a fatally-injured regulated employee(s) involved in a human-factor highway-rail grade crossing accident/incident under § 219.201(a)(5)(iv) must be post-mortem PAT tested.

Paragraph (a)(5)(v) states that only a regulated employee who has violated an FRA regulation or railroad operating rule and whose actions may have contributed to the cause or severity of the event must be PAT tested in the event of a human-factor highway-rail grade crossing accident/incident.

Paragraph (a)(6)

Paragraph 219.203(a)(3) requires a railroad to exclude from PAT testing an employee involved in an impact accident or passenger train accident with injury, or a surviving employee involved in a fatal train incident, if the railroad can immediately determine that the employee had no role in the cause or severity of the event. If a railroad determines that an event qualifies for PAT testing, the railroad must consider the same immediately available information to determine whether an employee should be subject to or excluded from PAT testing.

Correspondingly, paragraph (a)(6) requires a railroad to make a PAT testing determination when an employee survives a human-factor highway-rail grade crossing accident/incident. There is no determination to be made, however, when a regulated employee has been involved in a major train accident or an employee has been fatally injured in a qualifying event while on-duty; in these circumstances the employee must be post-mortem PAT tested, as specified in paragraphs (a)(6)(i) and (ii).

Paragraph (b)—Railroad Responsibility

Paragraph (b)(1) requires a railroad to take all practicable steps to ensure that each regulated employee subject to PAT testing provides the required specimens. This includes a regulated employee who may not have been present or on-duty at the time of the PAT testing event, but who may have played a role in its cause or severity, since paragraph (e) of this section amends FRA's recall provisions to allow employee recall in such circumstances.

Paragraph (b)(3) adopts longstanding FRA guidance that FRA PAT testing takes precedence over any toxicological testing conducted by state or local law enforcement officials. *See* Interpretive Guidance Manual at 20.

Paragraph (c)—Alcohol Testing

Paragraph (c) allows a railroad to require a regulated employee who is subject to PAT testing to undergo additional PAT breath alcohol testing if the employee is still on, and has never left, railroad property.

Paragraph (d)—Timely Specimen Collection

New paragraph (d)(1) requires a railroad: (1) To make "every reasonable effort to assure that specimens are provided as soon as possible after the accident or incident," and, (2) if the railroad was unable to collect specimens within four hours of the qualifying event, to prepare and maintain a record

stating why the test was not promptly administered (the railroad is still required to collect the specimens as soon thereafter as possible, however, under § 219.203(b)(1)).

Previously, § 219.209(c) required a railroad to notify FRA's Drug and Alcohol Program Manager immediately by phone whenever a specimen collection took longer than four hours, and to prepare a written explanation for any delay in specimen collection beyond four hours; submission of that report, however, was required only upon request by FRA. As amended in § 219.203(d)(1), FRA is reiterating most of the requirements formerly in § 219.209(c), but is now requiring a railroad to submit its written report within 30 days after expiration of the month during which the qualifying event occurred.

#### Paragraph (e)—Employee Recall

As proposed, FRA eliminated its previous requirement that a qualifying PAT event had to have occurred during the employee's duty tour.

FRA has simplified its employee recall provisions by requiring a regulated employee to be immediately recalled and placed on duty for PAT testing if only two conditions are met: (1) The railroad could not retain the employee in duty status because the employee went off duty under normal carrier procedures before the railroad instructed the employee to remain on duty pending its testing determination; *and* (2) the railroad's preliminary investigation indicates a clear probability that the employee played a role in the cause or severity of the accident/incident. An employee who has been transported to receive medical care is considered to be on-duty for purposes of PAT testing. A railroad may also PAT test an employee who has failed to remain available for PAT testing as required.

Paragraph (e)(3) requires an employee to be recalled regardless of whether the qualifying event occurred while the employee was on duty, although a railroad is prohibited from recalling an employee if more than 24 hours has passed since the event. An employee who has been recalled for PAT testing must be placed on duty before he or she is PAT tested.

Paragraph (e)(4) specifies that both urine and blood specimens must be collected from an employee who has been recalled for PAT testing. An employee who left railroad property before being recalled can be PAT tested for drugs only, since the employee could have legitimately used alcohol after leaving. For this reason, a recalled

employee can be PAT tested for alcohol only if the employee never left the railroad's property and the railroad completely prohibits the use of alcohol on its property.

Paragraph (e)(5) requires a railroad to document its attempts to contact an employee who has to be recalled for PAT testing. If a railroad cannot contact and obtain a specimen from an employee subject to mandatory recall within 24 hours of a qualifying event, the railroad must notify and submit a narrative report to FRA as required by paragraph (d)(1). In its report, the railroad must show that it made a good faith effort to contact the employee, recall the employee, place the employee on duty, and obtain specimens from the employee.

#### Paragraph (f)—Place of Specimen Collection

Paragraph (f) states that an independent medical facility is required only for the mandatory collection of PAT urine and blood specimens since a breath alcohol PAT test (which is authorized, but not required) is not an invasive procedure. Section 219.203(c) authorizes a railroad to conduct FRA breath alcohol testing following a qualifying event, provided this testing does not interfere with the timely collection of urine and blood specimens (as specified in the PAT testing specimen collection procedures in appendix C to this part).

Although FRA still considers it a best practice for a railroad to pre-designate medical facilities for PAT testing, FRA has removed this requirement, which is impracticable for several reasons. First, because the prompt treatment of injured employees must take precedence over any railroad pre-designation, an emergency responder may take an injured employee to a closer but non-designated medical facility. Second, even if a railroad has pre-designated a medical facility, the facility's responding employees may not be aware of or honor this designation.

Paragraph (f)(1) states that a phlebotomist (a certified technician trained and qualified to draw blood in accordance with state requirements) is a "qualified medical professional" who may draw blood specimens for PAT testing. (A qualified medical professional does not need to meet the requirements of part 40, since part 40 does not apply to FRA PAT testing.) A qualified railroad or hospital contracted collector may also collect or assist in the collection of specimens, provided the medical facility has no objections.

Paragraph (f)(2) clarifies that employees who are subject to

performing regulated service are deemed to have consented to PAT testing under § 219.11(a), just as employees who perform covered service already are. For PAT testing only, FRA allows urine to be collected from an injured regulated employee who has already been catheterized for medical purposes, regardless of whether the employee is conscious. PAT testing is not subject to part 40's prohibition against collecting urine from an unconscious person.

#### Paragraph (g)—Obtaining Cooperation of Facility

In the NPRM, FRA had proposed replacing 1-800-424-8801 with 1-800-424-8802 as the contact number for the National Response Center (NRC). A railroad must contact the NRC when a treating medical facility refuses to collect blood specimens because an employee is unable to provide consent. A commenter suggested that FRA instead replace both 1-800-424-8801 and 1-800-424-8802 with 1-800-424-0201, a toll-free phone number specific to FRA. As the commenter noted, listing 1-800-424-0201 as the contact number for the NRC would make this part consistent with §§ 229.17, 230.22 and 234.7 of this chapter (respectively, Locomotive Safety Standards, Steam Locomotive Inspection and Maintenance Standards, and Grade Crossing Safety). FRA agrees, and is listing 1-800-424-0201 as its sole NRC contact number, in this paragraph, and in §§ 219.207(b) and 219.209(a)(1) of this part.

#### Section 219.205—Specimen Collection and Handling

##### Paragraph (c)

A railroad may no longer order a PAT testing kit directly from the designated FRA PAT testing laboratory (the laboratory specified in appendix B to part 219); the railroad must instead contact FRA's Drug and Alcohol Program Manager to request an order form to obtain a PAT testing kit from the laboratory. FRA will continue to follow its standard practice of making fatality PAT testing kits available only to Class I, Class II, and commuter railroads. If a small railroad has a PAT testing event involving a fatality to an on-duty employee, the small railroad should contact the National Railroad Response Center. FRA will then provide a fatality kit to a medical examiner or assist the small railroad in obtaining one from a larger railroad.

As proposed, FRA is removing paragraph (c)(3), which states that a limited number of shipping kits are

available at FRA's field offices, since FRA field offices no longer have these kits.

**Paragraph (d)**

For greater flexibility, FRA has amended this paragraph to allow a railroad to use other shipment methods besides air freight, provided the 24-hour delivery requirement is met. FRA is also allowing a railroad to hold specimens in a secure refrigerator for a maximum of 72 hours if a specimen's delivery cannot be ensured within 24 hours due to a suspension in delivery services.

**Paragraph (e)**

To ensure greater specimen security, FRA is prohibiting a railroad or medical facility from opening a specimen kit or a transport box after it has been sealed, even if it is later discovered that an error had been made either with the specimens or the chain of custody form. If such an error is discovered, the railroad or medical facility must make a contemporaneous written record of it and send that record to the laboratory, preferably with the transport box.

**Section 219.207—Fatality**

As discussed above, FRA is replacing 1-800-424-8801 and 1-800-424-8802, the phone numbers for the NRC previously listed in paragraph (b), with 1-800-424-0201. A railroad supervisor who is having difficulty obtaining post-mortem specimens from the local authority or custodian should call 1-800-424-0201 to notify the NRC duty officer.

In paragraph (d), FRA is clarifying that the information in "Appendix C to this part [which] specifies body fluid and tissue specimens for toxicological analysis in the case of a fatality," is also available in the "instructions included inside the shipping kits."

**Section 219.209—Reports of Tests and Refusals**

**Paragraph (a)(1)**

As discussed above, FRA is replacing 1-800-424-8802, the phone number previously listed in this paragraph for the NRC, with 1-800-424-0201. A railroad should call the latter number to notify the NRC of the occurrence of a qualifying post-accident event. The railroad must also notify the FRA Drug and Alcohol Manager; the contact number for doing so, 202-493-6313, is unchanged.

Previously, paragraph (a)(2)(v) of this section required a railroad reporting PAT tests and refusals to include the number, names, and occupations of the involved employees. To protect employee privacy interests and reduce

railroads, reporting burdens, FRA is requiring railroads to report only the number of employees tested.

Paragraph (b) required a railroad to provide a "concise narrative report" to FRA if, as a result of the non-cooperation of an employee or any other reason, the railroad was unable to obtain PAT testing specimens from an employee subject to PAT testing. As amended, a railroad must also notify FRA's Drug and Alcohol Program Manager immediately by phone of the failure. If a railroad representative is unable to speak directly to the FRA Drug and Alcohol Program Manager, the representative must leave a detailed voicemail explaining the circumstances and reasons for the railroad's failure to obtain PAT specimens. The purpose of this telephonic report is to assist both railroads and FRA in determining whether a refusal has occurred.

Paragraph (c) previously required a railroad to maintain records explaining why PAT testing was not performed within four hours of a qualifying event. FRA is deleting this requirement from § 219.209 because it is already addressed in § 219.203(d)(1), as discussed above in the section-by-section analysis for that section.

**Section 219.211—Analysis and Follow-Up**

Since part 40 does not apply to FRA PAT testing, FRA is amending paragraph (b) of this section to adopt part 40's prohibition on standing down (temporarily removing from service) an employee based solely upon a laboratory's confirmation of a non-negative test result, before the railroad's Medical Review Officer (MRO) has completed the result's verification. See § 40.21(a). As in part 40, a railroad may remove an employee from regulated service only after an MRO has verified that the employee has had a confirmed positive test, an adulterated test, or a substituted test.

As amended, paragraph (c) now provides the address of the FRA Associate Administrator for Railroad Safety.

For consistency throughout this part, in paragraph (e), FRA is substituting "Drug and Alcohol Program Manager" for "Alcohol/Drug Program Manager." Also, to enable employees to respond to their test results more easily, FRA is allowing responses to be sent by email.

Paragraph (g)(3) previously provided that FRA's PAT testing program does not authorize railroads to hold an employee out of service pending the receipt of the test results, "nor does it restrict a railroad from taking such action in an appropriate case." As

clarification, FRA is adding that a railroad must have additional information regarding an employee's actions or inaction, independent of the employee's involvement in a qualifying event, to justify holding the employee out of service under company authority. As with paragraph (b)'s prohibition against standing down an employee based solely on a confirmed laboratory test result, reports, an employee's involvement in a PAT testing event is not in itself a basis for a railroad's holding the employee out of regulated service.

**Section 219.213—Refusals; Consequences**

Paragraph (b) now requires a railroad to provide *written* notice to an employee who is being withdrawn from service under this part for refusing to provide a specimen for PAT testing. As with § 219.107, FRA is adopting *SAPlist.com*'s suggestion to delete the term "unlawful" from this section's heading, since it implies that there are "lawful" refusals. This is not a substantive change.

**Subpart D—Reasonable Suspicion Testing**

As proposed, reasonable suspicion testing remains in subpart D while reasonable cause testing is now in subpart E; this division underscores the importance of the differences between these types of tests, despite their similarity in names. (To accommodate this restructuring, the Identification of Troubled Employees requirements previously in subpart E have been moved to new subpart K.)

**Section 219.301—Mandatory Reasonable Suspicion Testing**

Paragraph (a) clarifies that a reasonable suspicion alcohol test is not required to confirm an on-duty employee's possession of alcohol.

Paragraph (c) requires all reasonable suspicion tests to comply with § 219.303 (which is generally consistent with the requirements previously found in § 219.300(b) and is discussed in more detail below).

Paragraph (d) requires a regulated employee to undergo reasonable suspicion testing if the employee's condition has stabilized within eight hours.

**Section 219.303—Reasonable Suspicion Observations**

This section contains the requirements for reasonable suspicion observations that were formerly in § 219.300(b).

**Paragraph (b)**

In paragraph (b), FRA clarifies that although two supervisors are required to make the required observations for reasonable suspicion drug testing, only one of these supervisors must be on-site and trained in accordance with § 219.11(g). This amendment incorporates long-standing FRA guidance, since two on-site trained supervisors are rarely available.

Before a reasonable suspicion drug test can take place, a trained on-site supervisor must describe the signs and symptoms that the on-site supervisor has observed of an employee's appearance and behavior to an off-site supervisor, who must confirm that these observations provide a reasonable basis to suspect the employee of drug abuse. Because of privacy concerns, this communication between supervisors may be made by telephone, but not by radio or email.

**Paragraph (c)**

New paragraph (c) prohibits a railroad from holding a regulated employee out of service from the time of the employee's reasonable suspicion test to the time of the railroad's receipt of the employee's verified test result (a practice known as "stand down"). A railroad may, however, use its own authority to hold an employee out of service during this period if the railroad has an independent basis for doing so (e.g., the employee is continuing to exhibit signs and symptoms of alcohol use).

**Paragraph (d)**

Paragraph (d) requires an on-site supervisor to document as soon as practicable the observed signs and symptoms that were the basis for the supervisor's decision to reasonable suspicion test a regulated employee. FRA is not adopting Labor's suggested alternate language, which essentially restates FRA's own without adding any clarification.

**Section 219.305—Prompt Specimen Collection; Time Limits****Paragraph (a)**

Paragraph (a) reiterates language formerly in § 219.302(a), which states consistent with the need to protect life and property, reasonable suspicion testing must be promptly conducted following the observations upon which the reasonable suspicion determination was based.

**Paragraph (b)**

Paragraph (b) requires a railroad to prepare and maintain a record

explaining the reasons for the delay whenever the railroad does not collect reasonable suspicion breath and/or urine specimens within two hours of the determination to test. If, however, a railroad has failed to collect reasonable suspicion testing specimens within eight hours of its determination to test, the railroad must discontinue its collection attempts and record why the test could not be conducted. The eight-hour deadline is met when the railroad has delivered the employee to a collection site where a collector is present and asked the collector to begin specimen collection.

Paragraph (b) also requires a railroad to submit its reasonable suspicion testing records upon request of the FRA Drug and Alcohol Program Manager.

**Paragraph (c)****Subpart E—Reasonable Cause Testing**

As discussed above, FRA is dividing reasonable suspicion and reasonable cause testing into separate subparts to emphasize that despite the similarity in names, the authority and criteria for mandatory reasonable suspicion testing is very different from that for discretionary reasonable cause testing. Formerly, reasonable suspicion and reasonable cause testing were both located in subpart D; reasonable suspicion testing remains in subpart D while reasonable cause testing is moved to subpart E. In addition, subpart E contains new rule violations tailored to the activities of MOW employees. FRA has re-designated the provisions of former subpart E as new subpart K.

**Section 219.401—Authorization for Reasonable Cause Testing**

Previously, a railroad had three options whenever the conditions for reasonable cause testing were met; the railroad could choose to: (1) Conduct a reasonable cause test under FRA authority, (2) conduct a reasonable cause test under its own (company) authority, or (3) not conduct a reasonable cause test. The railroad could switch among these choices without advance notice. For example, a railroad could conduct one employee's reasonable cause test under FRA authority, and another's under company authority, without any explanation. In many instances, an employee who had received a reasonable cause test was unsure as to what authority the test had been conducted under, while the lack of a consistency requirement led to frequent complaints about disparate treatment among employees.

FRA is now requiring a railroad to choose between using FRA authority or

company authority for reasonable cause testing. A railroad that chooses to use FRA authority must announce its choice to its employees and must use that FRA authority exclusively, by (1) providing notice of its selection of FRA authority in its educational materials; (2) specifying that FRA testing is authorized only after "train accidents" and "train incidents," as defined in § 219.5; and (3) adding new rule violations or other errors to § 219.403 as bases to test. Once a railroad has announced that it will be using FRA authority exclusively for reasonable cause testing, the railroad is prohibited from conducting reasonable cause tests under its own authority after an event listed in § 219.403. The railroad may always, however, use its own authority to test for events that are outside of the FRA criteria for reasonable cause testing listed in this subpart.

**Section 219.403—Requirements for Reasonable Cause Testing**

This section authorizes FRA reasonable cause testing after "train accidents" and "train incidents" as defined in § 219.5, but not after all part 225 reportable "accidents/incidents." As amended, railroads are authorized to conduct FRA reasonable cause testing for additional rule violations or other errors that reflect the expansion of part 219 to MOW workers, relate to signal systems and highway-rail grade crossing warning systems, and reflect recent amendments to 49 CFR part 218, Railroad Operating Practices.

**Paragraph (a)**

Section 219.301(b)(2) previously authorized reasonable cause testing following "an accident or incident reportable under part 225" when "a supervisory employee of the railroad has a reasonable belief, based on specific, articulable facts, that the employee's acts or omissions contributed to the occurrence or severity of the accident or incident." In this rule, FRA is clarifying that the terms "accident/incident" and "accident or incident reportable under part 225" in § 219.301(b)(2) do not authorize FRA reasonable cause testing after all part 225 reportable accidents/incidents.

As defined in § 225.5, the term "accident/incident" includes employee injuries and illnesses that conform with OSHA's recordkeeping/reporting requirements, but do not otherwise fall within FRA's railroad safety jurisdiction. See Accident Reporting Guide at 1–2 ("FRA's accident/incident reporting regulations that concern railroad occupational casualties should be maintained, to the extent practicable,

in general conformity with OSHA's recordkeeping and reporting regulations").

In its audits, FRA has found numerous instances where this confusion in terms has resulted in a railroad deciding to conduct an FRA reasonable cause test after every reportable injury, even if that injury was unconnected with the movement of on-track equipment (e.g., a slip, trip, or fall that was not related to the movement of on-track equipment where the railroad had no basis to believe that the employee's act or omission contributed to the injury (which is also a violation of existing § 219.301(b)(2)).

Furthermore, the § 225.5 definition of "accident/incident" includes occupational illnesses, such as carpal tunnel syndrome, carbon monoxide poisoning, noise-induced hearing loss, and dust diseases of the lungs, as well as circumstances such as a suicide attempt made by an on-duty employee, that do not authorize FRA reasonable cause testing. See *Accident Reporting Guide* at 33, and at Appendix E-2 through E-5.

To correct this confusion, FRA is specifying in § 219.403(a) that reasonable cause testing is authorized following "train accidents" and "train incidents," as defined by § 219.5, when a responsible railroad supervisor has a reasonable belief, based on specific, articulable facts, that the individual employee's acts or omissions contributed to the occurrence or severity of the train accident or train incident. By using the terms "train accident" and "train incident," FRA is attempting to limit the circumstances under which FRA reasonable cause testing is authorized to a subset of part 225 reportable accident/incidents. (A railroad may, of course, perform a reasonable cause test under its own authority for an accident/incident that does not qualify as a train accident or train incident.)

For consistency with the remainder of this subpart, FRA is also substituting the term "responsible railroad supervisor" for "supervisory employee."

#### Paragraph (b)

Paragraph (b) contains a list of rule violations and other errors that are grounds for FRA reasonable cause testing whenever a regulated employee is directly involved. The rule violations and other errors previously in § 219.301(b)(3) can now be found in paragraphs (b)(1)–(4), (b)(6)–(8), and (b)(10) of this section, without any substantive amendments. Paragraphs (b)(5), (b)(9), (b)(11)–(12), and (b)(13)–(18) contain additional rule violations

and other errors that are new grounds for FRA reasonable cause testing, as discussed below.

#### • Additional Rule Violations or Other Errors Related to Railroad Operating Practices

In paragraphs (b)(5) and (9), FRA is adding two new categories to the rule violations or other errors that are grounds for reasonable cause testing. These additional categories reflect recent amendments to 49 CFR part 218—Railroad Operating Practices.

In 2008, FRA amended part 218 to require railroads to adopt and comply with operating rules regarding shoving and pushing movements and the operation of switches. Many of these operating rule requirements for switches already provided bases for FRA reasonable cause testing, such as "[a]lignment of a switch in violation of a railroad rule, failure to align a switch as required for movement, operation of a switch under a train, or unauthorized running through a switch" and "[e]ntering a crossover before both switches are lined for movement or restoring either switch to normal position before the crossover movement is completed." § 219.301(b)(3)(iv) and (vii). Nevertheless, in paragraph (b)(5), FRA is authorizing reasonable cause testing if a regulated employee fails to restore and secure a main track switch when required.

Although § 218.99 requires a railroad to adopt specific operating rules governing shoving and pushing movements, FRA is authorizing reasonable cause testing only for § 218.99 violations that can pose significant safety concerns, as discussed below. For instance, a railroad is authorized to conduct FRA reasonable cause testing on a regulated employee who fails to provide point protection in accordance with § 218.99(b)(3), but is not authorized to do so if a regulated employee fails to conduct a job briefing.

#### • Additional Rule Violations or Other Errors Related to MOW Employees

Paragraphs (b)(13)–(17) authorize FRA reasonable cause testing for additional rules violations and errors related to the performance of MOW activities: Paragraph (b)(13) authorizes testing for the failure of a machine operator that results in a collision between a roadway maintenance machine and/or other on-track equipment or a regulated employee; paragraph (b)(14) authorizes testing for the failure of a roadway worker-in-charge to notify all affected employees when releasing working limits; paragraph (b)(15) authorizes testing for the failure of a flagman or

watchman/lookout to notify employees of an approaching train or other on-track equipment; paragraph (b)(16) authorizes testing for the failure to ascertain on-track safety before fouling a track; and paragraph (b)(17) authorizes testing for the improper use of individual train detection (ITD) in a manual interlocking or control point.

#### • Additional Rule Violations or Other Errors Related to Covered Service

As proposed, FRA is authorizing reasonable cause testing for three additional rule violations or other errors primarily addressing the actions of covered employees.

First, paragraph (b)(11) authorizes a railroad to conduct FRA reasonable cause testing if a regulated employee has interfered with the normal functioning of any grade crossing signal system or any signal or train control device without first taking measures to provide for the safety of highway traffic or train operations which depend on the normal functioning of such a device (e.g., by temporarily installing a jumper cable and failing to remove it after finishing repairs or testing). This includes the types of unlawful interference described in § 234.209 (grade crossing systems) and § 236.4 (signals).

Second, paragraph (b)(12) authorizes a railroad to conduct FRA reasonable cause testing if a regulated employee has failed to perform required stop-and-flag duties after a malfunction of a grade crossing signal system.

Third, paragraph (b)(18) authorizes a railroad to conduct FRA reasonable cause testing on a regulated employee whose failure to apply three point protection (by fully applying the locomotive and train brakes, centering the reverser, and placing the generator field switch in the off position) results in a reportable injury to a regulated employee.

A contracting company that performs regulated service for a railroad is authorized, but not required, to conduct FRA reasonable cause tests on its regulated employees. Conversely, a railroad is authorized to conduct FRA reasonable cause testing on its contractors when they are performing regulated service on the railroad's behalf.

#### Section 219.405—Documentation Requirements

Although reasonable cause testing remains discretionary, a railroad must create and maintain written documentation of the basis for a reasonable cause test if that test is conducted under FRA authority.

Accordingly, the railroad supervisor who made the determination that reasonable cause exists must promptly document the observations or facts (e.g., the amount of property damage, the rule that was violated, the role of the employee) that were the basis for this determination, although the documentation does not have to be completed before the FRA reasonable cause testing has been conducted.

#### Section 219.407—Prompt Specimen Collection; Time Limitations

This section clarifies that the eight-hour time period for conducting a reasonable cause test runs from the time a railroad supervisor is notified of the occurrence of the train accident, train incident, or rule violation that is the basis for the test.

#### Section 219.409—Limitations on Authority

##### Paragraph (a)

This paragraph contains an amended version of language that was previously in § 219.301(e). As amended, this paragraph states that: (1) If an event qualifies for mandatory PAT testing, a railroad is prohibited from conducting FRA reasonable cause tests in lieu of, or in addition to, the required PAT tests. Second, FRA is removing the word “compulsory,” which misleadingly implies that FRA reasonable cause testing is required, when it is optional but authorized in certain situations. Third, FRA is removing the second sentence of § 219.301(e), which, in part, stated that “breath test authority is authorized in any case where breath test results can be obtained in a timely manner at the scene of an accident and conduct of such tests does not materially impede the collection of specimens under Subpart C of this part.” FRA believes this sentence is confusing because FRA is proposing, in § 219.203(c), to allow only PAT breath alcohol testing, although such testing should be recorded on DOT’s alcohol custody and control form.

##### Paragraph (b)

For reasons similar to those discussed in § 219.211(b), paragraph (b) of this section prohibits a railroad from holding a regulated employee out of service pending the results of an FRA reasonable cause test. A railroad may, however, hold an employee out of service under its own authority.

##### Paragraph (c)

Paragraph (c) requires a supervisor to make a separate reasonable cause determination for each individual in a

train crew, rather than a collective decision to test the crew as a whole.

#### Subpart F—Pre-Employment Tests

##### Section 219.501—Pre-Employment Drug Testing

##### Paragraph (a)

A regulated railroad employee must have a negative Federal pre-employment drug test result for each railroad for which the employee performs regulated service. This requirement does not apply to contractor employees who perform regulated service for the railroad.

##### Paragraph (b)

As proposed, FRA is moving language previously in this paragraph to paragraph (e), where it will be discussed below.

Paragraph (b) now addresses the pre-employment drug testing requirements for contractor employees. In contrast to the pre-employment drug testing requirements for regulated employees discussed in paragraph (a) above, FRA is not requiring a contractor employee who performs regulated service for multiple railroads to have a negative Federal pre-employment drug test result for each railroad. Instead, each railroad only has to verify and document that the contractor employee has a negative Federal pre-employment drug test result on file with the contractor who is his or her direct employer. However, a contractor employee is required to have a new Federal pre-employment drug test if he or she switches direct employers by working for a different contractor who provides regulated service to railroads.

##### Paragraph (c)

A railroad is not required to conduct an FRA pre-employment drug test on an applicant or first-time transfer to regulated service if the railroad has already conducted a pre-employment drug test with a negative test result on the applicant or first-time transfer under the authority of another DOT agency. In most cases, this agency will be FMCSA, because railroads often require signal maintainers and MOW employees to hold a CDL as a condition of their employment, and a negative FMCSA pre-employment drug test result is one of the prerequisites to obtaining a CDL. See 49 CFR 382.301. This amendment increases a railroad’s hiring flexibility by allowing the railroad to transfer a CDL holder to first-time regulated service without having to conduct an FRA pre-employment drug test or having to wait for a negative test result (a railroad could, however, choose to

perform a new pre-employment drug test under its own authority). Since many MOW employees already hold CDLs because their jobs require the operation of railroad commercial motor vehicles, this limited exception will substantially lessen the number of pre-employment drug tests railroads will have to perform after the effective date of this final rule.

This exception applies, however, only when an applicant or first-time transfer’s negative DOT pre-employment drug test result is the result of a test conducted by the railroad itself. In other words, a CDL holder who performs regulated service for multiple railroads must have a separate negative pre-employment drug test result for each railroad. For example, a CDL holder who already has a negative DOT pre-employment drug test for Railroad A must still have a negative FRA pre-employment drug test result for Railroad B before he or she can begin performing regulated service for Railroad B.

##### Paragraph (d)

As proposed, new paragraph (d) specifies that an applicant must withdraw his or her application before the drug testing process begins if the applicant wants to decline a pre-employment drug test and have no record kept of that declination.

##### Paragraph (e)

In new paragraph (e), FRA exempts from pre-employment drug testing: (1) An employee who began performing MOW activities for a railroad before the effective date of this final rule; and (2) an employee who began performing regulated service for a small railroad (as defined in § 219.3(c)) before the effective date of this final rule. Both exemptions apply only so long as the employee continues to work for the same railroad that he or she was working for before the effective date of the final rule.

##### Section 219.502—Pre-Employment Alcohol Testing

This section addresses optional pre-employment alcohol testing.

##### Paragraph (a)(5)

Paragraph (a)(5) prohibits a railroad from permitting a regulated employee with an alcohol concentration of 0.04 or greater from performing regulated service until the employee has completed the return-to-duty process in § 219.104(d).

##### Paragraph (b)

Paragraph (b) of this section (addressing pre-employment alcohol

testing) previously contained language identical to § 219.501(b) (addressing pre-employment drug testing), which provides that, as used in subpart H, the term covered employee includes an applicant for pre-employment testing only. It also provided that no record may be maintained if an applicant declines to be tested and withdraws his or her application for employment. As discussed above in § 219.501(b), FRA has amended the language in § 219.502(b) to clarify that an individual must decline to participate in a pre-employment alcohol test by withdrawing his or her application before the testing process begins. As defined by DOT in § 40.243(a), the testing process begins when an individually wrapped or sealed mouthpiece is selected by the collector or the employee.

#### *Section 219.503—Notification; Records*

The first and second sentences of this section require railroads to provide medical review of pre-employment drug tests and to “notify” an applicant of the “results of the drug and alcohol test” as provided for by subpart H. FRA is amending both of these sentences to clarify that subpart H adopts the requirements found in part 40. FRA is also amending the second sentence to clarify that a railroad must provide written notice to an applicant who has had any type of non-negative FRA test result (*i.e.*, not just a positive, but also an adulteration, substitution, or refusal). A railroad is not required, however, to provide written notification to an applicant who has had a negative FRA pre-employment alcohol or drug test result.

FRA is also amending the third sentence of this section to clarify that a railroad must maintain a record of each application it denies because of the applicant’s non-negative FRA pre-employment test. A railroad must maintain a record for each individual who has had a non-negative test result on a FRA pre-employment test, even if the railroad denied the individual’s application for employment, because an individual who has had such a result must comply with the return-to-service and follow-up testing requirements of part 40 before he or she can begin performing DOT safety-sensitive functions for any employer regulated by a DOT agency. A railroad does not have to maintain a record, however, if an applicant withdraws his or her application to perform regulated service before the testing process begins.

#### *Section 219.505—Non-Negative Tests and Refusals*

Previously, this section prohibited an individual who “refuses” a pre-employment test from performing covered service based upon the application and examination with respect to which such refusal was made. As proposed, FRA has amended this section to specifically prohibit an individual who has refused or who had a non-negative (*i.e.*, a positive, adulterated, or substituted test result) pre-employment test result from performing DOT safety-sensitive functions for any DOT-regulated employer until the individual has completed the Federal return-to-duty process in § 219.104(d). As amended, this section conforms with § 40.25(e), which prohibits an employer who has information that an individual has violated a DOT agency drug or alcohol regulation from using that individual to perform DOT safety-sensitive functions until the employer receives information that the individual has complied with the return-to-duty requirements of part 40 or any DOT agency.

#### **Subpart G—Random Alcohol and Drug Testing Programs**

To achieve deterrence, a random testing program must ensure that each covered employee (including volunteers and probationary employees of a railroad or a contractor to a railroad), believes that he or she is subject to random testing without advance notice each time the employee is on duty and subject to performing covered service.

FRA received no objections to its proposal to subject an employee who performs MOW activities to the same random testing requirements as one who performs covered service. Accordingly, each railroad must submit for FRA approval a random testing plan that ensures each regulated employee believes he or she is subject to random testing without advance warning each time the employee is on-duty and subject to performing regulated service.

As proposed, FRA is revising and expanding subpart G, to clarify and consolidate requirements and to incorporate longstanding published FRA guidance. FRA received no comment on the majority of these changes, which are adopted as proposed without additional discussion.

#### **Subpart H—Drug and Alcohol Testing Procedures**

FRA received no comments on its minor editorial changes to this section, which are adopted as proposed.

#### **Subpart I—Annual Report**

##### *Section 219.800—Annual Reports*

FRA received no comments on its minor editorial changes to this section, which are adopted as proposed.

#### **Subpart J—Recordkeeping Requirements**

##### *Section 219.901—Retention of Alcohol and Drug Testing Records*

FRA received no comments on its proposals to ease recordkeeping burdens by consolidating requirements, removing others, and allowing still others to be maintained electronically. Accordingly, FRA is adopting these proposals without further discussion, except for proposed paragraph (c)(4)(iv), which contained an incorrect reference to prescription drug training records under § 219.103 and FRA has not adopted.

#### **Subpart K—Referral Programs**

For a variety of reasons, commenters found FRA’s proposal to replace its self-referral, co-worker report, and alternative policy requirements with peer support program requirements, to be both confusing and ill-advised. NCRMA and SMART (from this point forward collectively referred to as “Labor,” unless a comment was submitted by only one labor organization), in particular, raised objections and called for clarifications. As Labor noted, the concept of a voluntary peer referral program arose from “Operation Redblock,” a private rail industry initiative to address alcohol abuse. Labor expressed deep misgivings, both that FRA’s proposed peer support programs could harm these existing railroad programs, and that FRA’s proposal to audit each program would invade individual privacy and undermine employee trust in the program. Labor also criticized FRA’s proposal to allow an EAP counselor to function as an alternative to a trained drug and alcohol counselor, because an EAP counselor rarely has specific expertise in abuse and addiction issues. (Typically, an EAP program addresses a broad range of issues, such as marital or financial problems.) Similarly, Labor objected to using peer counselors, noting that a peer is usually a volunteer who provides empathy and advice based on his or her own drug and alcohol problems, without a counseling or medical degree.

The Associations suggested that FRA use the term “peer prevention” instead of “peer support” to emphasize that these programs should be proactive in nature. The Associations also warned

that FRA should audit and release aggregate program data only, because an employee could be discouraged from self-referring if the employee knew that his or her individual data would be subject to FRA examination. Like Labor, the Associations noted that a peer support group is usually composed of selected peers and volunteers rather than medical professionals; the Associations therefore supported allowing an employee who self-refers to have the option of receiving counseling and treatment from a Drug Abuse Counselor (DAC). Overall, the Associations found FRA's proposed subpart K flawed and redundant of the voluntary referral provisions already in § 219.403.

After consideration, FRA agrees that its proposal to mandate the establishment of peer support programs was unnecessary, since privately run railroad programs and FRA's own subpart E policies have both proven effective in identifying and helping employees with drug and alcohol abuse issues. FRA also agrees that its proposed peer support programs could interfere with, or possibly even be detrimental to, existing railroad self-referral programs. Therefore, instead of requiring the adoption of peer prevention programs, FRA is revising and moving its voluntary referral, co-worker report, and alternative policy requirements from subpart E (which has been revised to address reasonable cause testing) to new subpart K.

With the exception of its proposal for non-peer referral programs, which FRA is authorizing but not requiring under this rule, FRA is not adopting its proposal to require peer support programs. To correspond with this decision, FRA is retitling this subpart "Referral Programs" instead of the proposed "Peer Support Programs." As explained in the NPRM, FRA believes subpart E's previous title "Identification of Troubled Employees," to be outdated since the primary purpose of that subpart had always been to evaluate and treat, not merely identify, employees who have substance abuse issues. FRA is also, as proposed, substituting the more commonly used term "program" for "policy."

In addition, FRA is adopting the Associations' recommendation to simplify this rule by requiring all the evaluation, counseling, treatment, and recommendation required by this part to be performed by a DAC. As defined in 49 CFR 242.7, a DAC meets all the credentialing and qualifying requirements of a Substance Abuse Professional (SAP). Title 49 CFR 40.3 defines an SAP A SAP as an individual

who evaluates an employee who has violated a DOT drug and alcohol regulation and makes recommendations concerning education, treatment, follow-up testing, and aftercare. By definition, therefore, a SAP cannot perform a role in a voluntary referral program. In contrast, a DAC can treat and evaluate an employee enrolled in a voluntary referral program, since the DAC's involvement is not triggered by an employee's drug or alcohol violation. With this caveat, a DAC serves the same function in part this part as a SAP does in part 40.

As mentioned above, FRA is adding an option for a "non-peer referral" program, which authorizes, but does not require, a railroad to accept referrals from family members, supervisors, labor representatives, and other individuals who are not co-workers but who have knowledge of an employee's drug abuse problems. FRA received no objections to its proposal of this additional referral program. To accommodate this third program, FRA is retitling its required "co-worker report" program as a "co-worker referral" program so that henceforth these three programs—voluntary, co-worker, and non-peer—will collectively be referred to as "referral programs."

With the addition of the option for a non-peer program, FRA is reprinting requirements formerly found in subpart E, in a format that breaks these requirements down to make them easier to understand and implement. Both partially excepted small railroads and contractors are excluded from subpart K. Class III railroads that do not qualify for the small railroad exception must comply, however.

#### *Section 219.1001—Requirements for Referral Programs*

##### *Paragraph (b)*

This paragraph generally outlines the purposes of mandatory voluntary referral and co-worker referral programs. The descriptions of these programs are reworded from those previously in subpart E, and no substantive changes are intended.

##### *Paragraph (c)*

This paragraph generally outlines the purposes of optional non-peer referral and alternative programs. The description of an alternate program is reworded from the one previously in subpart E, and no substantive change is intended.

##### *Paragraph (c)(1)*

Although FRA is not otherwise adopting its proposal to require "peer

support groups," FRA is authorizing a railroad to establish a "non-peer referral" program if it chooses to do so. A "non-peer" is an individual who is not considered to be an employee's co-worker, such as a trained supervisor, representative of an employee's collective bargaining organization, or family member.

##### *Paragraphs (d)(1), (2), and (5)*

These paragraphs restate general conditions for referral programs previously found in subpart E. No substantive changes are intended.

##### *Paragraphs (d)(3)–(4)*

These paragraphs prohibit referral programs from interfering with the return-to-duty requirements in subpart B and the reasonable suspicion testing requirements in subpart D.

#### *Section 219.1003—Referral Program Conditions*

With the exception of the paragraphs discussed below, the required allowances, conditions, and procedures in this section were previously contained in subpart E.

##### *Paragraph (g)*

As proposed, FRA is removing its previous minimum of 45 days leave of absence to allow the DAC to determine the period of time an employee needs.

##### *Paragraph (h)(3)*

Formerly, only co-worker referrals allowed railroads to condition an employee's return to regulated service upon successful completion of a return-to-service medical evaluation. As proposed, a railroad may impose this condition on self-referrals and non-peer referrals as well.

##### *Paragraph (h)(4)*

As proposed, a railroad must return an employee to regulated service within five working days of a DAC's recommendation that the employee is fit to return.

##### *Paragraph (i)*

As proposed, this paragraph prohibits a person or entity from changing a DAC's evaluation of an employee or recommendation for assistance. Only the DAC who made the initial evaluation may modify that evaluation and any follow-up recommendations based upon new or additional information.

##### *Paragraph (j)*

As proposed, the confidentiality conditions in this paragraph, which had previously applied only to candidates

for locomotive certification and locomotive engineers, have been expanded to cover candidates for conductor certification and conductors. Similarly, these requirements no longer apply only to voluntary referrals; co-worker and non-peer referrals are also covered.

#### Paragraph (k)

As proposed, a regulated employee who enters a co-worker or non-peer referral for a verified violation of § 219.101 or § 219.102 must contact a DAC within a reasonable period of time, as specified by the railroad's programs. If a regulated employee does not contact a DAC within this time period, the railroad may investigate the employee's cooperation and compliance with the referral program.

#### Paragraph (l)

As proposed, paragraph (l) requires a DAC to complete a regulated employee's evaluation within 10 working days of the employee's entering a referral program and contacting the DAC. If more than one evaluation is required, the DAC must complete these evaluations within 20 working days. These time frames, which had previously applied only to co-worker referrals, now apply to voluntary and non-peer referrals as well.

#### Paragraph (m)

As proposed, a referral program may not require follow-up treatment, care, or testing that exceeds 24 months beyond the regulated employee's removal from service, unless the regulated employee had committed a substantiated part 219 violation.

#### Section 219.1005—Optional Provisions

This section describes provisions that a railroad is authorized, but not required to, include in its referral program. The inclusion of any of these provisions may be conditioned on the agreement of an affected labor organization.

Paragraph (a) permits a referral program to waive confidentiality if a regulated employee refuses to cooperate in a course of education, counseling, or treatment recommended by a DAC or if the railroad determines later, after investigation, that a regulated employee was involved in an alcohol or drug-related disciplinary offense growing out of subsequent conduct. This text was previously found in subpart E for voluntary referrals.

Paragraph (a) specifies that nothing in subpart K prevents a railroad or labor organization from adopting, publishing, and implementing referral program policies that offer more favorable

conditions to regulated employees with substance abuse problems, consistent with the railroad's responsibility to prevent violations of §§ 219.101 and 219.102. This language was previously found in subpart E.

Paragraph (b) requires an alternate program to have the concurrence of the recognized representatives of the regulated employees as shown by a collective bargaining agreement or other document describing the class or craft of employees to which the alternate program applies. This agreement must expressly reference subpart K and the intention of the railroad and the employee representatives that the alternate program applies in lieu of the programs required by subpart K. This language is similar to that previously found in subpart E.

Paragraph (c) requires a railroad to submit a copy of the agreement or other document described in paragraph (b), along with a copy of the alternate program described in paragraph (a), to the FRA Drug and Alcohol Program Manager for approval. FRA will review the program to see if it meets the general standards and intent of § 219.1003. If an alternate policy is amended or revoked, the railroad must notify FRA at least 30 days before the amendment or revocation's effective date. This last requirement was previously in subpart E.

Paragraph (d) specifies that § 219.1007 does not excuse a railroad from the requirement to adopt, publish, and implement § 219.1003 programs for any group of regulated employees not covered by an approved alternate program. A virtually identical provision was previously located in subpart E.

Paragraph (e) references § 219.105(c), which specifies that FRA has the authority to audit any railroad alcohol and/or drug use education, prevention, identification, and rehabilitation program (including, but not limited to, alternate referral programs), to ensure that the program is not designed or implemented to circumvent or otherwise undermine Federal requirements.

#### Appendix A

Appendix A to this part contains a schedule of civil penalties for use in enforcing this part's requirements. FRA has revised the penalty schedule to correspond to the restructuring of and addition of new sections to this part. Because such penalty schedules are statements of agency policy, notice and comment are not required before their issuance. See 5 U.S.C. 553(b)(3)(A). Nonetheless, FRA has revised the

penalty schedule consistent with the previous, public schedule.

#### VII. Regulatory Impact and Notices

##### A. Executive Orders 12866 and 13563 and DOT Regulatory Policies and Procedures

This final rule has been evaluated in accordance with existing policies and procedures and determined to be non-significant, under both Executive Orders 12866, and 13563, and DOT policies and procedures. See 44 FR 11034, Feb. 26, 1979. FRA has prepared and placed in the docket (No. FRA-2009-0039) a regulatory impact analysis (RIA) addressing the economic impact of this final rule. Document inspection and copying facilities are available at the DOT Central Docket Management Facility located in Room W12-140 on the Ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC 20590. Docket material is also available for inspection electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. As part of the RIA, FRA has assessed quantitative measurements of the cost and benefit streams expected to result from implementation of this final rule. Overall, the final rule will result in safety benefits and potential business benefits for the railroad industry. It will also, however, generate an additional burden on railroads and railroad contractors, mainly due to the expenses associated with increased drug and alcohol testing and program administration, particularly regarding MOW employees.

The costs will primarily be derived from implementation of the statutory mandate to expand the scope of part 219 to cover MOW employees. The benefits will primarily accrue from the expected injury, fatality, and property damage avoidance resulting from the expansion of part 219 to cover MOW employees, as well as the PAT testing threshold increase.

Table 1 summarizes the quantified costs and benefits expected to accrue from implementation of the final rule over a 20-year period. It presents costs associated with the various types of drug and alcohol testing in the final rule and details the statutory costs (those required by the RSIA mandate to expand part 219 to MOW employees), discretionary costs (those that are due to the non-RSIA requirements), and the total of the two types of costs. Table 1 also presents the quantified benefits expected to accrue over a 20-year period and details the statutory benefits (those that result from implementation of the

RSIA mandate to expand part 219 to MOW employees) and the discretionary benefits (those that are due to the non-RSIA requirements). The benefits include not only injury, fatality, and property damage avoidance (accident reduction benefits), but also the savings, or benefit, that will accrue from fewer

PAT tests being conducted due to FRA's increasing the property damage threshold for major train accidents.

For the 20-year period analyzed, the estimated quantified cost that will be imposed on industry totals approximately \$24.3 million (undiscounted), with discounted costs totaling \$14.2 million (Present Value

(PV), 7 percent) and \$18.9 million (PV, 3 percent). The estimated quantified benefits for this 20-year period total approximately \$115.8 million (undiscounted), with discounted benefits totaling \$57.4 million (PV, 7 percent) and \$83.6 million (PV, 3 percent).

	Statutory	Discretionary	Total
<b>Costs (20 year)</b>			
PAT Testing—Adding MOW .....	\$52,000		\$52,000
PAT Testing—Impact Def + Xing .....		\$241,974	241,974
Reasonable Suspicion Testing .....	842,398		842,398
Pre-Employment Testing—Adding MOW .....	673,897		673,897
Pre-Employment Testing—Sm, RR .....		29,904	29,904
Random Testing .....	20,863,074		20,863,074
Annual Reporting .....	160,911		160,911
Recordkeeping Requirement .....	1,397,840		1,397,840
<b>Costs Subtotal .....</b>	<b>23,990,120</b>	<b>271,878</b>	<b>24,261,998</b>
<b>Benefits (20 year)</b>			
Accident Reduction .....	115,369,281		115,369,281
PAT Testing Threshold Reduction .....		388,295	388,295
<b>Benefits Subtotal .....</b>	<b>115,369,281</b>	<b>388,295</b>	<b>115,757,576</b>
<b>Net Benefits .....</b>	<b>91,379,161</b>	<b>116,417</b>	<b>91,495,578</b>

Overall, the RIA demonstrates that the costs, both statutory and discretionary, associated with implementing the final rule are expected to be outweighed by the benefits resulting from reduced injuries, fatalities, and property damage attributable to drug and alcohol misuse by regulated employees. FRA has also found that the costs will be outweighed by injury and fatality mitigation alone, and benefits will further accrue due to reduced property damage. Specifically, the statutory requirements incur a discounted 20-year cost of \$14.1 million (PV, 7 percent) and \$18.6 million (PV, 3 percent). The discretionary portion of the costs to incur over the next 20-years is \$143,665 (PV, 7 percent) and \$202,023 (PV, 3 percent), with discounted 20-year benefits of \$205,574 (PV, 7 percent) and \$288,776 (PV, 3 percent).

#### *B. Regulatory Flexibility Act and Executive Order 13272; Initial Regulatory Flexibility Assessment*

FRA developed the final rule in accordance with Executive Order 13272 ("Proper Consideration of Small Entities in Agency Rulemaking") and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) to ensure potential impacts of rules on small entities are properly considered. Furthermore, FRA invited all interested

parties to submit data and information regarding the Initial Regulatory Flexibility Analysis (IRFA) and did receive two comments about it during the public comment period.

The Regulatory Flexibility Act requires an agency to review regulations to assess their impact on small entities. An agency must conduct a regulatory flexibility analysis unless it determines and certifies that a rule is not expected to have a significant economic impact on a substantial number of small entities.

The final rule will apply to all employees of railroad carriers, contractors, or subcontractors to railroad carriers who perform maintenance-of-way activities. Based on information available, FRA estimates that less than 14 percent of the total railroad costs associated with implementing the final rule will be borne by small entities. This percentage is based directly upon the percentage of affected employees estimated to be working for small entities. Small entities were exempt from certain requirements of the prior rule, continue to be exempt from certain requirements of this final rule, and otherwise bear proportional burden for the requirements based upon the number of regulated employees each entity employs. Small entities will not incur greater costs per employee than the larger entities.

FRA generally uses conservative assumptions in its costing of rules; based on those assumptions, FRA estimates that the cost for the final rule will be approximately \$24 million for the next 20 years for the railroad industry. There are 695 railroads that are considered small for purposes of this analysis, and together they comprise approximately 93 percent of the railroads impacted directly by this final regulation. The 14 percent of the burden will be spread amongst the 695 entities, based proportionally upon the number of employees each has. Thus, although a substantial number of small entities in this sector will likely be impacted, the economic impact on them will likely be insignificant. This RFA is not intended to be a stand-alone document. To get a better understanding of the total costs for the railroad industry (which form the basis for the estimates in this RFA), or more cost detail on any specific requirement, please see the RIA that FRA has placed in the docket for this rulemaking.

#### **1. Description of Regulated Entities**

The "universe" of the entities considered in an RFA generally includes only those small entities that can reasonably expect to be directly regulated by this final action. The types of small entities potentially affected by this final rule are: (1) Small railroads;

(2) small contractors that engage in MOW operations; and (3) small contractors that provide HOS services (such as dispatching, signal, and train and engine services).

“Small entity” is defined in 5 U.S.C. 601(3) as having the same meaning as “small business concern” under Section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated, and is not dominant in its field of operation. Section 601(4) likewise includes within the definition of “small entities” not-for-profit enterprises that are independently owned and operated, and are not dominant in their field of operation. The U.S. Small Business Administration (SBA) stipulates in its size standards that the largest a railroad business firm that is “for profit” may be and still be classified as a “small entity” is 1,500 employees for “Line Haul Operating Railroads” and 500 employees for “Switching and Terminal Establishments.” Additionally, 5 U.S.C. 601(5) defines as “small entities” governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000.

Federal agencies may adopt their own size standards for small entities in consultation with SBA and in conjunction with public comment. Pursuant to that authority, FRA has published a final statement of agency policy that formally establishes “small entities” or “small businesses” as being railroads, contractors, and hazardous materials shippers that meet the revenue requirements of a Class III railroad as set forth in 49 CFR 1201.1–1, which is \$20 million or less in inflation-adjusted annual revenues, and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less. (See 68 FR 24891; May 9, 2003, codified at appendix C to 49 CFR part 209.) The \$20 million limit is based on the STB’s revenue threshold for a Class III railroad. Railroad revenue is adjusted for inflation by applying a revenue deflator formula in accordance with 49 CFR 1201.1–1. FRA is using this definition for this rulemaking.

An estimated 1,095 entities will be affected by the rule. FRA estimates that there are approximately 400 MOW contractor companies and 695 small railroads on the general system. FRA estimates that 86 percent of employees that will be regulated under this rule work for these 74 railroads and contractors. Most railroads must comply with all provisions of part 219. However, as previously indicated, FRA has a “small railroad” definition

associated with part 219 that limits compliance requirements for railroads with 15 HOS employees or less and no joint operations to reduce burden on the smallest of railroads.

There are approximately 695 small railroads (as defined by revenue size). Class II and Class III railroads do not report to the STB, and although the number of Class II railroads is known, the precise number of Class III railroads is difficult to ascertain due to conflicting definitions, conglomerates, and even seasonal operations. Potentially, all small railroads could be impacted by this final regulation. Part 219 has a small railroad exception for all railroads with 15 or fewer covered employees, except when these railroads have joint operations with another railroad, therefore increasing risk. Thus a railroad with such characteristics shall be called a “partially excepted small railroad” in this analysis, and is a subsection of the “small entities” as defined by the STB and FRA, addressed above. Currently, there are 288 partially excepted small railroads and, as FRA is not amending to the substantive criteria of classification, there should be no change in the number of partially excepted small railroads associated with the final rule.

All commuter railroad operations in the United States are part of larger governmental entities whose jurisdictions exceed 50,000 in population.

As mentioned, all railroads must comply with all or limited subparts of part 219. For partially excepted small railroads, per FRA’s definition, the significant burden involves the costs of adding MOW employees to the existing testing programs, and adding reasonable suspicion and pre-employment drug testing (which they have not needed to comply with).

A significant portion of the MOW industry consists of contractors. FRA has determined that risk lies as heavily with contractors as with railroad employees, so contractors and subcontractors will be subject to the same provisions of part 219 as the railroads for which they do contract work. Whether contractors must comply with all or part of the provisions of part 219 will depend on the size of the largest railroad (assumed to have the largest risk) for which the contractor works.

FRA discussed with industry representatives how to ascertain the number of contractors that will be involved with this rulemaking. FRA is aware that some railroads hire contractors to conduct some or all of the MOW worker functions on their

railroads. Generally, the costs for the burdens associated with this rulemaking will get passed on from the contractor to the pertinent railroad. FRA has determined that there are approximately 400 MOW-related contractor companies who will be covered by the final rule. Of those, 370 are considered to be a “small entity.” FRA has sought estimates of the number of contractors that may be fully compliant and how many may be partially excepted, depending on the size of the largest railroad for which they work.

FRA expects that some HOS small contractors will be impacted based upon the compliance requirements for part 219 small railroads to now include reasonable suspicion testing and pre-employment drug testing. This burden is estimated to be minimal, as reasonable suspicion tests occur extremely infrequently on small railroads (average less than one time per year for all small railroads), and pre-employment drug tests, the least costly of all tests, will only be required for new employees.

No other small businesses (non-railroad related) are expected to be negatively impacted significantly by this rulemaking. Conversely, this final regulation will bring business to consortiums, collectors, testing labs, and other companies involved in the drug and alcohol program business.

Expanding the program to cover MOW employees will only have a small effect in terms of testing burden for railroads, based upon the cost of pre-employment drug testing for new employees and the testing of MOW employees. FRA estimates that 90 percent of small railroads already conduct pre-employment drug testing under their own company authority. Many of these contractors have employees with commercial drivers’ licenses (CDLs), and therefore fall under the drug and alcohol program requirements of the Federal Motor Carrier Safety Administration (FMCSA). Therefore, an estimated 40 percent of MOW contracted employees already participate in a DOT drug and alcohol testing program. Furthermore, FRA estimates that as many as 50–75 percent of all MOW contractor companies have some form of a drug and alcohol testing program, and that around 25 percent of these companies currently complete random testing (the most burdensome type of testing).

Consortia are companies that provide testing, random selection, collection, policy development, and training services to help employers stay compliant. Consortia alleviate much of the administrative burden of a testing

program and negotiate volume discounts on behalf of their clients. It is likely that all part 219 small railroads already have a compliant testing program for employees that have been covered under the regulation. It should also be noted that approximately 125 of the small railroads that will be impacted are subsidiaries of large short line holding companies with resources comparable to larger railroads. Additionally, many small railroads are members of ASLRRA, which was consulted throughout the development of this regulation. ASLRRA has helped create a consortium for its members in the past, and FRA will work to ensure that small entities, as well as large, have the ability to adhere to the regulation as easily as possible. The consortium market will be affected in a positive manner due to new business from this rulemaking; this is a secondary benefit not discussed in this RFA.

#### Significant Economic Impact Criteria

Previously, FRA sampled small railroads and found that revenue averaged approximately \$4.7 million (not discounted) in 2006. One percent of

that average annual revenue per small railroad is \$47,000. FRA realizes that some railroads will have lower revenue than \$4.7 million. However, FRA estimates that small railroads will not have any additional expenses over the next ten years to comply with the new requirements in this final regulation. Based on this, FRA concludes that the expected burden of this final rule will not have a significant impact on the competitive position of small entities, or on the small entity segment of the railroad industry as a whole.

#### Substantial Number Criteria

This final rule will likely burden all small railroads that are not exempt from its scope or application (see 49 CFR 219.3). Thus, as noted above this final rule will impact a substantial number of small railroads.

#### 2. Certification

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 605(b)), FRA certifies that this final rule will not have a significant economic impact on a substantial number of small entities. FRA invited all interested parties to submit data and

information regarding the potential economic impact that will result from adoption of the proposals in the NPRM. FRA did receive comments concerning the initial regulatory flexibility analysis in the public comment process. The final rule addresses these concerns by continuing FRA's longstanding approach of counting only a railroad's covered employees for purposes of determining whether the railroad qualifies for the small railroad exception (the railroad also cannot participate in any joint operations) because FRA believes this is the best measure of the risks posed by the railroad's operations. FRA received no objections to this proposal and adopted in its final rule.

#### C. Paperwork Reduction Act

FRA is submitting the information collection requirements in this final rule for review and approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections that contain the new and current information collection requirements and the estimated time to fulfill each requirement are as follows:

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
219.4—Petition for Recognition of a Foreign Railroad's Workplace Testing Program.	2 Railroads .....	2 petitions .....	40 hours .....	80
219.7—Waivers .....	722 railroads + 400 MOW contractors.	4 waivers .....	2 hours .....	8
219.9—Joint Operating Agreement between Railroads Assigning Responsibility for Compliance with this Part Amongst Themselves ( <b>Revised Requirement</b> ).	722 railroads + 400 MOW contractors.	525 agreements .....	30 minutes .....	263
—Request to railroad for documents by employee engaged in joint operation and subject to adverse action after being required to participate in breath/body fluid testing under subpart C, D, or E of part 219 ( <b>Revised Requirement</b> ).	722 railroads + 400 MOW contractors.	2 requests/documents ..	1 hour .....	2
—Document by railroad/contractor delineating responsibility for Compliance with this part ( <b>Revised Requirement</b> ).	722 railroads + 400 MOW contractors.	10 documents .....	2 hours .....	20
219.11—Employee consent to participate in body fluid testing under subpart C.	722 railroads + 400 MOW contractors.	30 consent forms .....	2 minutes .....	1
—Notification to employees for testing ( <b>New Requirement</b> ).	142,000 employees .....	9,508 notices .....	5 seconds .....	13
—RR Alcohol & Drug Program that provides training to supervisors and information on criteria for post-accident toxicological testing contained in part 219, subpart C, and appendix C ( <b>Revised Requirement</b> ).	722 railroads + 400 MOW contractors.	722 modified Programs	1 hour .....	722
—Alcohol and Drug Programs —New RRs	5 railroads .....	5 programs .....	3 hours .....	15
—Training of Supervisory Employees in signs/symptoms of alcohol/drug influence.	722 railroads + 400 MOW contractors.	2,462 trained supervisors.	3 hours .....	7,386
219.12—RR Documentation on need to place employee on duty for follow-up tests ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	5 documents .....	30 minutes .....	3
219.23—Educational materials concerning the effects of alcohol/drug misuse on individual employees.	722 railroads + 400 MOW contractors.	1,098 revised educational documents.	1 hour .....	1,098
—Copies of educational materials to employees.	142,000 employees .....	142,000 copies of documents.	2 minutes .....	4,733

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
219.104—Removal of employee from regulated service ( <b>Rev. Requirement</b> ) Verbal Notice + Follow-up Written Letter.	722 railroads + 400 MOW contractors.	500 notices + 500 letters.	30 seconds + 2 minutes	21
—Request for Hearing by Employee who Denies Test Result or other Information is Valid Evidence of part 219 Violation.	722 railroads + 400 MOW contractors.	50 requests + 50 hearings.	2 minutes + ..... 4 hours .....	202
—Applicants Declining Pre-Employment Testing and Withdrawing Employment Application— Communications ( <b>Revised Requirement</b> ).	722 railroads + 400 MOW contractors.	60 notices/communications.	2 minutes .....	2
219.105— <b>Revised Requirements</b> RR Duty to prevent violation—Documents provided to FRA after agency request regarding RR's Alcohol and/or Drug Use Education/Prevention/ Etc.	722 railroads + 400 MOW contractors.	2 documents .....	5 minutes .....	.17
—RR Supervisor Rule G observations and records of regulated employees.	722 railroads/400 MOW contractors.	280,000 Rule G observations + 280,000 records.	2 seconds + 2 seconds	310
219.201(c)—Report by RR concerning decision by person other than RR representative about whether an accident/incident qualifies for testing.	722 railroads + 400 MOW contractors.	2 reports .....	30 minutes .....	1
219.203/207—Major train accidents—Post Accident Toxicological Testing Forms				
—Completion of FRA F 6180.73 .....	142,000 employees .....	240 forms .....	10 minutes .....	40
—Determination by RR representative to test non-crew member regulated employees based on specific information ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	80 decisions/determinations.	15 minutes .....	20
—Determination by RR representative to exclude surviving crewmember from testing ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	50 decisions/determinations.	5 minutes .....	4
—Verbal notification and subsequent written report of failure to collect urine/blood specimens within four hours ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	80 notifications + 80 reports.	2 minutes + 30 minutes	43
—RR determination after accident to make crew available for toxicological testing ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	25 decisions/determinations.	10 minutes .....	4
—RR call for train relief crew ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	25 calls .....	5 minutes .....	2
—Recall of employees for testing and Narrative Report Completion ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	4 calls + 4 reports .....	2 minutes + 30 minutes	2
—RR Reference to part 219 requirements and FRA's post-accident toxicological kit in seeking to obtain facility cooperation ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	80 references .....	15 minutes .....	20
—RR Notification to National Response Center of injured employee unconscious or otherwise unable to give testing consent.	722 railroads + 400 MOW contractors.	2 phone calls .....	10 minutes .....	.33
219.205—Specimen Handling/Collection—Completion of Form FRA F 6180.74 by train crew members after accident.	722 railroads + 400 MOW contractors.	240 forms .....	15 minutes .....	60
—RR representative request to medical facility representative to complete remaining information on FRA F 6180.74.	722 railroads + 400 MOW contractors.	80 ph. requests .....	2 minutes .....	3
—RR representative completion of Form FRA F 6180.73.	722 railroads + 400 MOW contractors.	80 forms .....	10 minutes .....	13
—Request to FRA Alcohol and Drug Program Manager for order form for Standard Shipping Kits ( <b>new requirement</b> ).	722 railroads + 400 MOW contractors.	5 requests .....	2 minutes .....	.17
—Request to National Response Center (NRC) for Post-Mortem Shipping Kit ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	1 request .....	2 minutes .....	.03333
—RR Request to Medical Facility to Transfer Sealed Toxicology Kit.	722 railroads + 400 MOW contractors.	40 ph. requests .....	2 minutes .....	1
—Documentation of chain of custody of sealed toxicology kit from medical facility to lab delivery.	722 railroads + 400 MOW contractors.	40 documents .....	2 minutes .....	1
—RR/Medical Facility Record of Kit Error ( <b>New Requirement</b> ).	722 RRs + 400 contr. ..	20 written records .....	2 minutes .....	1

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
219.209(a)—Notification to NRC and FRA of Accident/Incident where Samples were Obtained.	722 railroads + 400 MOW contractors.	40 phone reports .....	2 minutes .....	1
219.209(c)—Record of Part 219 Test not Administered within 4 Hours Following Accident/Incident.	722 railroads + 400 MOW contractors.	40 records .....	30 minutes .....	20
219.211(b)—Results of post-accident toxicological testing to RR MRO and RR Employee.	722 railroads + 400 MOW contractors.	10 reports .....	15 minutes .....	3
(c)—MRO Report to FRA of positive test for alcohol/drugs of surviving employee.	722 railroads + 400 MOW contractors.	10 reports .....	15 minutes .....	3
219.303—Reasonable Suspicion Observations (Drug Test)				
—Communication between On-Site and Off-Site Supervisors regarding Reasonable Suspicion Observation.	722 railroads + 400 MOW contractors.	50 phone communications.	2 minutes .....	2
—RR Written Documentation of Observed Signs/Symptoms for Reasonable Suspicion Determination.	722 railroads + 400 MOW contractors.	30 documents .....	5 minutes .....	3
219.305—RR Written Record Stating Reasons Test was Not Promptly Administered ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	30 records .....	2 minutes .....	1
219.401—Notification to Employee regarding Reasonable Cause Testing ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	50 notifications .....	15 minutes .....	13
219.405—RR Documentation Describing Basis of Reasonable Cause Testing ( <b>New Requirements</b> ).	722 railroads + 400 MOW contractors.	50 documents .....	15 minutes .....	13
—RR Documentation of Rule/Part 225 Violation for Each Reasonable Cause Test ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	20 documents .....	15 minutes .....	5
219.407—Prompt specimen collection time limitation exceeded—Record ( <b>Revised Requirement</b> ).	722 railroads + 400 MOW contractors.	15 records .....	15 minutes .....	4
219.501—RR Documentation of Negative Pre-Employment Drug Tests ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	1,200 tests + 1,200 documents.	15 minutes + 5 minutes	400
219.605—Submission of random testing plan ( <b>Revised Requirement</b> ): Existing RRs.	5 railroads .....	5 plans .....	1 hour .....	5
—New Railroads submission of random testing plans ( <b>Revised Requirement</b> ).	722 railroads + 400 MOW contractors.	20 amendments .....	1 hour .....	20
—Amendments to Currently-Approved FRA Random Testing Plan ( <b>Revised Requirement</b> ).	722 railroads + 400 MOW contractors.	21 resubmitted plans ...	15 minutes .....	5
—Resubmitted random testing plans after notice of FRA disapproval ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	50 amendments .....	10 minutes .....	8
—Non-Substantive Amendment to an Approved Plan ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	20 random testing plans.	15 minutes .....	5
—New/Combined/Amended Random Testing Plans Incorporating New Categories of Regulated Employees ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	200 plans .....	1 hour .....	200
219.607—RR Requests to Contractor or Service Agent to Submit Part 219 Compliant Random Testing Plan on Its Behalf ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	50 requests .....	15 minutes .....	13
—Contractor Random Testing Plan ( <b>New Requirement</b> ).	722 MOW contractors ..	50 plans .....	1 hour .....	50
219.609—Inclusion of Regulated Service Contractor Employees/Volunteers in RR Random Testing Plan ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	15 plans .....	10 minutes .....	3
—Addenda to RR Random Testing Plan Describing Method Used to Test Contractor/Volunteer Employees in Non-Random Testing Plan ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	15 addenda .....	10 minutes .....	3
219.611—Random Alcohol and Drug Test Pools: Good Faith Determinations and Evaluations of Employee Likelihood of Performing Regulated Service ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	25,000 determinations + 25,000 evaluations.	30 seconds + 30 seconds.	417
—Random Testing Pool Updates ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	13,176 pool updates ....	5 minutes .....	1,098
—Documents on RR Multiple Random Testing Pools ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	96 documents .....	5 minutes .....	8

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
219.613—RR Identification of Total Number of Eligible Employees for Random Testing ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	2,196 IDs .....	2 minutes .....	73
—RR Records/Explanation of Discarded Selection Draws ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	10 records/e explanations.	2 minutes .....	.33
—Electronic or Hard Copy of RR Snapshot of Each Random Testing Pool ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	13,176 snapshots/records.	2 minutes .....	1,098
219.615—Incomplete Random Testing Collections—Documentation ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	2,000 documents .....	.5 minute .....	17
219.617—Employee Exclusion from Random alcohol/drug testing after providing verifiable evidence from credible outside professional ( <b>Revised Requirement</b> ).	722 railroads + 400 MOW contractors.	5 documents .....	1 hour .....	5
219.619—Report by MRO of Verified Positive Test or by Breath Alcohol Technician of Breath Alcohol Specimen of 0.04 or Greater ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	88 reports .....	5 minutes .....	7
219.623—Random Testing Records ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	40,000 records .....	1 minute .....	667
219.901—RR Alcohol and Drug Misuse Prevention Records for MOW Employees Kept by FRA—Two Year Maintenance ( <b>Revised Requirement</b> ).	722 railroads + 400 MOW contractors.	16,960 records .....	5 minutes .....	1,413
219.1001—RR Change of Service Provider or Policy for Referral Program.	722 railroads + 400 MOW contractors.	40 programs .....	3 hours .....	120
—New Railroads Adoption of Referral Program.	5 railroads .....	5 programs .....	3 hours .....	15
—Co-worker Report that Employee is Unsafe to work with/in Violation of Part 219 or Railroad's Drug/Alcohol Rules.	722 railroads + 400 MOW contractors.	602 reports .....	5 minutes .....	50
219.1003—RR Designation of DAC and expectations when self-referral is allowed.	722 railroads + 400 MOW contractors.	40 designations/R RR expectations.	20 minutes .....	13
—RR Employee Self-Referral .....	722 railroads + 400 MOW contractors.	602 self-referrals .....	10 seconds .....	2
—Referral for treatment/evaluation of regulated employee by co-worker as unsafe to work with or in violation of part 219 or RR alcohol/drug rules.	722 railroads + 400 MOW contractors.	602 treatment referrals/evaluations.	30 minutes .....	301
—After non-per referral, removal of employee from service and confirmation by RR representative that employee is unsafe to work with or in violation of part 219 or RR drug/alcohol rule ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	3 removal confirmations	4 hours .....	12
—Regulated employee waiver of investigation on RR rule charge and contact of DAC within reasonable time period ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	3 waivers + 3 DAC contacts.	3 hours + 20 minutes ...	10
—Employee evaluation by qualified DAC after self-referral, co-worker referral, or non-peer referral.	722 railroads + 400 MOW contractors.	602 evaluations .....	2 hours .....	1,204
—DAC recommendation of leave of absence for regulated employee.	722 railroads + 400 MOW contractors.	602 mentions/rec-ommendation.	1 hour .....	602
—DAC Notification to RR that employee is fit to return to regulated service.	722 railroads + 400 MOW contractors.	602 notices .....	10 minutes .....	100
—DAC modification of initial evaluation of regulated employee.	722 railroads + 400 MOW contractors.	60 modified evaluations	10 minutes .....	10
219.1005—Referral Programs with Labor Organization Approvals that Include Optional Provisions ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	10 referral programs ....	20 hours .....	200
219.1007—Filing of Documents/Records with FRA of Labor Concurrences for Alternate Referral Programs ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	10 documents .....	1 hour .....	10
—Notice to FRA of Amendment or Revocation of FRA Approved Referral Program ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	1 notice/amended peer referral program.	1 hour .....	1
Appendix C—Completion of Form FRA F 6180.75 after rail accident/incident resulting in fatality.	722 railroads + 400 MOW contractors.	10 completed forms .....	20 minutes .....	3

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, FRA Office of Railroad Safety, Information Collection Clearance Officer, at 202-493-6292, or Ms. Kim Toone, FRA Office of Information Technology, Information Clearance Officer, at 202-493-6132.

Organizations and individuals desiring to submit comments on the collection of information requirements should send them directly to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503, Attention: FRA Desk Officer. Comments may also be sent via email to the Office of Management and Budget at the following address: [oira\\_submissions@omb.eop.gov](mailto:oira_submissions@omb.eop.gov).

OMB is required to make a decision concerning the collection of information requirements contained in this final rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

FRA cannot impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action before the effective date of the final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

#### D. Federalism Implications

Executive Order 13132, "Federalism" (64 FR 43255, Aug. 4, 1999), requires FRA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive Order to include regulations 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." Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not

required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. FRA has determined that the rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. In addition, FRA has determined that this rule will not impose substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

This rule complies with a statutory mandate and will not have a substantial effect on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. In addition, this rule will not have any federalism implications that impose substantial direct compliance costs on State and local governments.

However, FRA notes that this part could have preemptive effect by the operation of law under a provision of the former Federal Railroad Safety Act of 1970, repealed and codified at 49 U.S.C. 20106 (Sec. 20106). Sec. 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the "essentially local safety or security hazard" exception to Sec. 20106.

In sum, FRA has analyzed this rule in accordance with the principles and criteria contained in Executive Order 13132. As explained above, FRA has determined that this rule has no federalism implications, other than the possible preemption of State laws under 49 U.S.C. 20106 and 20119. Accordingly, FRA has determined that preparation of a federalism summary

impact statement for this rule is not required.

#### E. Environmental Impact

FRA has evaluated this final rule in accordance with the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), other environmental statutes, related regulatory requirements, and its "Procedures for Considering Environmental Impacts" (FRA's Procedures) (64 FR 28545, May 26, 1999). FRA has determined that this final rule is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's NEPA Procedures, "Promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions of air or water pollutants or noise or increased traffic congestion in any mode of transportation." See 64 FR 28547, May 26, 1999. Categorical exclusions (CEs) are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). See 40 CFR 1508.4.

In analyzing the applicability of a CE, the agency must also consider whether extraordinary circumstances are present that would warrant a more detailed environmental review through the preparation of an EA or EIS. *Id.* In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. The purpose of this rulemaking is to expand the scope of FRA's drug and alcohol regulations to cover MOW workers as per Congress' mandate in the RSIA. Specifically, the rule adopts part 214's definition of "Roadway Worker" to define "MOW employee" under part 214, contains a revised version of the troubled employee identification requirements, and updates and restructures the rule to make it more user-friendly. FRA does not anticipate any environmental impacts from this or any other requirement of the final rule. FRA also finds that there are no extraordinary circumstances present in connection with this final rule.

#### F. Executive Order 12898 (Environmental Justice)

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and DOT Order 5610.2(a) (91 FR 27534, May 10,

2012) require DOT agencies to achieve environmental justice as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations. The DOT Order instructs DOT agencies to address compliance with Executive Order 12898 and requirements within the DOT Order in rulemaking activities, as appropriate. FRA has evaluated this final rule under Executive Order 12898 and the DOT Order and determined it will not cause disproportionately high and adverse human health and environmental effects on minority populations or low-income populations.

#### *G. Executive Order 13175 (Tribal Consultation)*

FRA has evaluated this final rule in accordance with the principles and criteria contained in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, dated November 6, 2000. The final rule would not have a substantial direct effect on one or more Indian tribes, would not impose substantial direct compliance costs on Indian tribal governments, and would not preempt tribal laws. Therefore, the funding and consultation requirements of Executive Order 13175 do not apply, and a tribal summary impact statement is not required.

#### *H. International Trade Impact Assessment*

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards.

This rulemaking is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

#### *I. Unfunded Mandates Reform Act of 1995*

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency “shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the

private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).” Section 202 of the Act (2 U.S.C. 1532) further requires that “before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in 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, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement” detailing the effect on State, local, and tribal governments and the private sector. This rule will not result in the expenditure of more than \$100,000,000 (as adjusted annually for inflation) by the public sector in any one year, and thus preparation of such a statement is not required.

#### *J. Energy Impact*

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.” 66 FR 28355 (May 22, 2001). Under the Executive Order, a “significant energy action” is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking, that: (1)(i) Is a significant regulatory action under Executive Order 12866 or any successor order; and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this rule in accordance with Executive Order 13211, and determined that it will not have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a “significant energy action” within the meaning of Executive Order 13211.

#### *K. Privacy Act Information*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). See <http://www.regulations.gov/#!privacyNotice>

for the privacy notice of [www.regulations.gov](http://www.regulations.gov) or interested parties may review DOT’s complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477). In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at [www.dot.gov/privacy](http://www.dot.gov/privacy).

#### **List of Subjects in 49 CFR Part 219**

Alcohol abuse, Drug abuse, Drug testing, Penalties, Railroad safety, Reporting and recordkeeping requirements, Safety, Transportation.

#### **The Rule**

For the reasons stated above, FRA amends part 219 as follows:

#### **PART 219—CONTROL OF ALCOHOL AND DRUG USE**

- 1. The authority citation for part 219 is revised to read as follows:

**Authority:** 49 U.S.C. 20103, 20107, 20140, 21301, 21304, 21311; 28 U.S.C. 2461, note; Sec. 412, Div. A, Pub. L. 110–432, 122 Stat. 4889 (49 U.S.C. 20140, note); and 49 CFR 1.89.

#### **Subpart A—General**

- 2. Revise § 219.1(a) to read as follows:

##### **§ 219.1 Purpose and scope.**

(a) The purpose of this part is to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.

\* \* \* \* \*

- 3. Revise § 219.3 to read as follows:

##### **§ 219.3 Application.**

(a) *General.* This part applies to all railroads and contractors, except as provided in paragraphs (b), (c), and (d) of this section, and except for:

(1) Railroads that operate only on track inside an installation that is not part of the general railroad system of transportation (*i.e.*, plant railroads, as defined in § 219.5);

(2) Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation, as defined in § 219.5; or

(3) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(b) *Annual report requirements.* (1) Subpart I of this part does not apply to

any domestic or foreign railroad that has fewer than 400,000 total annual employee work hours, including hours worked by all employees of the railroad, regardless of occupation, not only while in the United States, but also while outside the United States.

(2) Subpart I of this part does not apply to any contractor that performs regulated service exclusively for railroads with fewer than 400,000 total annual employee work hours, including hours worked by all employees of the railroad, regardless of occupation, not only while in the United States, but also while outside the United States.

(3) When a contractor performs regulated service for at least one railroad with fewer than 400,000 total annual employee hours, including hours worked by all employees of the railroad, regardless of occupation, not only while in the United States, but also while outside the United States, subpart I of this part applies as follows:

(i) A railroad with more than 400,000 total annual employee work hours must comply with subpart I regarding any contractor employees it integrates into its own alcohol and drug testing program under this part; and

(ii) If a contractor establishes its own independent alcohol and drug testing program that meets the requirements of this part and is acceptable to the railroad, the contractor must comply with subpart I if it has 200 or more regulated employees.

(c) *Small railroad exception.* (1) Subparts E and G of this part do not apply to small railroads, and a small railroad may not perform the Federal alcohol and drug testing authorized by these subparts. For purposes of this part, a small railroad means a railroad that:

(i) Has a total of 15 or fewer employees who are covered by the hours of service laws at 49 U.S.C. 21103, 21104, or 21105, or who would be subject to the hours of service laws at 49 U.S.C. 21103, 21104, or 21105 if their services were performed in the United States; and

(ii) Does not have joint operations, as defined in § 219.5, with another railroad that operates in the United States, except as necessary for purposes of interchange.

(2) An employee performing only MOW activities, as defined in § 219.5, does not count towards a railroad's total number of covered employees for the purpose of determining whether it qualifies for the small railroad exception.

(3) A contractor performing MOW activities exclusively for small railroads also qualifies for the small railroad exception (*i.e.*, is excepted from the

requirements of subparts E and G of this part). A contractor is not excepted if it performs MOW activities for at least one or more railroads that does not qualify for the small railroad exception under this section.

(4) If a contractor is subject to all of part 219 of this chapter because it performs regulated service for multiple railroads, not all of which qualify for the small railroad exception, the responsibility for ensuring that the contractor complies with subparts E and G of this part is shared between the contractor and any railroad using the contractor that does not qualify for the small railroad exception.

(d) *Foreign railroad.* (1) This part does not apply to the operations of a foreign railroad that take place outside the United States. A foreign railroad is required to conduct post-accident toxicological testing or reasonable suspicion testing only for operations that occur within the United States.

(2) Subparts F, G, and K of this part do not apply to an employee of a foreign railroad whose primary reporting point is outside the United States if that employee is:

(i) Performing train or dispatching service on that portion of a rail line in the United States extending up to 10 route miles from the point that the line crosses into the United States from Canada or Mexico; or

(ii) Performing signal service in the United States.

■ 4. In § 219.4, revise paragraphs (a)(1), (b)(1), and (b)(2) to read as follows:

**§ 219.4 Recognition of a foreign railroad's workplace testing program.**

(a) \* \* \*

(1) To be so considered, the petition must document that the foreign railroad's workplace testing program contains equivalents to subparts B, F, G, and K of this part:

\* \* \* \* \*

(b) \* \* \*

(1) Upon FRA's recognition of a foreign railroad's workplace alcohol and drug use program as compatible with the return-to-service requirements in subpart B of this part and the requirements of subparts F, G, and K of this part, the foreign railroad must comply with either the specified provisions of § 219.4 or with the standards of its recognized program, and any imposed conditions, with respect to its employees whose primary reporting point is outside the United States and who perform train or dispatching service in the United States. The foreign railroad must also, with respect to its final applicants for, or its employees seeking to transfer for the first time to,

duties involving such train or dispatching service in the United States, comply with either subpart F of this part or the standards of its recognized program.

(2) The foreign railroad must comply with subparts A (general), B (prohibitions, other than the return-to-service provisions in paragraph (d) of this section), C (post-accident toxicological testing), D (reasonable suspicion testing), I (annual report requirements), and J (recordkeeping requirements) of this part. Drug or alcohol testing required by these subparts (except for post-accident toxicological testing required by subpart C) must be conducted in compliance with all applicable provisions of the DOT Procedures for Workplace Drug and Alcohol Testing Programs (part 40 of this title).

\* \* \* \* \*

■ 5. Section 219.5 is amended by:

■ a. Revising the introductory text;

■ b. Adding new definitions of "Administrator", "Associate Administrator", "category of regulated employee", and "contractor" in alphabetical order;

■ c. Revising the definitions of "covered employee" and "covered service";

■ d. Adding new definitions of "DOT, The Department, or DOT agency", "DOT-regulated employee", "DOT safety-sensitive duties or DOT safety-sensitive functions", "Drug and Alcohol Counselor or DAC," "employee", "evacuation", "flagman or flagger" and "fouling a track" in alphabetical order;

■ e. Revising the definition of "FRA representative";

■ f. Removing the definition of "general railroad system of transportation";

■ g. Adding new definitions of "highway-rail grade crossing" and "highway-rail grade crossing accident/incident" in alphabetical order;

■ h. Revising the definition of "impact accident";

■ i. Adding new definitions of "joint operations" and "maintenance-of-way employee or MOW employee" in alphabetical order;

■ j. Revising the definition of "medical facility";

■ k. Adding new definitions of "non-peer", "on-track or fouling equipment", "other impact accident", "person", and "plant railroad" in alphabetical order;

■ l. Revising the definition of "railroad property damage or damage to railroad property";

■ m. Adding new definitions of "raking collision", "regulated employee", "regulated service", "responsible railroad supervisor", "side collision", and "tourist, scenic, historic, or

excursion operations that are not part of the general railroad system of transportation” in alphabetical order;  
 ■ n. Removing the definition of “train”;  
 ■ o. Revising the definitions of “train accident” and “train incident”; and  
 ■ p. Adding a new definition of “watchman/lookout” in alphabetical order.

The revisions and additions read as follows:

#### § 219.5 Definitions.

As used in this part only—

\* \* \* \* \*

*Administrator* means the Administrator of the Federal Railroad Administration or the Administrator's delegate.

*Associate Administrator* means the Associate Administrator for Railroad Safety, Federal Railroad Administration, or the Associate Administrator's delegate.

*Category of regulated employee* means a broad class of either covered service or maintenance-of-way employees (as defined in this section). For the purpose of determining random testing rates under § 219.625, if an individual performs both covered service and maintenance-of-way activities, he or she belongs in the category of regulated employee that corresponds with the type of regulated service comprising more than 50 percent of his or her regulated service.

\* \* \* \* \*

*Contractor* means a contractor or subcontractor performing functions for a railroad.

\* \* \* \* \*

*Covered employee* means an employee (as defined in this section to include an employee, volunteer, or probationary employee performing activities for a railroad or a contractor to a railroad) who is performing covered service under the hours of service laws at 49 U.S.C. 21101, 21104, or 21105 or who is subject to performing such covered service, regardless of whether the person has performed or is currently performing covered service. (An employee is not a “covered employee” under this definition exclusively because he or she is an employee for purposes of 49 U.S.C. 21106.) For the purposes of pre-employment testing only, the term “covered employee” includes a person applying to perform covered service in the United States.

*Covered service* means service in the United States as a train employee, a dispatching service employee, or a signal employee, as those terms are defined at 49 U.S.C. 21101, but does not include any period the employee is

relieved of all responsibilities and is free to come and go without restriction.

\* \* \* \* \*

*DOT, The Department, or DOT agency* means all DOT agencies, including, but not limited to, the Federal Aviation Administration (FAA), the Federal Railroad Administration (FRA), the Federal Motor Carrier Safety Administration (FMCSA), the Federal Transit Administration (FTA), the National Highway Traffic Safety Administration (NHTSA), the Pipeline and Hazardous Materials Safety Administration (PHMSA), the United States Coast Guard (USCG) (for purposes of part 40 coverage only), and the Office of the Secretary (OST). These terms include any designee of a DOT agency.

*DOT-regulated employee* means any person who is designated in a DOT agency regulation as subject to drug testing and/or alcohol testing. The term includes individuals currently performing DOT safety-sensitive functions designated in DOT agency regulations and applicants for employment subject to pre-employment testing. For purposes of drug testing conducted under the provisions of 49 CFR part 40, the term employee has the same meaning as the term “donor” as found on the Custody and Control Form and related guidance materials produced by the Department of Health and Human Services.

*DOT safety-sensitive duties or DOT-safety sensitive functions* means functions or duties designated by a DOT agency, the performance of which makes an individual subject to the drug testing and/or alcohol testing requirements of that DOT agency. For purposes of this part, regulated service has been designated by FRA as a DOT safety-sensitive duty or function.

\* \* \* \* \*

*Drug and Alcohol Counselor or DAC* means a person who meets the credentialing and qualification requirements described in § 242.7 of this chapter.

*Employee* means any individual (including a volunteer or a probationary employee) performing activities for a railroad or a contractor to a railroad.

*Evacuation* means the mandatory or voluntary relocation of at least one person who is not a railroad employee for the purpose of avoiding exposure to a hazardous material release. It does not include the closure of public transportation roadways for the purpose of containing a hazardous material release, unless the closure is accompanied by an evacuation order.

*Flagman or Flagger* means any person designated by the railroad to direct or

restrict the movement of trains past a point on a track to provide on-track safety for maintenance-of-way employees, while engaged solely in performing that function.

\* \* \* \* \*

*Fouling a track* means the placement of an individual or an item of equipment in such proximity to a track that the individual or equipment could be struck by a moving train or on-track equipment, or in any case is within four feet of the field side of the near running rail.

\* \* \* \* \*

*FRA representative* means the Associate Administrator for Railroad Safety of FRA and staff, the Associate Administrator's delegate (including a qualified State inspector acting under part 212 of this chapter), the Chief Counsel of FRA, the Chief Counsel's delegate, or FRA's Drug and Alcohol Program oversight contractor.

\* \* \* \* \*

*Highway-rail grade crossing* means:

(1) A location where a public highway, road, or street, or a private roadway, including associated sidewalks, crosses one or more railroad tracks at grade; or

(2) A location where a pathway explicitly authorized by a public authority or a railroad carrier that is dedicated for the use of non-vehicular traffic, including pedestrians, bicyclists, and others that crosses one or more railroad tracks at grade. The term “sidewalk” means that portion of a street between the curb line, or the lateral line of a roadway, and the adjacent property line or, on easements of private property, that portion of a street that is paved or improved and intended for use by pedestrians.

*Highway-rail grade crossing accident/incident* means any impact between railroad on-track equipment and a highway user at a highway-rail grade crossing. The term “highway user” includes pedestrians, as well as automobiles, buses, trucks, motorcycles, bicycles, farm vehicles, and all other modes of surface transportation motorized and un-motorized.

*Impact accident*, (1) Impact accident means a train accident, as defined in this section, consisting either of—

(i) A head-on or rear-end collision between on-track equipment;

(ii) A side collision, derailment collision, raking collision, switching collision, or “other impact accident,” as defined by this section;

(iii) Impact with a deliberately-placed obstruction, such as a bumping post (but not a derail); or

(iv) Impact between on-track equipment and any railroad equipment

fouling the track, such as an impact between a train and the boom of an off-rail vehicle.

(2) The definition of “impact accident” does not include an impact with naturally-occurring obstructions such as fallen trees, rock or snow slides, livestock, etc.

\* \* \* \* \*

*Joint operations* means rail operations conducted by more than one railroad on the same track (except for minimal joint operations necessary for the purpose of interchange), regardless of whether such operations are the result of contractual arrangements between the railroads, order of a governmental agency or a court of law, or any other legally binding directive. For purposes of this part only, minimal joint operations are considered necessary for the purpose of interchange when:

(1) The maximum authorized speed for operations on the shared track does not exceed 20 mph;

(2) Operations are conducted under operating rules that require every locomotive and train to proceed at a speed that permits stopping within one half the range of vision of the locomotive engineer;

(3) The maximum distance for operations on the shared track does not exceed 3 miles; and

(4) Any operations extending into another railroad’s yard are for the sole purpose of setting out or picking up cars on a designated interchange track.

*Maintenance-of-way employee or MOW employee* means a roadway worker as defined in § 214.7 of this chapter.

*Medical facility* means a hospital, clinic, physician’s office, or laboratory where post-accident toxicological testing specimens can be collected according to recognized professional standards, and where an individual’s post-accident medical needs can be attended to.

\* \* \* \* \*

*Non-peer* means a supervisor (other than a co-worker), labor organization representative, or family member of a regulated employee.

*On-track or fouling equipment* means any railroad equipment that is positioned on the rails or that is fouling the track, and includes, but is not limited to, the following: A train, locomotive, cut of cars, single car, motorcar, yard switching train, work train, inspection train, track motorcar, highway-rail vehicle, push car, crane, or other roadway maintenance machine, such as a ballast tamping machine, if the machine is positioned on or over the rails or is fouling the track.

*Other impact accident* means an accident or incident, not classified as a head-on, rear-end, side, derailment, raking, or switching collision, that involves contact between on-track or fouling equipment. This includes impacts in which single cars or cuts of cars are damaged during operations involving switching, train makeup, setting out, etc.

\* \* \* \* \*

*Person* means an entity of any type covered under 1 U.S.C. 1, including but not limited to the following: A railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad, such as a service agent performing functions under part 40 of this title; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor.

*Plant railroad* means a plant or installation that owns or leases a locomotive, uses that locomotive to switch cars throughout the plant or installation, and is moving goods solely for use in the facility’s own industrial processes. The plant or installation could include track immediately adjacent to the plant or installation if the plant railroad leases the track from the general system railroad and the lease provides for (and actual practice entails) the exclusive use of that trackage by the plant railroad and the general system railroad for purposes of moving only cars shipped to or from the plant. A plant or installation that operates a locomotive to switch or move cars for other entities, even if solely within the confines of the plant or installation, rather than for its own purposes or industrial processes, will not be considered a plant railroad because the performance of such activity makes the operation part of the general railroad system of transportation.

\* \* \* \* \*

*Railroad property damage or damage to railroad property* means damage to railroad property (specifically, on-track equipment, signals, track, track structure, or roadbed) and must be calculated according to the provisions for calculating costs and reportable damage in the FRA Guide for Preparing Accident/Incident Reports (see § 225.21 of this chapter for instructions on how to obtain a copy). Generally, railroad property damage includes labor costs and all other costs to repair or replace in-kind damaged on-track equipment, signals, track, track structures (including bridges and tunnels), or

roadbed. (Labor costs that must be accounted for include hourly wages, transportation costs, and hotel expenses.) It does not include the cost of clearing a wreck; however, additional damage to the above-listed items caused while clearing the wreck must be included in the damage estimate. It also includes the cost of rental and/or operation of machinery such as cranes and bulldozers, including the services of contractors, to replace or repair the track right-of-way and associated structures. Railroad property damage does not include damage to lading. Trailers/containers on flatcars are considered to be lading and damage to these is not to be included in on-track equipment damage. Damage to a flat car carrying a trailer/container, however, is included in railroad property damage. Railroads should refer directly to the FRA Guide for Preparing Accident/Incident Reports for additional guidance on what constitutes railroad property damage.

*Raking collision* means a collision between parts or lading of a consist on an adjacent track, or with a structure such as a bridge.

*Regulated employee* means a covered employee or maintenance-of-way employee who performs regulated service for a railroad subject to the requirements of this part.

*Regulated service* means covered service or maintenance-of-way activities, the performance of which makes an employee subject to the requirements of this part.

\* \* \* \* \*

*Responsible railroad supervisor* means any responsible line supervisor (e.g., a trainmaster or road foreman of engines) or superior official in authority over the regulated employees to be tested.

\* \* \* \* \*

*Side collision* means a collision at a turnout where one consist strikes the side of another consist.

\* \* \* \* \*

*Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation* means a tourist, scenic, historic, or excursion operation conducted only on track used exclusively for that purpose (i.e., there is no freight, intercity passenger, or commuter passenger railroad operation on the track).

*Train accident* means a rail equipment accident described in § 225.19(c) of this chapter involving damage in excess of the current reporting threshold (see § 225.19(e) of this chapter), including an accident involving a switching movement. Rail

equipment accidents include, but are not limited to, collisions, derailments, and other events involving the operations of on-track or fouling equipment (whether standing or moving).

*Train incident* means an event involving the operation of railroad on-track or fouling equipment that results in a casualty but in which railroad property damage does not exceed the reporting threshold.

\* \* \* \* \*

*Watchman/lookout* means an employee who has been annually trained and qualified to provide warning of approaching trains or on-track equipment. Watchmen/lookouts must be properly equipped to provide visual and auditory warning by such means as a whistle, air horn, white disk, red flag, lantern, or fusee. A watchman/lookout's sole duty is to look out for approaching trains/on-track equipment and provide at least fifteen seconds advanced warning to employees before the arrival of trains/on-track equipment.

■ 6. Revise § 219.9 to read as follows:

**§ 219.9 Responsibility for compliance.**

(a) *General.* Although the requirements of this part are stated in terms of the duty of a railroad, when any person, as defined by § 219.5, performs any function required by this part, that person (whether or not a railroad) shall perform that function in accordance with this part.

(b) *Joint operations.* (1) In the case of joint operations, primary responsibility for compliance with subparts C, D, and E of this part rests with the host railroad, and all affected employees must be responsive to direction from the host railroad that is consistent with this part. However, nothing in this paragraph restricts railroads engaged in joint operations from appropriately assigning responsibility for compliance with this part amongst themselves through a joint operating agreement or other binding contract. FRA reserves the right to bring an enforcement action for noncompliance with this part against the host railroad, the employing railroad, or both.

(2) When an employee of a railroad engaged in joint operations is required to participate in breath or body fluid testing under subpart C, D, or E of this part and is subsequently subject to adverse action alleged to have arisen out of the required test (or alleged refusal thereof), necessary witnesses and documents available to the other railroad engaged in the joint operations must be made available to the employee and his or her employing railroad on a reasonable basis.

(c) *Contractor responsibility for compliance.* As provided by paragraph (a) of this section, any independent contractor or other entity that performs regulated service for a railroad, or any other services under this part or part 40 of this title, has the same responsibilities as a railroad under this part with respect to its employees who perform regulated service or other service required by this part or part 40 of this title for the railroad. The entity's responsibility for compliance with this part may be fulfilled either directly by that entity or by the railroad treating the entity's regulated employees as if they were the railroad's own employees for purposes of this part. The responsibility for compliance must be clearly spelled out in the contract between the railroad and the other entity or in another document. In the absence of a clear delineation of responsibility, FRA may hold the railroad and the other entity jointly and severally liable for compliance.

■ 7. Add § 219.10 to read as follows:

**§ 219.10 Penalties.**

Any person, as defined by § 219.5, who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least \$650 and not more than \$25,000 per violation, except that: Penalties may be assessed against individuals only for willful violations; where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury, or has caused death or injury, a penalty not to exceed \$105,000 per violation may be assessed; and the standard of liability for a railroad will vary depending upon the requirement involved. See, e.g., § 219.105, which is construed to qualify the responsibility of a railroad for the unauthorized conduct of an employee that violates § 219.101 or § 219.102 (while imposing a duty of due diligence to prevent such conduct). Each day a violation continues constitutes a separate offense. See Appendix A to this part for a statement of agency civil penalty policy.

■ 8. Amend § 219.11 by revising paragraphs (a), (b)(1) and (2), and (c) through (h) to read as follows:

**§ 219.11 General conditions for chemical tests.**

(a)(1) Any regulated employee who is subject to performing regulated service for a railroad is deemed to have consented to testing as required in subparts B, C, D, E, F, G, and K of this part.

(2) A regulated employee required to participate in alcohol and/or drug

testing under this part must be on duty and subject to performing regulated service when the specimen collection is initiated and the alcohol testing/urine specimen collection is conducted (with the exception of pre-employment testing under subpart F of this part).

(b)(1) Each regulated employee must participate in such testing, as required under the conditions set forth in this part and implemented by a representative of the railroad or employing contractor.

(2) In any case where an employee is suffering a substantiated medical emergency and is subject to alcohol or drug testing under this part, necessary medical treatment must be accorded priority over provision of the breath or body fluid specimen(s). A medical emergency is an acute medical condition requiring immediate medical care. A railroad may require an employee to substantiate a medical emergency by providing verifiable documentation from a credible outside professional (e.g., doctor, dentist, hospital, or law enforcement officer) substantiating the medical emergency within a reasonable period of time.

\* \* \* \* \*

(c) A regulated employee who is required to be tested under subparts C, D, or E of this part and who is taken to a medical facility for observation or treatment after an accident or incident is deemed to have consented to the release to FRA of the following:

(1) The remaining portion of any body fluid specimen taken by the medical facility within 12 hours of the accident or incident that is not required for medical purposes, together with any normal medical facility record(s) pertaining to the taking of such specimen;

(2) The results of any laboratory tests for alcohol or any drug conducted by or for the medical facility on such specimen;

(3) The identity, dosage, and time of administration of any drugs administered by the medical facility before the time specimens were taken by the medical facility or before the time specimens were taken in compliance with this part; and

(4) The results of any breath tests for alcohol conducted by or for the medical facility.

(d) Any person required to participate in body fluid testing under subpart C of this part (post-accident toxicological testing) shall, if requested by a representative of the railroad or the medical facility, evidence consent to the taking of specimens, their release for toxicological analysis under pertinent

provisions of this part, and release of the test results to the railroad's Medical Review Officer by promptly executing a consent form, if required by the medical facility. A regulated employee is not required to execute any document or clause waiving rights that the employee would otherwise have against the railroad, and any such waiver is void. The employee may not be required to waive liability with respect to negligence on the part of any person participating in the collection, handling or analysis of the specimen or to indemnify any person for the negligence of others. Any consent provided consistent with this section may be construed to extend only to those actions specified in this section.

(e)(1) A regulated employee who is notified of selection for testing under this part must cease to perform his or her assigned duties and proceed to the testing site either immediately or as soon as possible without adversely affecting safety.

(2) A railroad must ensure that the absence of a regulated employee from his or her assigned duties to report for testing does not adversely affect safety.

(3) Nothing in this part may be construed to authorize the use of physical coercion or any other deprivation of liberty to compel breath or body fluid testing.

(f) Any employee performing duties for a railroad who is involved in a qualifying accident or incident described in subpart C of this part, and who dies within 12 hours of that accident or incident as the result thereof, is deemed to have consented to the removal of body fluid and/or tissue specimens necessary for toxicological analysis from the remains of such person, and this consent is implied by the performance of duties for the railroad (*i.e.*, a consent form is not required). This consent provision applies to all employees performing duties for a railroad, and not just regulated employees.

(g) Each supervisor responsible for regulated employees (except a working supervisor who is a co-worker as defined in § 219.5) must be trained in the signs and symptoms of alcohol and drug influence, intoxication, and misuse consistent with a program of instruction to be made available for inspection upon demand by FRA. Such a program shall, at a minimum, provide information concerning the acute behavioral and apparent physiological effects of alcohol, the major drug groups on the controlled substances list, and other impairing drugs. The program must also provide training on the qualifying criteria for post-accident

toxicological testing contained in subpart C of this part, and the role of the supervisor in post-accident collections described in subpart C and appendix C of this part.

(h) Nothing in this subpart restricts any discretion available to the railroad to request or require that a regulated employee cooperate in additional breath or body fluid testing. However, no such testing may be performed on urine or blood specimens provided under this part. For purposes of this paragraph (h), all urine from a void constitutes a single specimen.

\* \* \* \* \*

■ 9. Add § 219.12 to read as follows:

**§ 219.12 Hours-of-service laws implications.**

(a) A railroad is not excused from performing alcohol or drug testing under subpart C (post-accident toxicological testing) and subpart D (reasonable suspicion testing) of this part because the performance of such testing would violate the hours-of-service laws at 49 U.S.C. ch. 211. If a railroad establishes that a violation of the hours-of-service laws is caused solely because it was required to conduct post-accident toxicological testing or reasonable suspicion testing, FRA will not take enforcement action for the violation if the railroad used reasonable due diligence in completing the collection and otherwise completed it within the time limitations of § 219.203(d) (for post-accident toxicological testing) or § 219.305 (for reasonable suspicion testing), although the railroad must still report any excess service to FRA.

(b) A railroad may perform alcohol or drug testing authorized under subpart E (reasonable cause testing) of this part even if the performance of such testing would violate the hours-of-service laws at 49 U.S.C. ch. 211. If a railroad establishes that a violation of the hours-of-service laws is caused solely by its decision to conduct authorized reasonable cause testing, FRA will not take enforcement action for the violation if the railroad used reasonable due diligence in completing the collection and otherwise completed it within the time limitations of § 219.407, although the railroad must still report any excess service to FRA.

(c) A railroad must schedule random alcohol and drug tests under subpart G of this part so that sufficient time is provided to complete the test within a covered employee's hours-of-service limitations under 49 U.S.C. ch. 211. However, if a direct observation collection is required during a random test per the requirements of part 40 of

this title, then the random test must be completed regardless of the hours-of-service law limitations, although the railroad must still report any excess service to FRA. A railroad may not place a regulated employee on-duty for the sole purpose of conducting a random alcohol or drug test under subpart G of this part.

(d) A railroad must schedule follow-up tests under § 219.104 so that sufficient time is provided to complete a test within a covered employee's hours-of-service limitations under 49 U.S.C. ch. 211. If a railroad is having a difficult time scheduling the required number of follow-up tests because a covered employee's work schedule is unpredictable, there is no prohibition against the railroad placing an employee (who is subject to being called to perform regulated service) on duty for the purpose of conducting the follow-up tests; except that an employee may be placed on duty for a follow-up alcohol test only if he or she is required to completely abstain from alcohol by a return-to-duty agreement, as provided by § 40.303(b) of this title. A railroad must maintain documentation establishing the need to place the employee on duty for the purpose of conducting the follow-up test and provide this documentation for review upon request of an FRA representative.

■ 10. Revise § 219.23 to read as follows:

**§ 219.23 Railroad policies.**

(a) Whenever a breath or body fluid test is required of an employee under this part, the railroad (either through a railroad employee or a designated agent, such as a contracted collector) must provide clear and unequivocal written notice to the employee that the test is being required under FRA regulations and is being conducted under Federal authority. The railroad must also provide the employee clear and unequivocal written notice of the type of test that is required (*e.g.*, reasonable suspicion, reasonable cause, random selection, follow-up, etc.). These notice requirements are satisfied if:

(1) For all FRA testing except mandatory post-accident toxicological testing under subpart C of this part, a railroad uses the mandated DOT alcohol or drug testing form, circles or checks off the box corresponding to the type of test, and shows this form to the employee before testing begins; or

(2) For mandatory post-accident toxicological testing under subpart C of this part, a railroad uses the approved FRA form and shows this form to the employee before testing begins.

(b) Use of the mandated DOT alcohol or drug testing forms for non-Federal

tests or mandatory post-accident toxicological testing under subpart C of this part is prohibited (except for post-accident breath alcohol testing permitted under § 219.203(c)). Use of the approved FRA post-accident toxicological testing form for any testing other than that mandated under subpart C is prohibited.

(c) Each railroad must develop and publish educational materials, specifically designed for regulated employees that clearly explain the requirements of this part, as well as the railroad's policies and procedures with respect to meeting those requirements. The railroad must ensure that a copy of these materials is distributed to each regulated employee hired for or transferred to a position that requires alcohol and drug testing under this part. (This requirement does not apply to an applicant for a regulated service position who either refuses to provide a specimen for pre-employment testing or who has a pre-employment test with a result indicating a violation of the alcohol or drug prohibitions of this part.) A railroad may satisfy this requirement by either—

(1)(i) Continually posting the materials in a location that is easily visible to all regulated employees going on duty at their designated reporting place and, if applicable, providing a copy of the materials to any employee labor organization representing a class or craft of regulated employees of the railroad; or

(ii) Providing a copy of the materials in some other manner that will ensure regulated employees can find and access these materials explaining the critical aspects of the program (e.g., by posting the materials on a company Web site that is accessible to all regulated employees); or

(2) For a minimum of three years after June 12, 2017, also ensuring that a hard copy of these materials is provided to each maintenance-of-way employee.

(d) *Required content.* The materials to be made available to regulated employees under paragraph (c) of this section must, at a minimum, include clear and detailed discussion of the following:

(1) The position title, name, and means of contacting the person(s) the railroad designates to answer employee questions about the materials;

(2) The specific classes or crafts of employees who are subject to the provisions of this part, such as engineers, conductors, MOW employees, signal maintainers, or train dispatchers;

(3) Sufficient information about the regulated service functions those

employees perform to make clear that the period of the work day the regulated employee is required to be in compliance with the alcohol prohibitions of this part is that period when the employee is on duty and is required to perform or is available to perform regulated service;

(4) Specific information concerning regulated employee conduct that is prohibited under subpart B of this part (e.g., the minimum requirements of §§ 219.101, 219.102, and 219.103);

(5) The requirement that a railroad utilizing the reasonable cause testing authority provided by subpart E of this part must give prior notice to regulated employees of the circumstances under which they will be subject to reasonable cause testing;

(6) The circumstances under which a regulated employee will be tested under this part;

(7) The procedures used to test for the presence of alcohol and controlled substances, protect the regulated employee and the integrity of the testing processes, safeguard the validity of the test results, and ensure that those results are attributed to the correct employee;

(8) The requirement that a regulated employee submit to alcohol and drug tests administered in accordance with this part;

(9) An explanation of what constitutes a refusal to submit to an alcohol or drug test and the attendant consequences;

(10) The consequences for a regulated employee found to have violated subpart B of this part, including the requirement that the employee be removed immediately from regulated service, and the responsive action requirements of § 219.104;

(11) The consequences for a regulated employee who has a Federal alcohol test indicating an alcohol concentration of 0.02 or greater but less than 0.04; and

(12) Information concerning the effects of alcohol and drug misuse on an individual's health, work, and personal life; signs and symptoms of an alcohol or drug problem (the employee's or a co-worker's); and available methods of evaluating and resolving problems associated with the misuse of alcohol and drugs, and the names, addresses, and telephone numbers of DACs and counseling and treatment programs.

(e) Optional provisions. The materials supplied to employees may also include information on additional railroad policies with respect to the use or possession of alcohol and drugs, including any consequences for an employee found to have a specific alcohol concentration that are based on the railroad's company authority independent of this part. Any such

additional policies or consequences must be clearly and obviously described as being based on the railroad's independent company authority.

■ 11. Add § 219.25 to subpart A to read as follows:

**§ 219.25 Previous employer drug and alcohol checks.**

(a) As required by § 219.701(a) and (b), a railroad must conduct drug or alcohol testing under this part in compliance with part 40 of this title (except for post-accident toxicological testing under subpart C of this part). A railroad must therefore comply with § 40.25 of this title by checking the alcohol and drug testing record of any direct regulated employee (a regulated employee who is not employed by a contractor to the railroad) it intends to use for regulated service before the employee performs such service for the first time. A railroad is not required to check the alcohol and drug testing record of contractor employees performing regulated service on its behalf (the alcohol and drug testing record of those contractor employees must be checked by their direct employers).

(b) When determining whether a person may become or remain certified as a locomotive engineer or a conductor, a railroad must comply with the requirements in § 240.119(c) (for engineers) or § 242.115(e) (for conductors) of this chapter regarding the consideration of Federal alcohol and drug violations that occurred within a period of 60 consecutive months before the review of the person's records.

**Subpart B—Prohibitions**

■ 12. Revise § 219.101(a) to read as follows:

**§ 219.101 Alcohol and drug use prohibited.**

(a) *Prohibitions.* Except as provided in § 219.103—

(1) No regulated employee may use or possess alcohol or any controlled substance when the employee is on duty and subject to performing regulated service for a railroad.

(2) No regulated employee may report for regulated service, or go or remain on duty in regulated service, while—

(i) Under the influence of or impaired by alcohol;

(ii) Having 0.04 or more alcohol concentration in the breath or blood; or

(iii) Under the influence of or impaired by any controlled substance.

(3) No regulated employee may use alcohol for whichever is the lesser of the following periods:

(i) Within four hours of reporting for regulated service; or

(ii) After receiving notice to report for regulated service.

(4)(i) No regulated employee tested under the provisions of this part whose Federal test result indicates an alcohol concentration of 0.02 or greater but less than 0.04 may perform or continue to perform regulated service for a railroad, nor may a railroad permit the regulated employee to perform or continue to perform regulated service, until the start of the regulated employee's next regularly scheduled duty period, but not less than eight hours following administration of the test.

(ii) Nothing in this section prohibits a railroad from taking further action under its own independent company authority when a regulated employee tested under the provisions of this part has a Federal test result indicating an alcohol concentration of 0.02 or greater, but less than 0.04. However, while a Federal test result of 0.02 or greater but less than 0.04 is a positive test and may be a violation of a railroad's operating rules, it is not a violation of this section and cannot be used to decertify an engineer under part 240 of this chapter or a conductor under part 242 of this chapter.

(5) If an employee tested under the provisions of this part has a test result indicating an alcohol concentration below 0.02, the test is negative and is not evidence of alcohol misuse. A railroad may not use a Federal test result below 0.02 either as evidence in a company proceeding or as a basis for subsequent testing under company authority. A railroad may take further action to compel cooperation in other breath or body fluid testing only if it has an independent basis for doing so. An independent basis for subsequent company authority testing will exist only when, after having a negative Federal reasonable suspicion alcohol test result, the employee exhibits additional or continuing signs and symptoms of alcohol use. If a company authority test then indicates a violation of the railroad's operating rules, this result is independent of the Federal test result and must stand on its own merits.

\* \* \* \* \*

■ 13. Revise § 219.102 to read as follows:

**§ 219.102 Prohibition on abuse of controlled substances.**

No regulated employee may use a controlled substance at any time, whether on duty or off duty, except as permitted by § 219.103.

■ 14. Revise § 219.104 to read as follows:

**§ 219.104 Responsive action.**

(a) *Removal from regulated service.*

(1) If a railroad determines that a regulated employee has violated § 219.101 or § 219.102, or the alcohol or controlled substances misuse rule of another DOT agency, the railroad must immediately remove the employee from regulated service and the procedures described in paragraphs (b) through (d) of this section apply.

(2) If a regulated employee refuses to provide a breath or body fluid specimen or specimens when required to by the railroad under a provision of this part, a railroad must immediately remove the regulated employee from regulated service, and the procedures described in paragraphs (b) through (d) of this section apply. This provision also applies to Federal reasonable cause testing under subpart E of this part (if the railroad has elected to conduct this testing under Federal authority).

(b) *Notice.* Before or upon removing a regulated employee from regulated service under this section, a railroad must provide written notice to the employee of the reason for this action. A railroad may provide a regulated employee with an initial verbal notice so long as it provides a follow-up written notice to the employee as soon as possible. In addition to the reason for the employee's withdrawal from regulated service, the written notice must also inform the regulated employee that he may not perform any DOT safety-sensitive duties until he completes the return-to-duty process of part 40.

(c) *Hearing procedures.* (1) Except as provided in paragraph (e)(5) of this section, if a regulated employee denies that a test result or other information is valid evidence of a § 219.101 or § 219.102 violation, the regulated employee may demand and must be provided an opportunity for a prompt post-suspension hearing before a presiding officer other than the charging official. This hearing may be consolidated with any disciplinary hearing arising from the same accident or incident (or conduct directly related thereto), but the presiding officer must make separate findings as to compliance with §§ 219.101 and 219.102.

(2) The hearing must be convened within the period specified in the applicable collective bargaining agreement. In the absence of an agreement provision, the regulated employee may demand that the hearing be convened within 10 calendar days of the employee's suspension or, in the case of a regulated employee who is unavailable due to injury, illness, or other sufficient cause, within 10 days of

the date the regulated employee becomes available for the hearing.

(3) A post-suspension proceeding conforming to the requirements of an applicable collective bargaining agreement, together with the provisions for adjustment of disputes under sec. 3 of the Railway Labor Act (49 U.S.C. 153), satisfies the procedural requirements of this paragraph (c).

(4) With respect to a removal or other adverse action taken as a consequence of a positive test result or refusal in a test authorized or required by this part, nothing in this part may be deemed to abridge any procedural rights or remedies consistent with this part that are available to a regulated employee under a collective bargaining agreement, the Railway Labor Act, or (with respect to employment at will) at common law.

(5) Nothing in this part restricts the discretion of a railroad to treat a regulated employee's denial of prohibited alcohol or drug use as a waiver of any privilege the regulated employee would otherwise enjoy to have such prohibited alcohol or drug use treated as a non-disciplinary matter or to have discipline held in abeyance.

(d) A railroad must comply with the requirements for Substance Abuse Professional evaluations, the return-to-duty process, and follow-up testing contained in part 40 of this title.

(1) *Post-accident toxicology testing exception.* If a regulated employee has a post-accident toxicology test result under subpart C of this part that is positive for a drug not listed in § 40.5's definition of "Drugs," a railroad may conduct the employee's return-to-duty and follow-up tests under part 40, or may conduct the employee's return-to-duty and follow-up tests under its own authority to comply with the requirements of paragraph (d) of this section, so long as its testing procedures are otherwise identical to those of part 40, and include the specific drug for which the violation occurred, on an expanded drug testing panel.

(e) *Applicability.* (1) This section does not apply to actions based on breath or body fluid tests for alcohol or drugs that are conducted exclusively under authority other than that provided in this part (e.g., testing under a company medical policy, testing for cause wholly independent of the subpart E Federal authority of this part, or testing under a labor agreement).

(2) This section does not apply to Federal alcohol tests indicating an alcohol concentration of less than 0.04.

(3) This section does not apply to a locomotive engineer or conductor who has an off-duty conviction for, or a completed state action to cancel, revoke,

suspend, or deny a motor vehicle driver's license for operating while under the influence of or impaired by alcohol or a controlled substance. (However, this information remains relevant for the purpose of locomotive engineer or conductor certification, according to the requirements of parts 240 or 242 of this chapter.)

(4) This section does not apply to an applicant who declines to be subject to pre-employment testing and withdraws an application for employment before the test begins. The determination of when a drug or alcohol test begins is made according to the provisions found in subparts E and L of part 40 of this title.

(5) Paragraph (c) of this section does not apply to an applicant who tests positive or refuses a DOT pre-employment test.

(6) As provided by § 40.25(j) of this title, paragraph (d) of this section applies to any DOT-regulated employer seeking to hire for DOT safety-sensitive functions an applicant who tested positive or who refused a DOT pre-employment test.

■ 15. Revise § 219.105 to read as follows:

**§ 219.105 Railroad's duty to prevent violations.**

(a) A railroad may not, with actual knowledge, permit a regulated employee to go or remain on duty in regulated service in violation of the prohibitions of § 219.101 or § 219.102. As used in this section, the actual knowledge imputed to the railroad is limited to that of a railroad management employee (such as a supervisor deemed an "officer," whether or not such person is a corporate officer) or a supervisory employee in the offending regulated employee's chain of command. A railroad management or supervisory employee has actual knowledge of a violation when he or she:

(1) Personally observes a regulated employee use or possess alcohol or use drugs in violation of this subpart. It is not sufficient for actual knowledge if the supervisory or management employee merely observes the signs and symptoms of alcohol or drug use that require a reasonable suspicion test under § 219.301;

(2) Receives information regarding a violation of this subpart from a previous employer of a regulated employee, in response to a background information request required by § 40.25 of this title; or

(3) Receives a regulated employee's admission of prohibited alcohol possession or prohibited alcohol or drug use.

(b) A railroad must exercise due diligence to assure compliance with §§ 219.101 and 219.102 by each regulated employee.

(c) A railroad's alcohol and/or drug use education, prevention, identification, intervention, and rehabilitation programs and policies must be designed and implemented in such a way that they do not circumvent or otherwise undermine the requirements, standards, and policies of this part. Upon FRA's request, a railroad must make available for FRA review all documents, data, or other records related to such programs and policies.

(d) Each year, a railroad's supervisors must conduct and record a number of "Rule G" employee observations at a minimum equal to twice the railroad's total number of regulated employees. Each "Rule G" observation must be made sufficiently close to an individual regulated employee to determine whether the employee is displaying signs and symptoms indicative of a violation of the prohibitions of this part.

■ 16. Revise § 219.107 to read as follows:

**§ 219.107 Consequences of refusal.**

(a) A regulated employee who refuses to provide a breath or body fluid specimen or specimens when required to by the railroad under a provision of this part must be withdrawn from regulated service for a period of nine (9) months. Per the requirements of part 40 of this title, a regulated employee who provides an adulterated or substituted specimen is deemed to have refused to provide the required specimen and must be withdrawn from regulated service in accordance with this section.

(b) *Notice.* Before or upon withdrawing a regulated employee from regulated service under this section, a railroad must provide written notice to the employee of the reason for this action, and the procedures described in § 219.104(c) apply. A railroad may provide a regulated employee with an initial verbal notice so long as it provides a follow-up written notice as soon as possible.

(c) The withdrawal required by this section applies only to an employee's performance of regulated service for any railroad with notice of such withdrawal. During the period of withdrawal, a railroad with notice of such withdrawal must not authorize or permit the employee to perform any regulated service for the railroad.

(d) The requirement of withdrawal for nine (9) months does not limit any discretion on the part of the railroad to impose additional sanctions for the same or related conduct.

(e) Upon the expiration of the nine month period described in this section, a railroad may permit an employee to return to regulated service only under the conditions specified in § 219.104(d), and the regulated employee must be subject to return-to-duty and follow-up tests, as provided by that section.

**Subpart C—Post-Accident Toxicological Testing**

■ 17. In § 219.201, revise paragraphs (a) and (b) to read as follows:

**§ 219.201 Events for which testing is required.**

(a) *List of events.* Except as provided in paragraph (b) of this section, FRA post-accident toxicological tests must be conducted after any event that involves one or more of the circumstances described in paragraphs (a)(1) through (5) of this section:

(1) *Major train accident.* Any train accident (*i.e.*, a rail equipment accident involving damage in excess of the current reporting threshold) that involves one or more of the following:

(i) A fatality to any person;

(ii) A release of hazardous material lading from railroad equipment accompanied by—

(A) An evacuation; or

(B) A reportable injury resulting from the hazardous material release (*e.g.*, from fire, explosion, inhalation, or skin contact with the material); or

(iii) Damage to railroad property of \$1,500,000 or more.

(2) *Impact accident.* Any impact accident (*i.e.*, a rail equipment accident defined as an "impact accident" in § 219.5) that involves damage in excess of the current reporting threshold, resulting in—

(i) A reportable injury; or

(ii) Damage to railroad property of \$150,000 or more.

(3) *Fatal train incident.* Any train incident that involves a fatality to an on-duty employee (as defined in § 219.5) who dies within 12 hours of the incident as a result of the operation of on-track equipment, regardless of whether that employee was performing regulated service.

(4) *Passenger train accident.* Any train accident (*i.e.*, a rail equipment accident involving damage in excess of the current reporting threshold) involving a passenger train and a reportable injury to any person.

(5) *Human-factor highway-rail grade crossing accident/incident.* A highway-rail grade crossing accident/incident when it involves:

(i) A regulated employee who interfered with the normal functioning

of a grade crossing signal system, in testing or otherwise, without first taking measures to provide for the safety of highway traffic that depends on the normal functioning of such system, as prohibited by § 234.209 of this chapter;

(ii) A train crewmember who was, or who should have been, flagging highway traffic to stop due to an activation failure of the grade crossing system, as provided by § 234.105(c)(3) of this chapter;

(iii) A regulated employee who was performing, or should have been performing, the duties of an appropriately equipped flagger (as defined in § 234.5 of this chapter) due to an activation failure, partial activation, or false activation of the grade crossing signal system, as provided by § 234.105(c)(1) and (2), § 234.106, or § 234.107(c)(1)(i) of this chapter;

(iv) A fatality to any regulated employee performing duties for the railroad, regardless of fault; or

(v) A regulated employee who violated an FRA regulation or railroad operating rule and whose actions may have played a role in the cause or severity of the accident/incident.

(b) *Exceptions.* Except for a human-factor highway-rail grade crossing accident/incident described in paragraph (a)(5) of this section, no test may be required in the case of a collision between railroad rolling stock and a motor vehicle or other highway conveyance at a highway/rail grade crossing. No test may be required for an accident/incident the cause and severity of which are wholly attributable to a natural cause (e.g., flood, tornado, or other natural disaster) or to vandalism or trespasser(s), as determined on the basis of objective and documented facts by the railroad representative responding to the scene.

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■ 18. Revise § 219.203 to read as follows:

**§ 219.203 Responsibilities of railroads and employees.**

(a) *Employees tested.* A regulated employee subject to post-accident toxicological testing under this subpart must cooperate in the provision of specimens as described in this part and appendix C to this part.

(1) *General.* Except as otherwise provided for by this section, following each qualifying event described in § 219.201, a regulated employee directly involved in a qualifying event under this subpart must provide blood and urine specimens for toxicological testing by FRA. This includes any regulated employee who may not have been

present or on-duty at the time or location of the event, but whose actions may have played a role in its cause or severity, including, but not limited to, an operator, dispatcher, or signal maintainer.

(2) *Fatalities.* Testing of the remains of an on-duty employee (as defined in § 219.5) who is fatally injured in a qualifying event described in § 219.201 is required, regardless of fault, if the employee dies within 12 hours of the qualifying event as a result of such qualifying event.

(3) *Major train accidents.* For an accident or incident meeting the criteria of a major train accident in § 219.201(a)(1)—

(i) All assigned crew members of all trains or other on-track equipment involved in the qualifying event must be subjected to post-accident toxicological testing, regardless of fault.

(ii) Other surviving regulated employees who are not assigned crew members of an involved train or other on-track equipment (e.g., a dispatcher or a signal maintainer) must be tested if a railroad representative can immediately determine, on the basis of specific information, that the employee may have had a role in the cause or severity of the accident/incident. In making this determination, the railroad representative must consider any such information that is immediately available at the time the qualifying event determination is made under § 219.201.

(4) *Fatal train incidents.* For a fatal train incident under § 219.201(a)(3), the remains of any on-duty employee (as defined in § 219.5) performing duties for a railroad who is fatally injured in the event are always subject to post-accident toxicological testing, regardless of fault.

(5) *Human-factor highway-rail grade crossing accident/incidents.* (i) For a human-factor highway-rail grade crossing accident/incident under § 219.201(a)(5)(i), only a regulated employee who interfered with the normal functioning of a grade crossing signal system and whose actions may have contributed to the cause or severity of the event is subject to testing.

(ii) For a human-factor highway-rail grade crossing accident/incident under § 219.201(a)(5)(ii), only a regulated employee who was a train crew member responsible for flagging highway traffic to stop due to an activation failure of a grade crossing system (or who was on-site and directly responsible for ensuring that flagging was being performed), but who failed to do so, and whose actions may have contributed to

the cause or severity of the event, is subject to testing.

(iii) For a human-factor highway-rail grade crossing accident/incident under § 219.201(a)(5)(iii), only a regulated employee who was responsible for performing the duties of an appropriately equipped flagger (as defined in § 234.5 of this chapter), but who failed to do so, and whose actions may have contributed to the cause or severity of the event is subject to testing.

(iv) For a human-factor highway-rail grade crossing accident/incident under § 219.201(a)(5)(iv), only the remains of any fatally-injured employee(s) (as defined in § 219.5) performing regulated service for the railroad are subject to testing.

(v) For a human-factor highway-rail grade crossing accident/incident under § 219.201(a)(5)(v), only a regulated employee who violated an FRA regulation or railroad operating rule and whose actions may have contributed to the cause or severity of the event is subject to testing.

(6) *Exception.* For a qualifying impact accident, passenger train accident, fatal train incident, or human-factor highway-rail grade crossing accident/incident under § 219.201(a)(2) through (5), a surviving crewmember or other regulated employee must be excluded from testing if the railroad representative can immediately determine, on the basis of specific information, that the employee had no role in the cause or severity of the accident/incident. In making this determination, the railroad representative must consider any information that is immediately available at the time the qualifying event determination is made under § 219.201.

(i) This exception is not available for assigned crew members of all involved trains if the qualifying event also meets the criteria for a major train accident under § 219.201(a)(1) (e.g., this exception is not available for an Impact Accident that also qualifies as a major train accident because it results in damage to railroad property of \$1,500,000 or more).

(ii) This exception is not available for any on-duty employee who is fatally-injured in a qualifying event.

(b) *Railroad responsibility.* (1) A railroad must take all practicable steps to ensure that all surviving regulated employees of the railroad who are subject to FRA post-accident toxicological testing under this subpart provide blood and urine specimens for the toxicological testing required by FRA. This includes any regulated employee who may not have been

present or on-duty at the time or location of the event, but whose actions may have played a role in its cause or severity, including, but not limited to, an operator, dispatcher, or signal maintainer.

(2) A railroad must take all practicable steps to ensure that tissue and fluid specimens taken from fatally injured employees are subject to FRA post-accident toxicological testing under this subpart.

(3) FRA post-accident toxicological testing under this subpart takes priority over toxicological testing conducted by state or local law enforcement officials.

(c) *Alcohol testing.* Except as provided for in paragraph (e)(4) of this section, if the conditions for mandatory post-accident toxicological testing exist, a railroad may also require an employee to provide breath for testing in accordance with the procedures set forth in part 40 of this title and in this part, if such testing does not interfere with timely collection of required urine and blood specimens.

(d) *Timely specimen collection.* (1) A railroad must make every reasonable effort to assure that specimens are provided as soon as possible after the accident or incident, preferably within four hours. Specimens that are not collected within four hours after a qualifying accident or incident must be collected as soon thereafter as practicable. If a specimen is not collected within four hours of a qualifying event, the railroad must immediately notify the FRA Drug and Alcohol Program Manager at 202-493-6313 and provide detailed information regarding the failure (either verbally or via a voicemail). The railroad must also submit a concise, written narrative report of the reasons for such a delay to the FRA Drug and Alcohol Program Manager, 1200 New Jersey Ave. SE., Washington, DC 20590. The report must be submitted within 30 days after the expiration of the month during which the accident or incident occurred. This report may also be submitted via email to an email address provided by the FRA Drug and Alcohol Program Manager.

(2) The requirements of paragraph (d) of this section must not be construed to inhibit an employee who is required to be post-accident toxicological tested from performing, in the immediate aftermath of an accident or incident, any duties that may be necessary for the preservation of life or property. Where practical, however, a railroad must utilize other employees to perform such duties.

(3) If a passenger train is in proper condition to continue to the next station

or its destination after an accident or incident, the railroad must consider the safety and convenience of passengers in determining whether the crew should be made immediately available for post-accident toxicological testing. A relief crew must be called to relieve the train crew as soon as possible.

(4) A regulated employee who may be subject to post-accident toxicological testing under this subpart must be retained in duty status for the period necessary to make the determinations required by § 219.201 and this section and (as appropriate) to complete specimen collection.

(e) *Recall of employees for testing.* (1) Except as otherwise provided for in paragraph (e)(2) of this section, a regulated employee may not be recalled for testing under this subpart if that employee has been released from duty under the normal procedures of the railroad. An employee who has been transported to receive medical care is not released from duty for purposes of this section. Furthermore, nothing in this section prohibits the subsequent testing of an employee who has failed to remain available for testing as required (e.g., an employee who is absent without leave). However, subsequent testing does not excuse a refusal by the employee to provide the specimens in a timely manner.

(2) A railroad must immediately recall and place on duty a regulated employee for post-accident drug testing, if—

(i) The employee could not be retained in duty status because the employee went off duty under normal railroad procedures before being contacted by a railroad supervisor and instructed to remain on duty pending completion of the required determinations (e.g., in the case of a dispatcher or signal maintainer remote from the scene of an accident who was unaware of the occurrence at the time he or she went off duty); and

(ii) The railroad's preliminary investigation (contemporaneous with the determination required by § 219.201) indicates a clear probability that the employee played a role in the cause or severity of the accident/incident.

(3) If the criteria in paragraph (e)(2) of this section are met, a regulated employee must be recalled for post-accident drug testing regardless of whether the qualifying event happened or did not happen during the employee's tour of duty. However, an employee may not be recalled for testing if more than 24 hours have passed since the qualifying event. An employee who has been recalled must be placed on

duty for the purpose of accomplishing the required post-accident drug testing.

(4) Urine and blood specimens must be collected from an employee who is recalled for testing in accordance with this section. If the employee left railroad property before being recalled, however, the specimens must be tested for drugs only. A railroad is prohibited from requiring a recalled employee to provide breath specimens for alcohol testing, unless the regulated employee has remained on railroad property since the time of the qualifying event and the railroad has a company policy completely prohibiting the use of alcohol on railroad property.

(5) A railroad must document its attempts to contact an employee subject to the recall provisions of this section. If a railroad is unable, as a result of the non-cooperation of an employee or for any other reason, to obtain specimen(s) from an employee subject to mandatory recall within the 24-hour period after a qualifying event and to submit specimen(s) to FRA as required by this subpart, the railroad must contact FRA and prepare a concise narrative report according to the requirements of paragraph (d)(1) of this section. The report must also document the railroad's good faith attempts to contact and recall the employee.

(f) *Place of specimen collection.* (1) With the exception of Federal breath testing for alcohol (when conducted as authorized under this subpart), an employee must be transported to an independent medical facility for specimen collection. In all cases, blood may be drawn only by a qualified medical professional or by a qualified technician subject to the supervision of a qualified medical professional (e.g., a phlebotomist). A collector contracted by a railroad or medical facility may collect and/or assist in the collection of specimens at the medical facility if the medical facility does not object and the collector is qualified to do so.

(2) If an employee has been injured, a railroad must ask the treating medical facility to obtain the specimens. Urine may be collected from an injured employee (conscious or unconscious) who has already been catheterized for medical purposes, but an employee may not be catheterized solely for the purpose of providing a specimen under this subpart. Under § 219.11(a), an employee is deemed to have consented to FRA post-accident toxicological testing by the act of being subject to performing regulated service for a railroad.

(g) *Obtaining cooperation of facility.*

(1) In seeking the cooperation of a medical facility in obtaining a specimen

under this subpart, a railroad must, as necessary, make specific reference to the requirements of this subpart and the instructions in FRA's post-accident toxicological shipping kit.

(2) If an injured employee is unconscious or otherwise unable to evidence consent to the procedure and the treating medical facility declines to obtain blood and/or urine specimens after having been informed of the requirements of this subpart, the railroad must immediately notify the duty officer at the National Response Center (NRC) at (800) 424-8802, stating the employee's name, the name and location of the medical facility, the name of the appropriate decisional authority at the medical facility, and the telephone number at which that person can be reached. FRA will then take appropriate measures to assist in obtaining the required specimens.

(h) *Discretion of physician.* Nothing in this subpart may be construed to limit the discretion of a medical professional to determine whether drawing a blood specimen is consistent with the health of an injured employee or an employee afflicted by any other condition that may preclude drawing the specified quantity of blood.

■ 19. Revise § 219.205 to read as follows:

**§ 219.205 Specimen collection and handling.**

(a) *General.* Urine and blood specimens must be obtained, marked, preserved, handled, and made available to FRA consistent with the requirements of this subpart, the instructions provided inside the FRA post-accident toxicological shipping kit, and the technical specifications set forth in appendix C to this part.

(b) *Information requirements.* Basic information concerning the accident/incident and any treatment administered after the accident/incident is necessary to process specimens, analyze the significance of laboratory findings, and notify railroads and employees of test results. Accordingly, the railroad representative must complete the information required by Form FRA 6180.73 (revised) for shipping with the specimens. Each employee subject to testing must cooperate in completion of the required information on Form FRA F 6180.74 (revised) for inclusion in the shipping kit and processing of the specimens. The railroad representative must ask an appropriate representative of the medical facility to complete the remaining portion of the information on each Form 6180.74. A Form 6180.73 must be forwarded in the shipping kit

with each group of specimens. A Form 6180.74 must be forwarded in the shipping kit for each employee who provides specimens. A Form 6180.73 and either a Form 6180.74 or a Form 6180.75 (for fatalities) are included in the shipping kit. (See paragraph (c) of this section.)

(c) *Shipping kits.* (1) FRA and the laboratory designated in appendix B to this part make available for purchase a limited number of standard shipping kits for the purpose of routine handling of post-accident toxicological specimens under this subpart. Specimens must be placed in the shipping kit and prepared for shipment according to the instructions provided in the kit and appendix C to this part.

(2) Standard shipping kits may be ordered directly from the laboratory designated in appendix B to this part by first requesting an order form from FRA's Drug and Alcohol Program Manager at 202-493-6313. In addition to the standard kit for surviving employees, FRA also has distributed a post-mortem shipping kit to Class I, II, and commuter railroads. The post-mortem kit may not be ordered by other railroads. If a smaller railroad has a qualifying event involving a fatality to an on-duty employee, the railroad should advise the NRC at 1-800-424-8802 of the need for a post-mortem kit, and FRA will send one overnight to the medical examiner's office or assist the railroad in obtaining one from a nearby railroad.

(d) *Shipment.* Specimens must be shipped as soon as possible by pre-paid air express (or other means adequate to ensure delivery within 24 hours from time of shipment) to the laboratory designated in appendix B to this part. However, if delivery cannot be ensured within 24 hours due to a suspension in air express delivery services, the specimens must be held in a secure refrigerator until delivery can be accomplished. In no circumstances may specimens be held for more than 72 hours. Where express courier pickup is available, the railroad must ask the medical facility to transfer the sealed toxicology kit directly to the express courier for transportation. If courier pickup is not available at the medical facility where the specimens are collected or if for any other reason a prompt transfer by the medical facility cannot be assured, the railroad must promptly transport the sealed shipping kit holding the specimens to the most expeditious point of shipment via air express. The railroad must maintain and document a secure chain of custody of the kit(s) from its release by the medical

facility to its delivery for transportation, as described in appendix C to this part.

(e) *Specimen security.* After a specimen kit or transportation box has been sealed, no entity other than the laboratory designated in appendix B to this part may open it. If the railroad or medical facility discovers an error with either the specimens or the chain of custody form after the kit or transportation box has been sealed, the railroad or medical facility must make a contemporaneous written record of that error and send it to the laboratory, preferably with the transportation box.

**§ 219.207—[Amended]**

■ 20. Section 219.207 is amended by—

■ a. In paragraph (a), removing the word “and/or” and adding, in its place, the word “and”; removing the words “timely collected” and adding, in their place, “collected in a timely fashion”; removing the word “shipping” and adding, in its place, “post-mortem shipping”; and removing the words “if a person” and adding, in their place, “if the custodian is someone”;

■ b. In the introductory text of paragraph (b), removing “(800) 424-8801 or”;

■ c. In paragraph (c), removing the word “and/or” and adding, in its place, the word “and”; and

■ d. In paragraph (d), removing the word “specifies” and adding, in its place, the words “and the instructions included inside the shipping kits specify”.

■ 21. In § 219.209, revise paragraphs (a)(2)(iv), (a)(2)(v), and (b), and remove paragraph (c), to read as follows:

**§ 219.209 Reports of tests and refusals.**

(a) \* \* \*

(2) \* \* \*

(iv) Brief summary of the circumstances of the accident/incident, including basis for testing (e.g., impact accident with a reportable injury); and

(v) Number of employees tested.

(b) If a railroad is unable, as a result of non-cooperation of an employee or for any other reason, to obtain a specimen and provide it to FRA as required by this subpart, the railroad must immediately notify the FRA Drug and Alcohol Program Manager at 202-493-6313 and provide detailed information regarding the failure (either verbally or via a voicemail). The railroad must also provide a concise narrative written report of the reason for such failure and, if appropriate, any action taken in response to the cause of such failure. This report must be appended to the report of the accident/incident required to be submitted under part 225 of this chapter and must also

be mailed to the FRA Drug and Alcohol Program Manager at 1200 New Jersey Avenue SE., Washington, DC 20590.

■ 22. Section 219.211 is amended by—

- a. Adding a sentence at the end of paragraph (b);
- b. Revising the second sentence of paragraph (c) and the second sentence of paragraph (e); and
- c. Revising paragraph (g)(3).

The revisions and additions read as follows:

**§ 219.211 Analysis and follow-up.**

\* \* \* \* \*

(b) \* \* \* An employer is prohibited from temporarily removing an employee from the performance of regulated service based only on a report from the laboratory to the MRO of a confirmed positive test for a drug or drug metabolite, an adulterated test, or a substituted test, before the MRO has completed verification of the test result.

(c) \* \* \* The Medical Review Officer must promptly report the results of each review to the Associate Administrator for Railroad Safety, FRA, 1200 New Jersey Avenue SE., Washington, DC 20590. \* \* \*

(e) \* \* \* An employee wishing to respond may do so by email or letter addressed to the Drug and Alcohol Program Manager, Office of Railroad Safety, FRA, 1200 New Jersey Avenue SE., Washington, DC 20590 within 45 days of receipt of the test results. \* \* \*

\* \* \* \* \*

(g) \* \* \*

(3) This provision does not authorize holding any employee out of service pending receipt of PAT testing results. It also does not restrict a railroad from taking such action based on the employee's underlying conduct, so long as it is consistent with the railroad's disciplinary policy and is taken under the railroad's own authority.

\* \* \* \* \*

**§ 219.213 [Amended]**

■ 23. In § 219.213, paragraphs (a) and (b), revise all references to "covered service" to read "regulated service," and in paragraph (b), add "written" in front of the word "notice".

■ 24. Revise subpart D to read as follows:

**Subpart D—Reasonable Suspicion Testing.**

219.301 Mandatory reasonable suspicion testing.

219.303 Reasonable suspicion observations.

219.305 Prompt specimen collection; time limitations.

**Subpart D—Reasonable Suspicion Testing**

**§ 219.301 Mandatory reasonable suspicion testing.**

(a) Each railroad must require a regulated employee to submit to a breath alcohol test when the railroad has reasonable suspicion to believe that the regulated employee has violated any prohibition of subpart B of this part concerning use of alcohol. The railroad's determination that reasonable suspicion exists to require the regulated employee to undergo an alcohol test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the employee. A Federal reasonable suspicion alcohol test is not required to confirm the on-duty possession of alcohol.

(b) Each railroad must require a regulated employee to submit to a drug test when the railroad has reasonable suspicion to believe that the regulated employee has violated the prohibitions of subpart B of this part concerning use of controlled substances. The railroad's determination that reasonable suspicion exists to require the regulated employee to undergo a drug test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the employee. Such observations may include indications of the chronic and withdrawal effects of drugs.

(c) Reasonable suspicion observations made under this section must comply with the requirements of § 219.303.

(d) As provided by § 219.11(b)(2), in any case where an employee is suffering a substantiated medical emergency and is subject to alcohol or drug testing under this subpart, necessary medical treatment must be accorded priority over provision of the breath or body fluid specimens. However, when the employee's condition is stabilized, reasonable suspicion testing must be completed if within the eight-hour limit provided for in § 219.305.

**§ 219.303 Reasonable suspicion observations.**

(a) With respect to an alcohol test, the required observations must be made by a responsible railroad supervisor (defined by § 219.5) trained in accordance with § 219.11(g). The supervisor who makes the determination that reasonable suspicion exists may not conduct the reasonable suspicion testing on that regulated employee.

(b) With respect to a drug test, the required observations must be made by

two responsible railroad supervisors (defined by § 219.5), at least one of whom must be both on site and trained in accordance with § 219.11(g). If one of the supervisors is off site, the on-site supervisor must communicate with the off-site supervisor, as necessary, to provide him or her the information needed to make the required observation. This communication may be performed via telephone, but not via radio or any other form of electronic communication.

(c) This subpart does not authorize holding any employee out of service pending receipt of toxicological analysis for reasonable suspicion testing, nor does it restrict a railroad from taking such action based on the employee's underlying conduct, provided it is consistent with the railroad's policy and taken under the railroad's own authority.

(d) The railroad must maintain written documentation that specifically describes the observed signs and symptoms upon which the determination that reasonable suspicion exists is based. This documentation must be completed promptly by the trained supervisor.

**§ 219.305 Prompt specimen collection; time limitations.**

(a) Consistent with the need to protect life and property, testing under this subpart must be conducted promptly following the observations upon which the testing decision is based.

(b) If a test required by this subpart is not administered within two hours following a determination made under this section, the railroad must prepare and maintain on file a record stating the reasons the test was not administered within that time period. If an alcohol or drug test required by this subpart is not administered within eight hours of a determination made under this subpart, the railroad must cease attempts to administer the test and must record the reasons for not administering the test. The eight-hour requirement is satisfied if the individual has been delivered to the collection site (where the collector is present) and the request has been made to commence collection of the specimens within that period. The records required by this section must be submitted to FRA upon request of the FRA Drug and Alcohol Program Manager.

(c) A regulated employee may not be tested under this subpart if that individual has been released from duty under the normal procedures of a railroad. An individual who has been transported to receive medical care is not released from duty for purposes of

this section. Nothing in this section prohibits the subsequent testing of an employee who has failed to remain available for testing as required (*i.e.*, who is absent without leave).

■ 25. Revise subpart E to read as follows:

#### **Subpart E—Reasonable Cause Testing**

Sec.

219.401 Authorization for reasonable cause testing.

219.403 Requirements for reasonable cause testing.

219.405 Documentation requirements.

219.407 Prompt specimen collection; time limitations.

219.409 Limitations on authority.

#### **Subpart E—Reasonable Cause Testing**

##### **§ 219.401 Authorization for reasonable cause testing.**

(a) Each railroad may, at its own discretion, elect to conduct Federal reasonable cause testing authorized by this subpart. If a railroad chooses to do so, the railroad must use only Federal authority for all reasonable cause testing that meets the criteria of § 219.403. In addition, the railroad must notify its regulated employees of its decision to use Federal reasonable cause testing authority in the employee educational policy required by § 219.23(e)(5). The railroad must also provide written notification of its decision to FRA's Drug and Alcohol Program Manager, 1200 New Jersey Ave. SE., Washington, DC 20590.

(b) If a railroad elects to conduct reasonable cause testing under the authority of this subpart, the railroad may, under the conditions specified in this subpart, require any regulated employee, as a condition of employment in regulated service, to cooperate with breath or body fluid testing, or both, to determine compliance with §§ 219.101 and 219.102 or a railroad rule implementing the requirements of §§ 219.101 and 219.102. This authority is limited to testing after observations or events that occur during duty hours (including any period of overtime or emergency service). The provisions of this subpart apply only when, and to the extent that, the test in question is conducted in reliance upon the authority conferred by this section. A railroad may not require an employee to be tested under the authority of this subpart unless reasonable cause, as defined in this section, exists with respect to that employee.

##### **§ 219.403 Requirements for reasonable cause testing.**

Each railroad's decision process regarding whether reasonable cause

testing is authorized must be completed before the reasonable cause testing is performed and documented according to the requirements of § 219.405. The following circumstances constitute reasonable cause for the administration of alcohol and/or drug tests under the authority of this subpart.

(a) *Train accident or train incident.* A regulated employee has been involved in a train accident or train incident (as defined in § 219.5) reportable under part 225 of this chapter, and a responsible railroad supervisor (as defined in § 219.5) has a reasonable belief, based on specific, articulable facts, that the individual employee's acts or omissions contributed to the occurrence or severity of the accident; or

(b) *Rule violation.* A regulated employee has been directly involved in one or more of the following railroad or FRA rule violations or other errors:

(1) Noncompliance with a train order, track warrant, track bulletin, track permit, stop and flag order, timetable, signal indication, special instruction or other directive with respect to movement of railroad on-track equipment that involves—

(i) Occupancy of a block or other segment of track to which entry was not authorized;

(ii) Failure to clear a track to permit opposing or following movements to pass;

(iii) Moving across a railroad crossing at grade without authorization; or

(iv) Passing an absolute restrictive signal or passing a restrictive signal without stopping (if required);

(2) Failure to protect on-track equipment, including leaving on-track equipment fouling an adjacent track;

(3) Operation of a train or other speedometer-equipped on-track equipment at a speed that exceeds the maximum authorized speed by at least 10 miles per hour or by 50% of such maximum authorized speed, whichever is less;

(4) Alignment of a switch in violation of a railroad rule, failure to align a switch as required for movement, operation of a switch under on-track equipment, or unauthorized running through a switch;

(5) Failure to restore and secure a main track switch as required;

(6) Failure to apply brakes or stop short of a derail as required;

(7) Failure to secure a hand brake or failure to secure sufficient hand brakes, as required;

(8) Entering a crossover before both switches are lined for movement or restoring either switch to normal position before the crossover movement is completed;

(9) Failure to provide point protection by visually determining that the track is clear and giving the signals or instructions necessary to control the movement of on-track equipment when engaged in a shoving or pushing movement;

(10) In the case of a person performing a dispatching function or block operator function, issuance of a mandatory directive or establishment of a route that fails to provide proper protection for on-track equipment;

(11) Interference with the normal functioning of any grade crossing signal system or any signal or train control device without first taking measures to provide for the safety of highway traffic or train operations which depend on the normal functioning of such a device.

Such interference includes, but is not limited to, failure to provide alternative methods of maintaining safety for highway traffic or train operations while testing or performing work on the devices or on track and other railroad systems or structures which may affect the integrity of the system;

(12) Failure to perform stop-and-flag duties necessary as a result of a malfunction of a grade crossing signal system;

(13) Failure of a machine operator that results in a collision between a roadway maintenance machine and on-track equipment or a regulated employee;

(14) Failure of a roadway worker-in-charge to notify all affected employees when releasing working limits;

(15) Failure of a flagman or watchman/lookout to notify employees of an approaching train or other on-track equipment;

(16) Failure to ascertain that provision was made for on-track safety before fouling a track;

(17) Improper use of individual train detection in a manual interlocking or control point; or

(18) Failure to apply three point protection (fully apply the locomotive and train brakes, center the reverser, and place the generator field switch in the off position) that results in a reportable injury to a regulated employee.

##### **§ 219.405 Documentation requirements.**

(a) Each railroad must maintain written documentation that specifically describes the basis for each reasonable cause test it performs under Federal authority. This documentation must be completed promptly by the responsible railroad supervisor; although it does not need to be completed before the reasonable cause testing is conducted.

(b) For a rule violation, the documentation must include the type of

rule violation and the involvement of each tested regulated employee. For a train accident or train incident reportable under part 225 of this chapter, a railroad must describe either the amount of railroad property damage or the reportable casualty and the basis for the supervisor's belief that the employee's acts or omissions contributed to the occurrence or severity of the train accident or train incident.

**§ 219.407 Prompt specimen collection; time limitations.**

(a) Consistent with the need to protect life and property, testing under this subpart must be conducted promptly following the observations upon which the testing decision is based.

(b) If a test conducted pursuant to the authority of this subpart is not administered within two hours following the observations upon which the testing decision is based, the railroad must prepare and maintain on file a record stating the reasons the test was not conducted within that time period. If an alcohol or drug test authorized by this subpart is not administered within eight hours of the event under this subpart, the railroad must cease attempts to administer the test and must record the reasons for not administering the test. The eight-hour time period begins at the time a responsible railroad supervisor receives notice of the train accident, train incident, or rule violation. The eight-hour requirement is satisfied if the employee has been delivered to the collection site (where the collector is present) and the request has been made to commence collection of specimen(s) within that period. The records required by this section must be submitted to FRA upon request of the FRA Drug and Alcohol Program Manager.

(c) A regulated employee may not be tested under this subpart if that individual has been released from duty under the normal procedures of the railroad. An individual who has been transported to receive medical care is not released from duty for purposes of this section. Nothing in this section prohibits the subsequent testing of a regulated employee who has failed to remain available for testing as required (*i.e.*, who is absent without leave).

**§ 219.409 Limitations on authority.**

(a) The alcohol and/or drug testing authority conferred by this subpart does not apply with respect to any event that meets the criteria for post-accident toxicological testing required under subpart C of this part.

(b) This subpart does not authorize holding an employee out of service

pending receipt of toxicological analysis for reasonable cause testing because meeting the testing criteria is only a basis to inquire whether alcohol or drugs may have played a role in the accident or rule violation. However, this subpart does not restrict a railroad from holding an employee out of service based on the employee's underlying conduct, so long as it is consistent with the railroad's policy and the action is taken under the railroad's own authority.

(c) When determining whether reasonable cause testing is justified, a railroad must consider the involvement of each crewmember in the qualifying event, not the involvement of the crew as a whole.

**Subpart F—Pre-Employment Tests**

■ 26. Revise § 219.501 to read as follows:

**§ 219.501 Pre-employment drug testing.**

(a) Before an individual performs regulated service the first time for a railroad, the railroad must ensure that the individual undergoes testing for drugs in accordance with the regulations of a DOT agency. No railroad may allow a direct employee (a railroad employee who is not employed by a contractor to the railroad) to perform regulated service, unless that railroad has conducted a DOT pre-employment test for drugs on that individual with a result that did not indicate the misuse of controlled substance. This requirement applies both to a final applicant for direct employment and to a direct employee seeking to transfer for the first time from non-regulated service to duties involving regulated service. A regulated employee must have a negative DOT pre-employment drug test for each railroad for which he or she performs regulated service as the result of a direct employment relationship.

(b) Each railroad must ensure that each employee of a contractor who performs regulated service on the railroad's behalf has a negative DOT pre-employment drug test on file with his or her employer. The railroad must also maintain documentation indicating that it had verified that the contractor employee had a negative DOT pre-employment drug test on file with his or her direct employer. A contractor employee who performs regulated service for more than one railroad does not need to have a DOT pre-employment drug test for each railroad for which he or she provides service.

(c) If a railroad has already conducted a DOT pre-employment test resulting in

a negative for a regulated service applicant under the rules and regulations of another DOT agency (such as the Federal Motor Carrier Safety Administration), FRA will accept the result of that negative DOT pre-employment test for purposes of the requirements of this subpart.

(d) As used in subpart H of this part with respect to a test required under this subpart, the term regulated employee includes an applicant for pre-employment testing only. If an applicant declines to be tested and withdraws an application for employment before the pre-employment testing process commences, no record may be maintained of the declination.

(e) The pre-employment drug testing requirements of this section do not apply to covered employees of railroads qualifying for the small railroad exception (see § 219.3(c)) or maintenance-of-way employees who were performing duties for a railroad before June 12, 2017. However, a grandfathered employee must have a negative pre-employment drug test before performing regulated service for a new employing railroad after June 12, 2017.

■ 27. In § 219.502, revise paragraph (a) introductory text, (a)(1), (a)(2), (a)(5), and (b) to read as follows:

**§ 219.502 Pre-employment alcohol testing.**

(a) A railroad may, but is not required to, conduct pre-employment alcohol testing under this part. If a railroad chooses to conduct pre-employment alcohol testing, the railroad must comply with the following requirements:

(1) The railroad must conduct a pre-employment alcohol test before the first performance of regulated service by an employee, regardless of whether he or she is a new employee or a first-time transfer to a position involving the performance of regulated service.

(2) The railroad must treat all employees performing regulated service the same for the purpose of pre-employment alcohol testing (*i.e.*, a railroad must not test some regulated employees and not others.)

\* \* \* \* \*

(5) If a regulated employee's Federal pre-employment test indicates an alcohol concentration of 0.04 or greater, a railroad may not allow him or her to begin performing regulated service until he or she has completed the Federal return-to-duty process under § 219.104(d).

(b) As used in subpart H of this part with respect to a test authorized under this subpart, the term regulated

employee includes an applicant for pre-employment testing only. If an applicant declines to be tested before the testing process commences, no record may be maintained of the declination. The determination of when an alcohol test commences must be made according to the provisions of § 40.243(a) of this title.

■ 28. Revise § 219.503 to read as follows:

**§ 219.503 Notification; records.**

Each railroad must provide for medical review of drug test results according to the requirements of part 40 of this title, as provided in subpart H of this part. The railroad must also notify the applicant in writing of the results of any Federal drug and/or alcohol test that is a positive, adulteration, substitution, or refusal in the same manner as provided for employees in part 40 of this title and subpart H of this part. Records must be maintained confidentially and be retained in the same manner as required under subpart J of this part for employee test records, except that such records need not reflect the identity of an applicant who withdrew an application to perform regulated service before the commencement of the testing process.

■ 29. Revise § 219.505 to read as follows:

**§ 219.505 Non-negative tests and refusals.**

An applicant who has tested positive or refused to submit to pre-employment testing under this section may not perform regulated service for any railroad until he or she has completed the Federal return-to-duty process under § 219.104(d). An applicant may also not perform DOT safety-sensitive functions for any other employer regulated by a DOT agency until he or she has completed the Federal return-to-duty process under § 219.104(d). This section does not create any right on the part of the applicant to have a subsequent application considered; nor does it restrict the discretion of the railroad to entertain a subsequent application for employment from the same person.

■ 30. Revise subpart G to read as follows:

**Subpart G—Random Alcohol and Drug Testing Programs**

Sec.

219.601 Purpose and scope of random testing programs.

219.603 General requirements for random testing programs.

219.605 Submission and approval of random testing plans.

219.607 Requirements for random testing plans.

219.609 Inclusion of contractor employees and volunteers in random testing plans.

219.611 Random alcohol and drug testing pools.

219.613 Random testing selections.

219.615 Random testing collections.

219.617 Participation in random alcohol and drug testing.

219.619 Positive alcohol and drug test results and refusals; procedures.

219.621 Use of service agents.

219.623 Records.

219.625 FRA Administrator's determination of random alcohol and drug testing rates.

**Subpart G—Random Alcohol and Drug Testing Programs**

**§ 219.601 Purpose and scope of random testing programs.**

(a) *Purpose.* The purpose of random alcohol and drug testing is to promote safety by deterring regulated employees from misusing drugs and abusing alcohol.

(b) *Regulated employees.* Each railroad must ensure that a regulated employee is subject to being selected for random testing as required by this subpart whenever the employee performs regulated service on the railroad's behalf.

(c) *Contractor employees and volunteers.* A regulated employee who is a volunteer or an employee of a contractor to a railroad may be incorporated into the random testing program of more than one railroad if:

(1) The contractor employee or volunteer is not already part of a random testing program that meets the requirements of this subpart and has been accepted by the railroad for which he or she performs regulated service (as described in § 219.609); or

(2) The railroad for which the contractor employee or volunteer performs regulated service is unable to verify that the individual is part of a random testing program acceptable to the railroad that meets the requirements of this subpart.

(d) *Multiple DOT agencies.* (1) If a regulated employee performs functions subject to the random testing requirements of more than one DOT agency, a railroad must ensure that the employee is subject to selection for random drug and alcohol testing at or above the current minimum annual testing rate set by the DOT agency that regulates more than 50 percent of the employee's DOT-regulated functions.

(2) A railroad may not include a regulated employee in more than one DOT random testing pool for regulated service performed on its behalf, even if the regulated employee is subject to the random testing requirements of more than one DOT agency.

**§ 219.603 General requirements for random testing programs.**

(a) *General.* To the extent possible, each railroad must ensure that its FRA random testing program is designed and implemented so that each employee performing regulated service on its behalf should reasonably anticipate that he or she may be called for a random test without advance warning at any time while on duty and subject to performing regulated service.

(b) *Prohibited selection bias.* A random testing program may not have a selection bias or an appearance of selection bias, or appear to provide an opportunity for a regulated employee to avoid complying with this section.

(c) *Plans.* As required by §§ 219.603 through 219.609, each railroad must submit for FRA approval a random testing plan meeting the requirements of this subpart. The plan must address all regulated employees, as defined in § 219.5.

(d) *Pools.* Each railroad must construct and maintain random testing pools in accordance with § 219.611.

(e) *Selections.* Each railroad must conduct random testing selections in accordance with § 219.613.

(f) *Collections.* Each railroad must perform random testing collections in accordance with § 219.615.

(g) *Cooperation.* Each railroad and its regulated employees must cooperate with and participate in random testing in accordance with § 219.617.

(h) *Responsive action.* Each railroad must handle positive random tests and verified refusals to test in accordance with § 219.619.

(i) *Service agents.* Each railroad may use a service agent to perform its random testing responsibilities in accordance with § 219.621.

(j) *Records.* Each railroad must maintain records required by this subpart in accordance with § 219.623.

**§ 219.605 Submission and approval of random testing plans.**

(a) *Plan submission.* (1) Each railroad must submit for review and approval a random testing plan meeting the requirements of §§ 219.607 and 219.609 to the FRA Drug and Alcohol Program Manager, 1200 New Jersey Ave. SE., Washington, DC 20590. A railroad commencing start-up operations must submit its plan no later than 30 days before its date of commencing operations. A railroad that must comply with this subpart because it no longer qualifies for the small railroad exception under § 219.3 (due to a change in operations or its number of covered employees) must submit its plan no later than 30 days after it becomes

subject to the requirements of this subpart. A railroad may not implement a Federal random testing plan or any substantive amendment to that plan before FRA approval.

(2) A railroad may submit separate random testing plans for each category of regulated employees (as defined in § 219.5), combine all categories into a single plan, or amend its current FRA-approved plan to add additional categories of regulated employees, as defined by this part.

(b) *Plan approval notification.* FRA will notify a railroad in writing whether its plan is approved. If the plan is not approved because it does not meet the requirements of this subpart, FRA will inform the railroad of its non-approval, with specific explanations of any required revisions. The railroad must resubmit its plan with the required revisions within 30 days of the date of FRA's written notice. Failure to resubmit the plan with the necessary revisions will be a failure to submit a plan under this part.

(c) *Plan implementation.* Each railroad must implement its random testing plan no later than 30 days from the date of FRA approval.

(d) *Plan amendments.* (1) Each railroad must submit to FRA a substantive amendment to an approved plan at least 30 days before its intended effective date. A railroad may not implement any substantive amendment before FRA approval.

(2) Each railroad must provide a non-substantive amendment to an approved plan (such as the replacement or addition of service providers) to the FRA Drug and Alcohol Program Manager in writing (by letter or email) before its effective date. However, FRA pre-approval is not required.

(e) *Previously approved plans.* A railroad is not required to resubmit a random testing plan that FRA had approved before June 12, 2017, unless the railroad must amend the plan to comply with the requirements of this subpart. A railroad must submit new plans, combined plans, or amended plans incorporating new categories of regulated employees (*i.e.*, maintenance-of-way employees) for FRA approval at least 30 days before June 12, 2017.

#### **§ 219.607 Requirements for random testing plans.**

(a) *General.* A random testing plan that a railroad submits under this subpart must address and comply with the requirements of this subpart. The railroad must also comply with these requirements in implementing the plan.

(b) *Model random testing plan.* A railroad (or a contractor or service agent

that submits a part 219-compliant random testing plan to a railroad for submission as a part of the railroad's random testing plan) may complete, modify if necessary, and submit a plan based on the FRA model random testing plan that can be downloaded from FRA's Drug and Alcohol Program Web site.

(c) *Specific plan requirements.* Each random testing plan must contain the following items of information, each of which must be contained in a separate, clearly identified section:

(1) Total number of covered employees, including covered service contractor employees and volunteers;

(2) Total number of maintenance-of-way employees, including maintenance-of-way contractor employees and volunteers;

(3) Names of any contractors who perform regulated service for the railroad, with contact information;

(4) Method used to ensure that any regulated service contractor employees and volunteers are subject to the requirements of this subpart, as required by § 219.609;

(5) Name, address, and contact information for the railroad's Designated Employer Representative (DER) and any alternates (if applicable);

(6) Name, address, and contact information for any service providers, including the railroad's Medical Review Officers (MROs), Substance Abuse and Mental Health Services Administration (SAMHSA) certified drug testing laboratory(ies), Drug and Alcohol Counselors (DACs), Substance Abuse Professionals (SAPs), and C/TPA or collection site management companies. Individual collection sites do not have to be identified;

(7) Number of random testing pools and the proposed general pool entry assignments for each pool. If using a C/TPA, a railroad must identify whether its regulated employees are combined into one pool, contained in separate pools, or combined in a larger pool with other FRA or other DOT agency regulated employees, or both.

(8) Target random testing rates;

(9) Method used to make random selections, including a detailed description of the computer program or random number table selection process employed;

(10) Selection unit(s) for each random pool (*e.g.*, employee name or ID number, job assignment, train symbol) and whether the individual selection unit(s) will be selected for drugs, alcohol, or both;

(11) If a railroad makes alternate selections, under what limited

circumstances these alternate selections will be tested (see § 219.613);

(12) Frequency of random selections (*e.g.*, monthly);

(13) Designated testing window. A designated testing window extends from the beginning to the end of the designated testing period established in the railroad's FRA-approved random plan (see § 219.603), after which time any individual selections for that designated testing window that have not been collected are no longer active (valid); and

(14) Description of how the railroad will notify a regulated employee that he or she has been selected for random testing.

#### **§ 219.609 Inclusion of contractor employees and volunteers in random testing plans.**

(a) Each railroad's random testing plan must demonstrate that all of its regulated service contractor employees and volunteers are subject to random testing that meets the requirements of this subpart. A railroad can demonstrate that its regulated service contractor employees and volunteers are in compliance with this subpart by either:

(1) Directly including regulated service contractor employees and volunteers in its own random testing plan and ensuring that they are tested according to that plan; or

(2) Indicating in its random testing plan that its regulated service contractor employees and volunteers are part of a random testing program which is compliant with the requirements of this subpart, *e.g.*, conducted by a contractor or C/TPA ("non-railroad random testing program"). If a railroad chooses this option, the railroad must append to its own random testing plan one or more addenda describing the method it will use to ensure that the non-railroad random testing program is testing its regulated service contractor employees and volunteers according to the requirements of this subpart. A railroad may comply with this requirement by appending the non-railroad random testing program or a detailed description of the program and how it complies with this subpart.

(b) Each railroad's random testing plan(s) and any addenda must contain sufficient detail to fully document that the railroad is meeting the requirements of this subpart for all personnel performing regulated service on its behalf.

(c) If a railroad chooses to use regulated service contractor employees and volunteers who are part of a non-railroad random testing program, the railroad remains responsible for

ensuring that the non-railroad program is testing the regulated service contractor employees and volunteers according to the requirements of this subpart.

(d) FRA does not pre-approve contractor or service agent random testing plans, but may accept them as part of its approval process of a railroad's plan.

**§ 219.611 Random alcohol and drug testing pools.**

(a) *General.* Each railroad must ensure that its random testing pools include all regulated employees who perform regulated service on its behalf, except that a railroad's random testing pools do not have to include regulated employees who are part of a non-railroad random testing program that is compliant with the requirements of this subpart and that has been accepted by the railroad.

(b) *Pool entries.* Each railroad must clearly indicate who will be tested when a specific pool entry is selected.

(1) Pool entries may be employee names or identification numbers, train symbols, or specific job assignments, although all the entries in a single pool must be of generally consistent sizes and types.

(2) Pool entries must not allow a field manager or field supervisor to have discretion over which employee is to be tested when an entry is selected.

(3) Pool entries must be constructed and maintained so that all regulated employees have an equal chance of being selected for random testing for each selection draw.

(c) *Minimum number of pool entries.* A railroad (including a service agent used by a railroad to carry out its responsibilities under this subpart) may not maintain a random testing pool with less than four pool entries. Placeholder pool entries (entries that do not represent legitimate selections of regulated employees) are not permitted. A railroad or contractor with less than four regulated employees can comply with this requirement by having its regulated employees incorporated into a railroad or non-railroad random testing pool that contains more than four entries.

(d) *Pool construction.* (1) An individual who is not subject to the random testing requirements of FRA or another DOT agency may not be placed in the same pool as a regulated employee.

(2) A railroad may not include a regulated employee in more than one random testing pool established under the regulations of a DOT agency.

(3) A regulated employee may be placed in a random testing pool with

employees subject to the random testing requirements of another DOT agency, only if all entries in the pool are subject to testing at the highest minimum random testing rate required by the regulations of a DOT agency for any single member in the pool.

(4) A regulated employee does not have to be placed in separate pools for random drug and random alcohol testing selection.

(5) A regulated employee must be incorporated into a random testing pool as soon as possible after his or her hire or first transfer into regulated service.

(e) *Frequency of regulated service.* (1) A railroad may not place a person in a random testing pool for any selection period in which he or she is not expected to perform regulated service.

(2) A railroad employee who performs regulated service on average less than once a quarter is a de minimis safety concern for random testing purposes, and does not have to be in a random testing program. A railroad that chooses to random test de minimis employees must place them in a separate random testing pool from employees who perform regulated service on a regular basis (e.g., engineers, conductors, dispatchers, and signal maintainers).

(3) A railroad must make a good faith effort to determine the frequency of an employee's performance of regulated service and must evaluate the employee's likelihood of performing regulated service in each upcoming selection period.

(f) *Pool maintenance.* Pool entries must be updated at least monthly, regardless of how often selections are made, and a railroad must ensure that each of its random testing pools is complete and does not contain outdated or inappropriate entries.

(g) *Multiple random testing pools.* A railroad may maintain more than one random testing pool if it can demonstrate that its random testing program is not adversely impacted by the number and types of pools or the construction of pool entries, and that selections from each pool will meet the requirements of this subpart.

**§ 219.613 Random testing selections.**

(a) *General.* Each railroad must ensure that each regulated employee has an equal chance of being selected for random testing whenever selections are made. A railroad may not increase or decrease an employee's chance of being selected by weighting an entry or pool.

(b) *Method of selection.* (1) Each railroad must use a selection method that is acceptable to FRA and meets the requirements of this subpart, such as a computer selection program, proper use

of a random number table, or an alternative method which FRA has approved as part of the railroad's random testing plan.

(2) A selection method must be free of bias or apparent bias and employ objective, neutral criteria to ensure that every regulated employee has an equal statistical chance of being selected within a specified time frame. The selection method may not utilize subjective factors that permit a railroad to manipulate or control selections in an effort to either target or protect any employee, job, or operational unit from testing.

(3) The randomness of a selection method must be verifiable, and, as required by § 219.623, any records necessary to document the randomness of a selection must be retained for not less than two years from the date the designated testing window for that selection expired.

(c) *Minimum random testing rate.* (1) Each railroad must distribute random tests reasonably throughout the calendar year and make sufficient selections to ensure that each random testing pool meets the Administrator's minimum annual random testing rates as established according to § 219.625.

(2) Each railroad must continually monitor changes in its workforce to ensure that the required number of selections and tests are conducted each year.

(d) *Selection frequency.* Each railroad must select at least one entry from each of its random testing pools every three months.

(e) *Discarded selection draws.* Each selection draw must identify who will be subject to random testing. A railroad cannot discard a selection draw without an acceptable explanation (e.g., the selection was drawn from an incomplete or inaccurate pool). A railroad must document and retain records for all discarded selection draws, including the specific reason the selection draw was not used, as required by § 219.623.

(f) *Increasing random selections.* A railroad that is unable to complete a collection for each selection made during a designated testing period may increase the number of selections in a subsequent selection period to ensure that it meets the annual minimum random testing rate for the calendar year.

(g) *Selection snapshots.* Each railroad must capture and maintain an electronic or hard copy snapshot of each random testing pool at the time it makes a testing selection. A railroad must not re-create pool entries from records after the time of the original selection. The railroad must maintain this snapshot for

a period of two years, as required by subpart J of this part.

(h) *Multiple DOT agencies.* Each railroad must ensure that each regulated employee who performs functions subject to the random testing requirements of more than one DOT agency is subject to random selection at or above the current minimum annual testing rate set by the DOT agency that regulates more than 50 percent of the employee's DOT-regulated functions.

#### **§ 219.615 Random testing collections.**

(a) *Minimum random testing rates.* Each railroad must complete a sufficient number of random alcohol and drug testing collections from each of its random testing pools to meet the Administrator's minimum annual testing rates established in accordance with § 219.625.

(b) *Designated testing window.* Each railroad must complete the collection for a selected pool entry within the FRA-approved designated testing window for that selection. Once a designated testing window has closed, any selections not collected during that window are no longer valid and may not be subject to random testing.

(c) *Collection timing.* (1) A regulated employee may be subject to random testing only while on duty and subject to performing regulated service.

(2) Each railroad's random alcohol and drug testing collections must be unannounced and spread reasonably throughout the calendar year. Collections must also be distributed unpredictably throughout the designated testing window and must reasonably cover all operating days of the week (including operating weekends and holidays), shifts, and locations.

(3) Random alcohol test collections must be performed unpredictably and in sufficient numbers at either end of an operating shift to attain an acceptable level of deterrence throughout the entire shift. At a minimum, a railroad must perform 10% of its random alcohol tests at the beginning of shifts and 10% of its random alcohol tests at the end of shifts.

(4) If a regulated employee has been selected for both random drug and alcohol testing, a railroad may conduct these tests separately, so long as both required collections can be completed by the end of the employee's shift and the railroad does not inform the employee that an additional collection will occur later.

(d) *Collection scheduling.* While pool entries may be selected randomly, a railroad may schedule each random test collection during a designated testing window according to its approved plan.

(1) A railroad may schedule a collection based on the availability of the selected pool entry, the logistics of performing the collection, and any other requirements of this subpart.

(2) If a selected pool entry does not identify the selection by name (*i.e.*, train crews or job functions), a railroad may not use its scheduling discretion to deliberately target or protect a particular employee or work crew. Unless otherwise approved in a random testing plan, railroad field supervisors or field management personnel may not use discretion to choose or to change collection dates or times if that choice could intentionally alter who is to be tested.

(e) *Notification requirements.* (1) A railroad may notify a regulated employee that he or she has been selected for random testing only during the duty tour in which the collection is to be conducted, and only so far in advance as is reasonably necessary to ensure the employee's presence at the scheduled collection time and place.

(2) A railroad must make collections as soon as possible. Each collection must begin within two hours after the railroad has notified the employee of his or her selection for random testing, unless the railroad has an acceptable reason for the delay. A railroad should monitor each employee after notification and, whenever possible, arrange for the employee to be immediately escorted by supervisory or management personnel to the collection location.

(3) A railroad must inform a regulated employee that he or she has been selected for random testing at the time the employee is notified. Completion of the Federal Drug Testing Custody and Control Form (CCF) or the DOT Alcohol Testing Form (ATF) indicating the basis of the test satisfies this requirement, so long as the employee has been shown and directed to sign the CCF or ATF as required by §§ 40.73 and 40.241 of this title.

(f) *Incomplete collections.* A railroad must use due diligence to ensure that a random testing collection is completed for each selected pool entry, unless it has an acceptable explanation for not conducting the collection. All reasons for incomplete collections must be fully documented and are subject to inspection by FRA upon request.

(g) *Hours-of-service limitations.* (1) Except as provided by paragraph (g)(2) of this section, a railroad must immediately terminate a random collection and may not reschedule it if the collection is not completed within a covered employee's hours-of-service limitations.

(2) If a random collection requires a direct observation collection under § 40.67 of this title, the directly observed collection must immediately proceed until completed. A railroad must submit an excess service report, as required by part 228 of this chapter, if completion of the directly observed collection causes the covered employee to exceed his or her hours-of-service limitations.

#### **§ 219.617 Participation in random alcohol and drug testing.**

(a) *Railroad responsibility.* (1) A railroad must, under the conditions specified in this subpart and subpart H of this part, require a regulated employee selected for random testing to cooperate in alcohol and/or drug testing.

(2) If an employee is performing regulated service at the time he or she is notified of his or her selection for random testing, the railroad must ensure that the employee immediately ceases to perform regulated service and proceeds to the collection site without adversely affecting safety. A railroad must also ensure that the absence of an employee from his or her assigned duties to report for testing does not adversely affect safety. Once an employee begins the testing process, he or she may not be returned to regulated service until the testing process is complete.

(3) A railroad may excuse an employee who has been notified of or her selection for random testing only if the employee can substantiate that a medical emergency involving the employee or an immediate family member (*e.g.*, birth, death, or medical emergency) supersedes the requirement to complete the test. A medical emergency is defined in this part as an acute medical condition requiring immediate emergency care. To be eligible for exclusion from random testing, the employee must provide verifiable documentation of the emergency situation from a credible outside professional within a reasonable period of time (*e.g.*, a doctor, dentist, hospital, law enforcement officer, or school authority). A railroad may not test an employee who has been excused from testing under the same random selection.

(b) *Employee responsibility.* (1) A regulated employee subject to the random testing requirements of this subpart must cooperate with the selection and testing process, and must proceed to the testing site upon notification that he or she has been selected for random testing.

(2) A regulated employee must fully cooperate and comply with the urine drug collection and/or breath alcohol

testing procedures required by subpart H of this part, and provide the required specimen(s), and must, upon request, complete the required paperwork and certifications.

**§ 219.619 Positive alcohol and drug test results and refusals; procedures.**

Section 219.104 contains the procedures for administrative handling by the railroad or contractor in the event a urine specimen provided under this subpart is reported as a verified positive by the Medical Review Officer, a breath alcohol specimen is reported at 0.04 or greater by the Breath Alcohol Technician, or a refusal to test has occurred. The responsive action required in § 219.104 is not stayed pending the result of the testing of a split urine specimen or a challenge to any part of the testing process or procedure.

**§ 219.621 Use of service agents.**

(a) A railroad may use a service agent (such as a consortium/third party administrator (C/TPA)) to act as its agent to carry out any role in random testing specifically permitted under subpart Q of part 40 of this title, such as maintaining random pools, conducting random selections, and performing random urine drug collections and breath alcohol tests.

(b) A railroad may not use a service agent to notify a regulated employee that he or she has been selected for random testing. A regulated employee who has been selected for random testing must otherwise be notified of the selection by his or her employer. A service agent may also not perform any role that § 40.355 of this title specifically reserves to an employer, which, for purposes of this subpart, is defined as a railroad or a contractor performing railroad-accepted testing.

(c) A railroad is primarily responsible for compliance with the random alcohol and drug testing of this subpart, but FRA reserves the right to bring an enforcement action for noncompliance against the railroad, its service agents, its contractors, and/or its employees.

(d) If a railroad conducts random drug and/or alcohol testing through a C/TPA, the number of employees required to be tested may be calculated for each individual railroad belonging to the C/TPA, or may be based on the total number of regulated employees covered by the C/TPA in a larger combined railroad or DOT agency random pool. Selections from combined railroad random pools must meet or exceed the highest minimum annual percentage rate established under this subpart or

any DOT agency drug testing rule that applies to any member of that pool.

**§ 219.623 Records.**

(a) As provided by § 219.901, each railroad is required to maintain records related to random testing for a minimum of two years.

(b) Contractors and service agents performing random testing responsibilities under this subpart must provide records required by this subpart whenever requested by the contracting railroad or by FRA. A railroad remains responsible for maintaining records demonstrating that it is in compliance with the requirements of this subpart.

**§ 219.625 FRA Administrator's determination of random alcohol and drug testing rates.**

(a) *Notice.* Each year, the Administrator publishes a **Federal Register** notice announcing the minimum annual random alcohol and drug testing rates which take effect on January 1 of the following calendar year. These rates are based on the railroad industry's random testing violation rates for the preceding two consecutive calendar years, which are determined using annual railroad alcohol and drug program data required to be submitted to the FRA's Management Information System (MIS) under § 219.800.

(b) *Information.* Data from MIS reports provide the information used for this determination. In order to ensure reliability of the data, the Administrator may consider the quality and completeness of the reported data, obtain additional information or reports from railroads, or make appropriate modifications in calculating the industry positive rate.

(c) *Initial minimum annual random testing rates.* The Administrator has established an initial minimum annual random testing rate of 50 percent for drugs and 25 percent for alcohol for any new category of regulated employees added to those already being tested under this part.

(1) These initial testing rates are subject to amendment by the Administrator in accordance with paragraphs (d) and (e) of this section after at least 18 months of MIS data have been compiled for the new category of regulated employees.

(2) The Administrator will determine separate minimum annual random testing rates for each added category of regulated employees for a minimum of three calendar years after that category is incorporated into random testing under this part.

(3) The Administrator may move to combine categories of regulated

employees requiring separate determinations into a single determination once the categories' testing rates are identical for two consecutive years.

(d) *Drug testing rate.* The Administrator may set the minimum annual random drug testing rate for the railroad industry at either 50 percent or 25 percent.

(1) When the minimum annual percentage rate for random drug testing is 50 percent, the Administrator may lower the rate to 25 percent if the Administrator determines that the MIS data for two consecutive calendar years show that the reported random testing positive rate is less than 1.0 percent.

(2) When the minimum annual percentage rate for random drug testing is 25 percent, and the MIS data for any calendar year show that the reported random testing positive rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random drug testing to 50 percent.

(e) *Alcohol testing rate.* The Administrator may set the minimum annual random alcohol testing rate for the railroad industry at 50 percent, 25 percent, or 10 percent.

(1) When the minimum annual percentage rate for random alcohol testing is 50 percent or 25 percent, the Administrator may lower this rate to 10 percent if the Administrator determines that the MIS data for two consecutive calendar years show that the random testing violation rate is less than 0.5 percent.

(2) When the minimum annual percentage rate for random alcohol testing is 50 percent, the Administrator may lower the rate to 25 percent if the Administrator determines that the MIS data for two consecutive calendar years show that the random testing violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

(3) When the minimum annual percentage rate for random alcohol testing is 25 percent, and the MIS data for that calendar year show that the random testing violation rate for drugs is equal to or greater than 0.5 percent but less than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random drug testing to 50 percent.

(4) When the minimum annual percentage rate for random alcohol testing is 10 percent or 25 percent, and the MIS data for any calendar year show that the random testing violation rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 50 percent.

## Subpart H—Drug and Alcohol Testing Procedures

### § 219.701 [Amended]

- 31. Revise § 219.701 by:
- a. In paragraphs (a) and (b), removing the phrase “B, D, F, and G” wherever it appears and adding, in its place, “B, D, E, F, G, and K (but only for co-worker or non-peer referrals that involve a violation of the prohibitions of this subpart)”; and
  - b. Removing paragraph (c).

## Subpart I—Annual Report

- 32. In § 219.800, revise the last sentence of paragraph (b) and the first sentence of paragraph (d) and add a new paragraph (f) to read as follows:

### § 219.800 Annual reports.

(b) \* \* \* For information on where to submit MIS forms and for the electronic version of the form, see: <http://www.fra.dot.gov/eLib/details/L02639>.

(d) As a railroad, if you have a regulated employee who performs multi-DOT agency functions (e.g., an employee drives a commercial motor vehicle and performs switchman duties for you), count the employee only on the MIS report for the DOT agency under which he or she is random tested.

(f) A railroad required to submit an MIS report under this section must submit separate reports for covered employees and MOW employees.

## Subpart J—Recordkeeping Requirements

- 33. Revise § 219.901 to read as follows:

### § 219.901 Retention of alcohol and drug testing records.

(a) *General.* (1) In addition to the records part 40 of this title requires keeping, a railroad must also maintain alcohol and drug misuse prevention program records in a secure location with controlled access under this section's requirements.

(2) A railroad must maintain for two years, rather than one year, the records to which § 40.333(a)(4) of this title applies (i.e., records of negative and cancelled drug test results and alcohol test results with a concentration of less than 0.02). A railroad may maintain legible and accessible scanned or electronic copies of these records for the second year.

(b) *Records maintained for a minimum of five years.* Each railroad

must maintain the following records for a minimum of five years:

- (1) A summary record or the individual files of each regulated employee's test results; and
- (2) A copy of the annual report summarizing the results of its alcohol and drug misuse prevention program (if required to submit the report under § 219.800(a)).

(c) *Records maintained for a minimum of two years.* Each railroad must maintain the following records for a minimum of two years:

- (1) Records related to the collection process:
  - (i) Collection logbooks, if used;
  - (ii) Documents relating to the random selection process, including the railroad's approved random testing plan and FRA's approval letter for that plan;
  - (iii) Documents generated in connection with decisions to administer Federal reasonable suspicion or reasonable cause alcohol or drug tests;
  - (iv) Documents generated in connection with decisions on post-accident testing; and
- (v) Documents verifying the existence of a medical explanation for the inability of a regulated employee to provide an adequate specimen;

(2) Records related to test results:

- (i) The railroad's copy of the alcohol test form, including the results of the test;
- (ii) The railroad's copy of the drug test custody and control form, including the results of the test;
- (iii) Documents related to any regulated employee's refusal to submit to an alcohol or drug test required under this part; and

(iv) Documents a regulated employee presented to dispute the result of an alcohol or drug test administered under this part;

(3) Records related to other violations of this part; and

(4) Records related to employee training:

- (i) Materials on alcohol and drug abuse awareness, including a copy of the railroad's policy on alcohol and drug abuse;
- (ii) Documentation of compliance with the requirements of § 219.23; and
- (iii) Documentation of training (including attendance records and training materials) the railroad provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for reasonable suspicion or post-accident alcohol and drug testing.

■ 34. Revise § 219.903 to read as follows:

### § 219.903 Access to facilities and records.

(a) Release of regulated employee information contained in records required to be maintained under § 219.901 must be in accordance with part 40 of this title and with this section. (For purposes of this section only, urine drug testing records are considered equivalent to breath alcohol testing records.)

(b) Each railroad must grant access to all facilities used to comply with this part to the Secretary of Transportation, United States Department of Transportation, or any DOT agency with regulatory authority over the railroad or any of its regulated employees.

(c) Each railroad must make available copies of all results for its drug and alcohol testing programs conducted under this part and any other information pertaining to the railroad's alcohol and drug misuse prevention program, when requested by the Secretary of Transportation or any DOT agency with regulatory authority over the railroad or regulated employee.

### § 219.905 [Removed and Reserved]

- 35. Remove and reserve § 219.905.
- 36. Add a new subpart K to read as follows:

## Subpart K—Referral Programs

Sec.

219.1001 Requirement for referral programs.

219.1003 Referral program conditions.

219.1005 Optional provisions.

219.1007 Alternate programs.

## Subpart K—Referral Programs

### § 219.1001 Requirement for referral programs.

(a) The purpose of this subpart is to help prevent the adverse effects of drug and alcohol abuse in connection with regulated employees.

(b) A railroad must adopt, publish, and implement the following programs:

(1) *Self-referral program.* A program designed to encourage and facilitate the identification of a regulated employee who abuses drugs or alcohol by providing the employee the opportunity to obtain counseling or treatment before the employee's drug or alcohol abuse manifests itself in a detected violation of this part; and

(2) *Co-worker referral program.* A program designed to encourage co-worker participation in preventing violations of this part.

(c) A railroad may adopt, publish, and implement the following programs:

(1) *Non-peer referral program.* A program designed to encourage non-peer participation in preventing violations of this part; and

(2) *Alternate program(s)*. An alternate program or programs meeting the specific requirements of § 219.1003 or complying with § 219.1007, or both.

(d) Nothing in this subpart may be construed to:

(1) Require payment of compensation for any period a regulated employee is restricted from performing regulated service under a voluntary, co-worker, or non-peer referral program;

(2) Require a railroad to adhere to a voluntary, co-worker, or non-peer referral program when the referral is made for the purpose, or with the effect, of anticipating or avoiding the imminent and probable detection of a rule violation by a supervising employee;

(3) Interfere with the subpart D requirement for Federal reasonable suspicion testing when a regulated employee is on duty and a supervisor determines the employee is exhibiting signs and symptoms of alcohol and/or drug use;

(4) Interfere with the requirements in § 219.104(d) for responsive action when a violation of § 219.101 or § 219.102 is substantiated; or

(5) Limit the discretion of a railroad to dismiss or otherwise discipline a regulated employee for specific rule violations or criminal offenses, except as this subpart specifically provides.

#### **§ 219.1003 Referral program conditions.**

(a) *General*. A referral program must specify the allowances, conditions, and procedures under which a self-referral, co-worker referral, and, if adopted, a non-peer referral, can occur, as follows:

(1) For a self-referral, a railroad must identify one or more designated DAC contacts (including telephone number and email (if available)) and any expectations regarding when the referral is allowed to take place (such as during non-duty hours, or while the employee is unimpaired, or both, as § 219.1005 permits);

(2) For a co-worker referral, a railroad may accept a referral under this subpart only if it alleges that the regulated employee was apparently unsafe to work with or in violation of this part or the railroad's drug and alcohol abuse rules. The employee must waive investigation of the rule charge and must contact the DAC within a reasonable period of time;

(3) For a non-peer referral, a railroad may remove a regulated employee from service only if a railroad representative confirms that the employee is unsafe to work with or in violation of this part or the railroad's drug and alcohol abuse rules. The employee must waive investigation of the rule charge and

must contact the DAC within a reasonable period of time.

(b) *Employment maintained*. A regulated employee who is affected by a drug or alcohol abuse problem may maintain an employment relationship with a railroad if:

(1) The employee seeks assistance through the railroad's voluntary referral program for his or her drug or alcohol abuse problem or a co-worker or a non-peer refers the employee for such assistance; and

(2) The employee successfully completes the education, counseling, or treatment program a DAC specifies under this subpart.

(c) *Employment action*. If a regulated employee does not choose to seek assistance through a referral program, or fails to cooperate with a DAC's recommended program, the disposition of the employee's relationship with the railroad is subject to normal employment action.

(d) *Qualified DAC evaluation*. (1) A DAC acceptable to the railroad must evaluate a regulated employee entering a self-referral, co-worker referral, or non-peer referral program;

(2) The DAC must meet any applicable state standards and comply with this subpart; and

(3) The DAC must determine the appropriate level of care (education, counseling, or treatment, or all three) necessary to resolve any identified drug or alcohol abuse problems.

(e) *Removal from regulated service*. A referral program must stipulate that a regulated employee a DAC has evaluated as having an active drug abuse disorder may not perform regulated service until the DAC can report that safety is no longer affected.

(f) *Confidentiality maintained*. Except as provided under paragraph (l) of this section, a railroad must treat a regulated employee's referral and subsequent handling (including education, counseling, and treatment) as confidential. Only personnel who administer the railroad's referral programs may have access to the identities of the individuals in these programs.

(g) *Leave of absence*. A railroad must grant a regulated employee the minimum leave of absence the DAC recommends to complete a primary education, counseling, or treatment program and to establish control over the employee's drug or alcohol abuse problem.

(h) *Return to regulated service*. (1) Except as §§ 219.1001(d)(4) and 219.1005 may provide, a railroad must return a regulated employee to regulated service upon the DAC's

recommendation that the employee has established control over his or her drug or alcohol abuse problem, has a low risk to return to drug or alcohol abuse, and has complied with any recommended return-to-service requirements.

(2) The DAC determines the appropriate number and frequency of required follow-up tests. The railroad determines the dates of testing.

(3) The railroad may condition an employee's return to regulated service on successful completion of a return-to-service medical evaluation.

(4) A railroad must return an employee to regulated service within five working days of the DAC's notification to the railroad that the employee is fit to return to regulated service, unless the employee has a disqualifying medical condition. (*i.e.*, the employee is at a low risk to return to drug or alcohol abuse).

(i) *Rehabilitation plan*. No person—whether an employing railroad, managed care provider, service agent, individual, or any person other than the DAC who conducted the initial evaluation—may change in any way the DAC's evaluation or recommendations for assistance. The DAC who made the initial evaluation may modify the employee's initial evaluation and follow-up recommendation(s) based on new or additional information.

(j) *Locomotive engineers and conductors*. Consistent with §§ 240.119(e) and 242.115(g) of this chapter, for a certified locomotive engineer, certified conductor, or a candidate for engineer or conductor certification, the referral program must state that confidentiality is waived (to the extent the railroad receives from a DAC official notice of the active drug abuse disorder and suspends or revokes the certification, as appropriate) if the employee at any time refuses to cooperate in a recommended course of counseling or treatment.

(k) *Contacting a DAC*. If a regulated employee does not contact a DAC within the railroad's specified time limits, the railroad may begin an investigation to assess the employee's cooperation and compliance with its referral program.

(l) *Time requirements for DAC evaluations*. Once a regulated employee has contacted the designated DAC, the DAC's evaluation must be completed within 10 working days. If the employee needs more than one evaluation, the evaluations must be completed within 20 working days.

(m) *Time limitations on follow-up treatment, care, or testing*. Any follow-up treatment, care, or testing established under a referral program must not

exceed 24 months beyond a regulated employee's initial removal from regulated service, unless the regulated employee's entry into the program involved a substantiated part 219 violation.

#### § 219.1005 Optional provisions.

A railroad's referral program may include any of the following provisions at the option of the railroad and with the approval of the labor organization(s) affected:

(a) The program may provide that the rule of confidentiality is waived if:

(1) The regulated employee at any time refuses to cooperate in a DAC's recommended course of education, counseling, or treatment; or

(2) The railroad determines, after investigation, that the regulated employee has been involved in a drug- or alcohol-related disciplinary offense growing out of subsequent conduct.

(b) The program may require successful completion of a return-to-service medical examination as a further condition of reinstatement in regulated service.

(c) The program may provide that it does not apply to a regulated employee whom the railroad has previously assisted under a program substantially consistent with this section.

(d) The program may provide that, in order to invoke its benefits, the regulated employee must report to the railroad's designated contact either:

(1) During non-duty hours (*i.e.*, at a time when the regulated employee is off duty); or

(2) While unimpaired and otherwise in compliance with the railroad's drug and alcohol rules consistent with this subpart.

#### § 219.1007 Alternate programs.

(a) Instead of the referral programs required under § 219.1001, a railroad is permitted to develop, publish, and implement alternate programs that meet the standards established in § 219.1001. Such programs must have the written concurrence of the recognized representatives of the regulated employees. Nothing in this subpart restricts a railroad or labor organization from adopting, publishing, and implementing programs that afford more favorable conditions to regulated employees troubled by drug or alcohol abuse problems, consistent with a railroad's responsibility to prevent violations of §§ 219.101, 219.102, and 219.103.

(b) The concurrence of the recognized representatives of the regulated employees in an alternate program may be evidenced by a collective bargaining agreement or any other document describing the class or craft of employees to which the alternate program applies. The agreement or other document must make express reference to this subpart and to the intention of the railroad and employee representatives that the alternate program applies instead of the program required by this subpart.

(c) The railroad must file the agreement or other document described in paragraph (b) of this section along with the requested alternate program it

submits for approval with the FRA Drug and Alcohol Program Manager. FRA will base its approval on whether the alternative program meets the § 219.1001 objectives. The alternative program does not have to include each § 219.1001 component, but must meet the general standards and intent of § 219.1001. If a railroad amends or revokes an approved alternate policy, the railroad must file a notice with FRA of such amendment or revocation at least 30 days before the effective date of such action.

(d) This section does not excuse a railroad from adopting, publishing, and implementing the programs § 219.1001 requires for any group of regulated employees not falling within the coverage of an appropriate, approved alternate program.

(e) Consistent with § 219.105(c), FRA has the authority to inspect the aggregate data of any railroad alcohol and/or drug use education, prevention, identification, and rehabilitation program or policy, including alternate peer support programs, to ensure that they are not designed or implemented in such a way that they circumvent or otherwise undermine Federal requirements, including the requirements in this part regarding peer support programs.

■ 37. Revise appendix A to read as follows:

#### Appendix A to Part 219—Schedule of Penalties

The following chart lists the schedule of civil penalties:

#### PENALTY SCHEDULE <sup>1</sup>

Section <sup>2</sup>	Violation	Willful violation
<b>Subpart A—General</b>		
219.3 Application:		
(a) Railroad or contractor does not have required program .....	\$5,000	\$7,500
(c) Railroad or contractor improperly tests under subpart E or G of this part .....	2,500	5,000
219.9 Responsibility for compliance:		
(b)(1) Host railroad failed to take responsibility for compliance or other railroad or contractor did not take responsive action of direction of host railroad during joint operations .....	5,000	7,500
219.11 General conditions for chemical tests:		
(b)(1) Employee unlawfully refuses to participate in testing .....	2,500	5,000
(b)(2) Employer fails to give priority to medical treatment .....	3,000	8,000
(b)(3) Employee fails to remain available .....	2,500	5,000
(d) Employee unlawfully required to execute a waiver of rights .....	2,500	5,000
(e)(1) Failure to direct employee to proceed to collection site as soon as possible without affecting safety .....	2,500	5,000
(e)(3) Railroad used or authorized the use of coercion to obtain specimens .....	5,000	7,500
(g) Failure to meet supervisory training requirements or program of instruction not available or program not complete .....	2,500	5,000
(h) Urine or blood specimens provided for Federal testing were used for non-authorized testing .....	2,500	5,000
219.12 Hours-of-service laws implications:		
(a)–(d) Failure to exceed Hours of Service to conduct required testing or exceeding HOS when not authorized to conduct testing .....	2,500	5,000
219.23 Railroad policies:		
(a) Failure to provide written notice of FRA test .....	1,000	4,000
(a)(1) Failure to provide written notice of basis for FRA test .....	1,000	4,000

PENALTY SCHEDULE <sup>1</sup>—Continued

Section <sup>2</sup>	Violation	Willful violation
(a)(2) Use of a non-approved FRA form for mandatory post-accident toxicological testing .....	1,000	4,000
(b) Improper use of Federal drug or alcohol testing form or use of Subpart C form for other test .....	1,000	4,000
(c) Failure to make required educational materials available .....	2,500	5,000
(d) Failure to provide required minimum educational content .....	2,500	5,000
(e) Non-Federal provisions are not clearly described as independent authority .....	2,500	5,000
219.25 Previous employer drug and alcohol checks:		
(a)(1) Failure to conduct previous employer drug and alcohol check or failure to provide response to previous employer when requested .....	2,500	5,000
(a)(2) Failure to perform and complete FRA and DOT-required background checks in a timely manner .....	2,500	5,000
(a)(3) Failure to document due diligence in completing FRA and DOT-required background checks .....	2,500	5,000
(b) Failure to comply with § 240.119(c) (for engineers) or § 242.115(e) (for conductors) of this chapter regarding the consideration of Federal alcohol and drug violations that occurred within a period of 60 consecutive months prior to the review of the person's records .....	2,500	5,000
<b>Subpart B—Prohibitions</b>		
219.101 Alcohol and drug use prohibited:		
(a) Railroad with actual knowledge of use, possession or impairment from alcohol or controlled substances permits employee to go on duty or remain on duty .....		10,000
219.103 Prescribed and over-the-counter drugs:		
(a) Failure to train employee properly on requirements .....	2,500	5,000
219.104 Responsive action:		
(a) Failure to remove employee from regulated service immediately .....	5,000	7,500
(b) Failure to provide written notice for removal .....	2,500	5,000
(c) Failure to provide prompt hearing within 10 calendar days .....	2,500	5,000
(d) Employee improperly returned to regulated service .....	5,000	7,500
(e) Failure to ensure certified locomotive engineers and conductors received required follow-up testing minimums as per § 240.119(d)(2) and § 242.115(f)(2) of this chapter .....	2,500	5,000
219.105 Railroad's duty to prevent violations:		
(a) Employee improperly permitted to remain in regulated service .....	7,500	10,000
(b) Failure to exercise due diligence to assure compliance with prohibition .....	5,000	7,500
(d) Failure to conduct and record minimum number of Rule G observations .....	2,500	5,000
219.107 Consequences of unlawful refusal:		
(a) Failure to disqualify an employee for nine months following a refusal .....	5,000	7,500
(b) Failure to provide written notice of withdrawal to employee .....	2,500	5,000
(c) Employee unlawfully returned to service .....	5,000	7,500
<b>Subpart C—Post-Accident Toxicological Testing</b>		
219.201 Events for which testing is required:		
(a) Failure to test after qualifying event (each regulated employee not tested is a violation) .....	5,000	7,500
(c)(1)(i) Failure to make good faith determination .....	5,000	7,500
(c)(1)(ii) Failure to provide requested decision report to FRA .....	2,500	5,000
(c)(2) Testing performed after non-qualifying event .....	5,000	10,000
219.203 Responsibilities of railroads and employees:		
(a)(1)(i) and (a)(2)(i) Failure to properly test/exclude from testing .....	5,000	7,500
(a)(1)(ii) and (a)(2)(ii) Non-regulated service employee tested .....	5,000	7,500
(b)(1) Delay in obtaining specimens due to failure to make every reasonable effort .....	2,500	5,000
(c) Independent medical facility not utilized .....	2,500	5,000
(d) Failure to report event or contact FRA when intervention required .....	1,000	3,000
(d)(1) Failure to collect specimens in a timely manner .....	2,500	5,000
(e)(2) Failure to recall employee for testing when conditions met .....	2,500	5,000
(e)(5) Failure to document why employee could not be recalled .....	2,500	5,000
(f)(1) Specimen collection not completed at an independent medical facility .....	2,500	5,000
219.205 Specimen collection and handling:		
(a) Failure to observe requirements with respect to specimen collection, marking and handling .....	2,500	5,000
(b) Failure to provide properly prepared forms with specimens .....	2,500	5,000
(d) Failure to promptly or properly forward specimens .....	2,500	5,000
219.207 Fatality:		
(a) Failure to collect specimens .....	5,000	7,500
(a)(1) Failure to ensure timely collection and shipment of required specimens .....	2,500	5,000
(b) Failure to request assistance when necessary .....	2,500	5,000
219.209 Reports of tests and refusals:		
(a)(1) Failure to provide telephonic report .....	1,000	2,000
(b) Failure to provide written report of refusal to test .....	1,000	2,000
(c) Failure to maintain report explaining why test not conducted within 4 hours .....	1,000	2,000
219.211 Analysis and follow-up:		
(c) Failure of the MRO to report MRO downgrades and/or verified non-negative results to FRA in a timely manner .....	2,500	5,000
(g)(3) Unauthorized withholding of regulated employee out of regulated service pending receipt of PAT testing results .....	2,500	5,000

PENALTY SCHEDULE <sup>1</sup>—Continued

Section <sup>2</sup>	Violation	Willful violation
<b>Subpart D—Reasonable Suspicion Testing</b>		
219.301 Mandatory reasonable suspicion testing:		
(a) Failure to conduct breath alcohol test when reasonable suspicion testing criteria met or conduct breath alcohol test under reasonable suspicion when criteria not met .....	5,000	7,500
(b) Failure to conduct drug test when reasonable suspicion testing criteria met or conduct drug test under reasonable suspicion when criteria not met .....	5,000	7,500
219.303 Testing when reasonable suspicion criteria not met:		
(a) Failure to use a trained supervisor when conducting a reasonable suspicion determination for alcohol .....	2,500	5,000
(b) Failure to use two supervisors, one of which must have been trained, when conducting a reasonable suspicion determination for drugs .....	2,500	5,000
(c) Improperly holding employee out of service .....	2,500	5,000
(d) Failure to provide adequate written documentation for the reasons for a reasonable suspicion test .....	2,500	5,000
219.305 Prompt specimen collections; time limitations:		
(a) Fail to promptly conduct test .....	2,500	5,000
(b) Failure to document why test not administered within time limits .....	2,500	5,000
(c) Improper recall of employee .....	2,500	5,000
<b>Subpart E—Reasonable Cause Testing</b>		
219.401 Authorization for reasonable cause testing:		
(a) Failure to declare which authority (Federal or company) is being used for reasonable cause testing .....	2,500	5,000
(b) Testing conducted after regulated employee is released from duty .....	2,500	5,000
219.403 Requirements for reasonable cause testing:		
(a) Testing when event did not meet the criteria for train accident or train incident .....	2,500	5,000
(b) Testing when event did not meet the criteria for rule violation .....	2,500	5,000
219.405 Documentation requirements:		
(a) Failure to provide adequate written documentation for the reasons for a reasonable cause test .....	1,000	2,500
(b) Failure to document specific type of rule violation and the involvement of each tested regulated employee .....	1,000	2,500
219.407 Prompt Specimen Collection; Time Limitations:		
(a) Failure to perform a test in a timely .....	2,500	5,000
(b) Failure to document why test not administered within time limits .....	1,000	2,500
(c) Improper recall of employee .....	2,500	5,000
219.409 Limitations on authority:		
(b) Improper withholding of regulated employee from regulated service pending test results .....	2,500	5,000
<b>Subpart F—Pre-Employment Tests</b>		
219.501 Pre-employment drug testing:		
(a) Failure to conduct a Federal pre-employment test before a final applicant or employee transfer performs regulated service .....	2,500	5,000
(b) Failure to conduct a Federal pre-employment test before an employee of a contractor performs regulated service .....	2,500	5,000
(e) Pre-employment testing of grandfathered regulated employee .....	1,000	2,500
219.502 Pre-employment alcohol testing:		
(a)(1) Failure to conduct alcohol testing of a regulated employee after choosing to perform Federal pre-employment alcohol testing .....	2,500	5,000
(a)(2) Failure to treat all regulated employees the same for purposes of Federal pre-employment alcohol testing .....	2,500	5,000
219.503 Notification; records:		
Failure to notify the applicant in writing of non-negative test results or refusal .....	1,000	2,500
<b>Subpart G—Random Alcohol and Drug Testing Programs</b>		
219.601 Purpose and scope of random testing programs:		
(b) Failure to ensure regulated employee is subject to random testing .....	2,500	5,000
(c) Contractor or volunteer not included in random testing while subject to performing regulated service ....	2,500	5,000
(d)(1) Regulated employee not subject to random testing at minimum rate set by agency covering more than 50% of employee's regulated functions .....	2,500	5,000
219.605 Submission and approval of random testing plans:		
(a)(1) Failure to obtain FRA approval of random testing program .....	2,500	5,000
(c) Failure to implement random testing plan within 30 days of notification of FRA approval .....	2,500	5,000
(d)(1) Failure to implement substantive plan amendment within 30 days of notification of FRA approval, or failure to obtain FRA approval before implementing substantive plan amendment before implementation .....	2,500	5,000
(d)(2) Failure to submit non-substantive plan amendment before implementation .....	2,500	5,000
219.607 Requirements for random testing plans:		
(a) Railroad implementation failed to comply with approved plan .....	2,500	5,000
(c) Failure to contain required plan elements .....	2,500	5,000
219.609 Inclusion of contractor employees and volunteers in random testing plans:		
(a) Failure to demonstrate that regulated service contractor employees and volunteers are subject to random testing .....	2,500	5,000

PENALTY SCHEDULE <sup>1</sup>—Continued

Section <sup>2</sup>	Violation	Willful violation
(c) Failure to ensure regulated service contractor and volunteers are tested in accordance with this subpart .....	2,500	5,000
219.611 Random drug and alcohol and drug testing pools:		
(a) Failure of railroad to ensure that all regulated employees including contractors and volunteers are included in random testing pools .....	2,500	5,000
(b)(2) Improper criteria for pool entries which allows for employer discretion over who is to be tested .....	2,500	5,000
(b)(3) Failure to construct and maintain pool entries that will ensure regulated employees have an equal chance of being selected randomly for each draw .....	2,500	5,000
(c) Maintaining a random testing pool with less than four pool entries .....	2,500	5,000
(d)(1) Failure to ensure that pools do not contain non-regulated employees .....	2,500	5,000
(d)(2) Regulated employee included in more than one DOT random pool .....	2,500	5,000
(d)(3) Failure to maintain pools and/or pool entries that meet FRA/DOT regulations .....	2,500	5,000
(d)(5) Failure to add or remove regulated employees to or from the proper random pool in a timely manner .....	2,500	5,000
(e)(2) Failure to remove employees who perform de minimis service from pools which include employees who perform regulated service on a regular basis .....	2,500	5,000
(f) Failure to have an effective mechanism to update and maintain pools .....	2,500	5,000
219.613 Random testing selections:		
(b)(1) Failure to use an FRA-acceptable selection procedure .....	2,500	5,000
(b)(2) Failure to ensure every regulated employee has an equal chance at being selected at each draw ...	2,500	5,000
(b)(3) Failure to have necessary documentation verifying the selection process for testing window .....	2,500	5,000
(c)(1) Failure to select pool entries at a rate which ensures compliance with FRA required random rates or fail to reasonably distribute selections throughout the selection year .....	2,500	5,000
(d) Railroad failed to select at least one entry from each of its random testing pools every three months ...	2,500	5,000
(e) Railroad discarded selection draws without an acceptable explanation .....	2,500	5,000
(g) Failure to capture and maintain electronic or hard copy snapshot of each random testing pool at the time it makes a testing selection .....	2,500	5,000
219.615 Random testing collections:		
(a) Failure to comply with minimum annual random collection testing rates .....	2,500	5,000
(b) Failure to test selections within the approved testing window .....	2,500	5,000
(c)(1) Testing a regulated employee while not on duty or testing a regulated employee not randomly selected or testing a non-regulated employee .....	2,500	5,000
(c)(2) Failure to distribute collections reasonably throughout all shifts, days of the week, weeks of the month, and months of the year .....	2,500	5,000
(c)(3) Failure to perform at least 10% of its random alcohol tests at the beginning of shifts and at least 10% of random alcohol tests at the end of shifts .....	2,500	5,000
(e)(1) Advance notification given to employees selected for testing .....	2,500	5,000
(e)(2) Fail to begin collection within two hours of notice of random selection without an acceptable reason for the delay .....	2,500	5,000
(f) Failure to test a selection without an FRA-acceptable reason .....	2,500	5,000
(g)(1) Fail to immediately terminate random collection due to hours of service expiration .....	2,500	5,000
219.617 Participation in random alcohol and drug testing:		
(a)(1) Failure to test regulated employee when properly selected for random test .....	2,500	5,000
(a)(2) Failure to restrict regulated employee from performing regulated service prior to completion of random testing .....	2,500	5,000
(a)(3) Improperly excused without substantiated medical emergency .....	2,500	5,000
219.621 Use of Service Agents:		
(g) Improper use a service agent to notify a regulated employee that they have been selected for random testing .....	2,500	5,000
219.623 Records		
(a) Failure of railroads to meet recordkeeping requirements .....	2,500	5,000
(g) Failure of contractors and service agents to provide required random testing records when requested by the contracting railroad or FRA .....	2,500	5,000
219.625 FRA Administrator's determination of random alcohol and drug rates		
(d) Failure to meet the required FRA random testing rate for drugs .....	2,500	5,000
(e) Failure to meet the required FRA random testing rate for alcohol .....	2,500	5,000

## Subpart H—Drug and Alcohol Testing Procedures

219.701 Standards for drug and alcohol testing:		
(a) Failure to comply with part 40 procedures in subpart B, D, E, F, G and K testing .....	5,000	7,500

## Subpart I—Annual Report

219.800 Annual Reports:		
(a) Failure to submit MIS report on time .....	2,500	5,000
(c) Failure to submit accurate MIS report .....	2,500	5,000
(d) Failure to include required data .....	2,500	5,000

## Subpart J—Recordkeeping Requirements

219.901 Retention of alcohol and drug testing records:		
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PENALTY SCHEDULE <sup>1</sup>—Continued

Section <sup>2</sup>	Violation	Willful violation
(a) Failure to maintain records required to be kept by part 40 of this chapter .....	2,500	5,000
(b) Failure to maintain records required to be kept for five years .....	2,500	5,000
(c) Failure to maintain records required to be kept for two years .....	2,500	5,000
219.903 Access to facilities and records:		
(a) Failure to release records in this subpart in accordance with part 40 of this chapter .....	2,500	5,000
(b) Failure to permit access to facilities .....	2,500	5,000
(c) Failure to provide access to results of railroad alcohol and drug testing programs .....	2,500	5,000
<b>Subpart K—Referral Programs</b>		
219.1001 Requirement for referral programs:		
(b)(1) Failure to adopt or implement required self-referral program or alternate program that meets the requirements of this subpart .....	2,500	5,000
(b)(2) Failure to adopt or implement required co-worker referral program or alternate program that meets the requirements of subpart K of this part .....	2,500	5,000
(d) Violation of referral program prohibitions .....	2,500	5,000
219.1003 Referral program conditions:		
(a) Failure to comply with referral program conditions .....	2,500	5,000
(b) Failure to maintain employment .....	2,500	5,000
(c) Failure to disqualify regulated employee when referral conditions not met .....	2,500	5,000
(d) Use of unqualified DAC .....	2,500	5,000
(e) Allowing person evaluated as having active substance abuse disorder to perform regulated service .....	2,500	5,000
(f) Breach of confidentiality .....	2,500	5,000
(g) Failure to allow recommended leave of absence .....	2,500	5,000
(h)(1)–(3) Failure to meet return to service conditions .....	2,500	5,000
(h)(4) Failure to return to service when conditions met .....	2,500	5,000
(i) Improper modification to rehabilitation plan .....	2,500	5,000
(l) Failure to complete DAC evaluation within time limit .....	2,500	5,000
(m) Exceeding 24 month time limit on aftercare when not associated with a substantiated part 219 violation .....	2,500	5,000
219.1007 Alternate programs:		
(c) Failure to obtain FRA approval of alternate program .....	2,500	5,000

<sup>1</sup> A penalty may be assessed against an individual only for a willful violation. The FRA Administrator reserves the right to assess a penalty of up to \$105,000 for any violation, including ones not listed in this penalty schedule, where circumstances warrant. See 49 CFR part 209, appendix A.

<sup>2</sup> The penalty schedule uses section numbers from 49 CFR part 219; and if more than one item is listed as a type of violation of a given section, each item is also designated by a “penalty code,” which is used to facilitate assessment of civil penalties. For convenience, penalty citations will cite the CFR section and the penalty code, if any. FRA reserves the right, should litigation become necessary, to substitute in its complaint the CFR citation in place of the combined CFR and penalty code citation.

Issued in Washington, DC, on May 27, 2016.

**Amitabha Bose,**  
Acting Administrator.

[FR Doc. 2016–13058 Filed 6–6–16; 8:45 am]

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## Part V

### Department of Health and Human Services

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Centers for Medicare & Medicaid Services

42 CFR Part 425

Medicare Program; Medicare Shared Savings Program; Accountable Care Organizations—Revised Benchmark Rebasing Methodology, Facilitating Transition to Performance-Based Risk, and Administrative Finality of Financial Calculations; Final Rule

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Centers for Medicare & Medicaid Services****42 CFR Part 425****[CMS–1644–F]****RIN 0938–AS67****Medicare Program; Medicare Shared Savings Program; Accountable Care Organizations—Revised Benchmark Rebasing Methodology, Facilitating Transition to Performance-Based Risk, and Administrative Finality of Financial Calculations****AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.**ACTION:** Final rule.**SUMMARY:** Under the Medicare Shared Savings Program (Shared Savings Program), providers of services and

suppliers that participate in an Accountable Care Organization (ACO) continue to receive traditional Medicare fee-for-service (FFS) payments under Parts A and B, but the ACO may be eligible to receive a shared savings payment if it meets specified quality and savings requirements. This final rule addresses changes to the Shared Savings Program, including: Modifications to the program's benchmarking methodology, when resetting (rebasing) the ACO's benchmark for a second or subsequent agreement period, to encourage ACOs' continued investment in care coordination and quality improvement; an alternative participation option to encourage ACOs to enter performance-based risk arrangements earlier in their participation under the program; and policies for reopening of payment determinations to make corrections after financial calculations have been performed and ACO shared savings and

shared losses for a performance year have been determined.

**DATES:** *Effective date:* The provisions of this final rule are effective on August 9, 2016.

*Applicability dates:* In the **SUPPLEMENTARY INFORMATION** section of this final rule, we provide a table (Table 1) that lists key changes in this final rule that have an applicability date other than the effective date of this final rule.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth November, (410) 786–8084. Email address: [aco@cms.hhs.gov](mailto:aco@cms.hhs.gov).

**SUPPLEMENTARY INFORMATION:** Table 1 lists key changes that have an applicability date other than 60 days after the date of publication of this final rule. By indicating that a provision is applicable to a performance year (PY) or agreement period, activities related to implementation of the policy may precede the start of the performance year or agreement period.

**TABLE 1—APPLICABILITY DATES OF SELECT PROVISIONS OF THE FINAL RULE**

Preamble section	Section title/description	Applicability date
II.A.2 .....	Integrating regional factors in resetting ACO benchmarks .....	Second or subsequent agreement periods beginning in 2017 and subsequent years.
II.A.2.e.3 .....	For factors based on National FFS expenditures used in establishing the ACO's historical benchmark: Use expenditures for assignable beneficiaries to determine trend factors and truncation thresholds.	Agreement periods beginning in 2017 and subsequent years. For 2014 starters electing the participation option to defer by 1 year entrance into a second agreement period under a two-sided model, 2015 starters, and 2016 starters/renewals, historical benchmarks will be adjusted for the 2017 performance year and any subsequent years in the current agreement period.
II.A.2.e.3 .....	For factors based on National FFS expenditures used in benchmark calculations and performance year expenditure calculations during the agreement period: Use expenditures for assignable beneficiaries to determine the annual benchmark update, and the truncation thresholds for determining performance year expenditures.	Performance year 2017 and subsequent performance years.
II.C .....	An additional participation option that would allow eligible Track 1 ACOs to defer by 1 year their entrance into a performance-based risk model (Track 2 or 3) for their second agreement period.	Second agreement period beginning in 2017 and subsequent years.

**Acronyms**

ACO Accountable Care Organization  
 APM Alternative Payment Model  
 AWI Area Wage Index  
 BY Benchmark Year  
 CAHPS Consumer Assessment of Healthcare Providers and Systems  
 CBSA Core Based Statistical Area  
 CMS Centers for Medicare & Medicaid Services  
 CSA Combined Statistical Area  
 CY Calendar Year  
 DSH Disproportionate Share Hospital  
 ESRD End Stage Renal Disease  
 FFS Fee for service  
 GAO Government Accountability Office  
 GPCI Geographic Practice Cost Index  
 HCC Hierarchical Condition Category  
 IME Indirect Medical Education  
 MA Medicare Advantage

MACRA Medicare Access and CHIP Reauthorization Act of 2015  
 MedPAC Medicare Payment Advisory Commission  
 MIPS Merit-Based Incentive Payment System  
 MLR Minimum Loss Rate  
 MSA Metropolitan Statistical Area  
 MSR Minimum Savings Rate  
 NPI National Provider Identifier  
 OACT Office of the Actuary  
 PGP Physician Group Practice  
 PUF Public Use File  
 PY Performance Year  
 RHC Rural Health Clinic  
 RIA Regulatory Impact Analysis  
 TIN Taxpayer Identification Number

**I. Executive Summary and Background****A. Executive Summary****1. Purpose**

Section 1899 of the Social Security Act (the Act) established the Shared Savings Program, which promotes accountability for a patient population, fosters coordination of items and services under Medicare Parts A and B, and encourages investment in infrastructure and redesigned care processes for high quality and efficient health care service delivery. We published the proposed rule entitled “Medicare Program; Medicare Shared Savings Program; Accountable Care Organizations—Revised Benchmark Rebasing Methodology, Facilitating

Transition to Performance-Based Risk, and Administrative Finality of Financial Calculations” (2016 proposed rule), which appeared in the February 3, 2016 **Federal Register** (81 FR 5824). In the 2016 proposed rule, we proposed changes to the regulations for the Shared Savings Program that were promulgated in November 2011 and June 2015, and codified at 42 CFR part 425. Our intent in this rulemaking is to make refinements to the Shared Savings Program to address concerns raised by stakeholders regarding the benchmarking methodology, and to establish additional options for ACOs to enter performance-based risk arrangements, as well as to address policies for reopening of payment determinations to make corrections after financial calculations have been performed and ACO shared savings and shared losses for a performance year have been determined.

## 2. Summary of the Major Provisions

The policies adopted in this final rule are designed to improve program function and transparency in the following areas:

- Modifying the methodology for rebasing and updating ACO historical benchmarks when an ACO renews its participation agreement for a second or subsequent agreement period to incorporate regional expenditures, thereby making the ACO's cost target more independent of its historical expenditures and more reflective of FFS spending in its region.
- Applying a methodology for risk adjustment to account for the health status of the ACO's assigned population in relation to FFS beneficiaries in the ACO's regional service area in determining the regional adjustment that is applied to the ACO's rebased historical benchmark.
- Adding a participation agreement renewal option to encourage ACOs to enter performance-based risk arrangements earlier in their participation in the Shared Savings Program.
- Defining circumstances under which we would reopen payment determinations to make corrections after the financial calculations have been performed and ACO shared savings and shared losses for a performance year have been determined.

Although we proposed revisions to the methodology for adjusting ACO benchmarks to account for changes in ACO participant (TIN) composition, we will not finalize that proposal and are deferring any revisions to the methodology until future rulemaking. However, we are finalizing conforming

changes to the current methodology for adjusting ACO benchmarks for ACO Participant List changes, to specify that the regional adjustment to the ACO's rebased historical benchmark will be redetermined annually using the most recent certified ACO Participant List for the relevant performance year.

## 3. Summary of Costs and Benefits

As a result of this final rule, the median estimate of the financial impact of the Shared Savings Program for CYs 2017 through 2019 is net federal savings of \$110 million greater than what would have been saved if no changes were made. Although this is the best estimate of the financial impact of the Shared Savings Program during CYs 2017 through 2019, a relatively wide range of possible outcomes exists. While approximately two-thirds of the stochastic trials resulted in an increase in net program savings, the 10th and 90th percentiles of the estimated distribution show a net increase in costs of \$240 million to net savings of \$480 million, respectively.

Overall, our analysis projects that improvements in the accuracy of benchmark calculations, including through the introduction of a regional adjustment to the ACO's rebased historical benchmark, are expected to result in increased overall participation in the program. These changes are also expected to improve the incentive for ACOs to invest in effective care management efforts, increase the attractiveness of participation under performance-based risk in Track 2 or 3 for certain ACOs with lower beneficiary expenditures, and result in overall greater gains in savings on FFS benefit claims costs than the associated increase in expected shared savings payments to ACOs. We intend to monitor emerging results for effects on claims costs, changing participation (including risk for cost due to selective changes in participation), and unforeseen bias in benchmark adjustments due to diagnosis coding intensity shifts. Such monitoring will be used to inform future rulemaking, such as if the Secretary determines that a lower weight should be used in calculating the regional adjustment amount.

## B. Background

On March 23, 2010, the Patient Protection and Affordable Care Act (Pub. L. 111–148) was enacted, followed by enactment of the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152) on March 30, 2010, which amended certain provisions of Public Law 111–148. Collectively known as the Affordable Care Act, these

public laws include a number of provisions designed to improve the quality of Medicare services, support innovation and the establishment of new payment models, better align Medicare payments with provider costs, strengthen Medicare program integrity, and put Medicare on a firmer financial footing.

Section 3022 of the Affordable Care Act amended Title XVIII of the Act (42 U.S.C. 1395 *et seq.*) by adding section 1899 to the Act to establish a Shared Savings Program. This program is a key component of the Medicare delivery system reform initiatives included in the Affordable Care Act and is a new approach to the delivery of health care. The purpose of the Shared Savings Program is to promote accountability for a population of Medicare beneficiaries, improve the coordination of FFS items and services, encourage investment in infrastructure and redesigned care processes for high quality and efficient service delivery, and promote higher value care. ACOs that successfully meet quality and savings requirements share a percentage of the achieved savings with Medicare. Consistent with the purpose of the Shared Savings Program, in establishing the program, we focused on developing policies aimed at achieving the three-part aim consisting of: (1) Better care for individuals; (2) better health for populations; and (3) lower growth in expenditures.

We published the final rule entitled “Medicare Program; Medicare Shared Savings Program: Accountable Care Organizations” (November 2011 final rule), which appeared in the November 2, 2011 **Federal Register** (76 FR 67802) to establish the program. We viewed this final rule as a starting point for the program, and because of the scope and scale of the program and our limited experience with shared savings initiatives under FFS Medicare, we built a great deal of flexibility into the program rules. We anticipated that subsequent rulemaking for the Shared Savings Program would be informed by lessons learned from our experience with the program as well as from testing through the Pioneer ACO Model and other initiatives conducted by the Center for Medicare and Medicaid Innovation (Innovation Center) under section 1115A of the Act.

Thereafter, we published a subsequent final rule entitled “Medicare Program; Medicare Shared Savings Program: Accountable Care Organizations” (June 2015 final rule), which appeared in the June 9, 2015 **Federal Register** (80 FR 32692). In that rule, we adopted policies designed to codify existing guidance, reduce

administrative burden, and improve program function and transparency in a number of areas, such as eligibility for program participation and data sharing. Additionally, we modified policies related to the financial model, in response to stakeholder feedback, to encourage greater and continued ACO participation, for example, by offering ACOs the opportunity to continue participating under the one-sided model for a second agreement period, modifying the existing two-sided performance-based risk track (Track 2), and offering an alternative two-sided performance-based risk track (Track 3). Track 3 includes prospective beneficiary assignment and a higher sharing rate for shared savings as well as the potential for greater liability for shared losses, among other features, informed by CMS' experience with the Pioneer ACO Model. We finalized new policies for resetting an ACO's financial benchmark in a second or subsequent agreement period, by adding back a portion of the ACO's savings generated during the previous agreement period and equally weighting the historical benchmark years, to encourage ACOs to seek to continue their participation in the program and to address stakeholder concerns about the benchmark rebasing methodology. We also stated our intention to address other modifications to program rules in future rulemaking in the near term including modifying the methodology for resetting benchmarks by incorporating regional trends and costs.

We are encouraged by the high degree of interest in participation in the Shared Savings Program. As of January 1, 2016, over 400 ACOs were participating in the Shared Savings Program. This includes 147 ACOs with 2012 and 2013 agreement start dates that entered into a new 3-year agreement effective January 1, 2016, to continue their participation in the program, and 100 ACOs that entered the program for a first agreement period beginning January 1, 2016. See Fact Sheet: CMS Welcomes New Medicare Shared Savings Program (Shared Savings Program) Participants, (January 11, 2016) available online at <https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2016-Fact-sheets-items/2016-01-11-2.html>.

We continue to look to experience gained by the Innovation Center in testing ACO models. In January 2016, we announced that 21 ACOs would be participating in the first performance year of the Next Generation ACO Model, a new ACO initiative being tested by the Innovation Center. The Next Generation ACO Model allows ACOs that are

experienced in coordinating care for populations of patients to assume higher levels of financial risk and reward than are available under the Pioneer ACO Model and Shared Savings Program. See HHS press release: New hospitals and health care providers join successful, cutting-edge federal initiative that cuts costs and puts patients at the center of their care (January 11, 2016) available online at <http://www.hhs.gov/about/news/2016/01/11/new-hospitals-and-health-care-providers-join-successful-cutting-edge-federal-initiative.html>.

In the 2016 proposed rule (81 FR 5824), we proposed further modifications to the program's regulations, addressing several policy areas that we believed should be revisited in light of the additional experience we have gained during program implementation, including the methodology for resetting benchmarks, participation options to encourage ACOs to enter performance-based risk tracks, and reopening of payment determinations to make corrections.

## II. Provisions of the Final Regulations and Responses to Public Comments

We received a total of 74 timely comments on the 2016 proposed rule (81 FR 5824). Stakeholders offered comments that addressed both high level issues related to the Shared Savings Program as well as our specific proposals and requests for comments. We extend our deep appreciation to the public for their interest in the program and the many thoughtful comments that were made in response to our proposed policies. In some instances, the public comments offered were outside the scope of the proposed rule, for example: Suggested revisions to the Shared Savings Program quality performance standard; suggestions for implementing the Skilled Nursing Facility (SNF) 3-day rule waiver for eligible Shared Savings Program ACOs; requests to modify the approach used to account for the costs of Critical Access Hospitals participating in Shared Savings Program ACOs; suggestions for limiting the liability of individual providers for shared losses incurred by ACOs; suggestions for modifying the financial incentives within the Shared Savings Program to encourage ACOs to use innovative treatments, technologies and diagnostics; suggestions for CMS to provide greater support for beneficiary engagement in their health care; and suggestions for the development of regulations pursuant to the Medicare Access and CHIP Reauthorization Act of 2015 (MACRA). These comments will not be addressed in this final rule, but we have shared them with the

appropriate subject matter experts in CMS. Summaries of the public comments that are within the scope of this rule and our responses to those comments are set forth in the various sections of this final rule under the appropriate headings. In this introduction to section II of this final rule, we address several global comments related to the Shared Savings Program. The remainder of this section of the final rule is organized to give an overview of each issue and the relevant proposals, to summarize and respond to public comments on the proposals, and to describe our final policy decisions based upon our review of the public comments received.

*Comment:* Some commenters are encouraged by the momentum of the program in attracting organizations and advancing our goal of transitioning providers away from traditional FFS to arrangements focused on value-based payments. However, some pointed to the statistics on the number of ACOs eligible for shared savings payments in the initial performance years of the Shared Savings Program and the attrition rate from the program as evidence of the need for changes to the program including: (1) Policy changes to provide greater rewards to ACOs for their cost reductions and quality improvements for Medicare beneficiaries; (2) policy options to reward organizations of differing provider compositions, sophistication and cost history; and (3) additional resources from CMS, such as more timely and actionable data, to support their success. Commenters addressing the sustainability of the program over the longer term often pointed to the intersections of various policy factors as being influential, most commonly the need for a benchmarking methodology that allows ACOs to continue to generate sufficient returns over time to support their care coordination and quality improvement activities to meet the program's goals, and the need for policies to reduce beneficiary churn in an ACO's assigned beneficiary population (for example, through prospective beneficiary assignment in all program Tracks and implementation of an attestation process for beneficiaries to voluntarily align to an ACO). Some commenters underscored the challenges for ACOs in moving FFS providers towards payment models based on value instead of volume and for already efficient organizations to realize further reward within the Shared Savings Program.

In general, some commenters pointed to the need for sufficient stability and predictability in the program to

effectively drive ACOs to enter performance-based risk models. Some commenters, including commenters representing rural providers, suggested CMS consider allowing ACOs to remain under a one-sided model for a long period, and perhaps even indefinitely, particularly ACOs that continue to generate savings.

*Response:* We thank all commenters for helping us continue to develop the Shared Savings Program. We appreciate commenters' support for the program generally, as well as their thoughtful remarks on overarching considerations for the future of the Shared Savings Program.

The ACOs participating in the Shared Savings Program are recognized as being a critical part of the Administration's goal to help drive Medicare and the health care system at large towards rewarding the quality of care as opposed to the quantity of care provided to beneficiaries. In January 2015, the Administration announced an ambitious goal of tying 30 percent of Medicare FFS payments to quality and value by 2016 and by 2018 making 50 percent of payments through alternative payment models, such as the Shared Savings Program (<https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2015-Fact-sheets-items/2015-01-26-3.html>). In March 2016, the Administration announced that it estimated having achieved this first goal, 11 months ahead of schedule, in part a result of entry by new ACOs in CMS ACO initiatives including the Shared Savings Program (<https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2016-Fact-sheets-items/2016-03-03-2.html>).

With these goals in mind, we believe this final rule will further strengthen the Shared Savings Program. In particular we believe it is critical to ensuring the sustainability of the program to make an ACO's benchmark incrementally less dependent on the ACO's historical spending and more reflective of spending in the ACO's region as the ACO continues in the program for multiple agreement periods. We also believe that the benchmarking methodology is only one of several factors that are important to ACOs' success in the Shared Savings Program. For example, we believe refinements to the Shared Savings Program's data sharing policies, finalized in the June 2015 final rule, including a streamlined process for ACOs to access Medicare beneficiary claims data and expanding the data that is made available through informational program reports, will facilitate ACOs' health care operations.

Further, we believe that ACOs are more likely to become successful in achieving the goals of the accountable care model over time, as indicated by performance results showing that ACOs with more experience in the program are more likely to generate shared savings (CMS Fact Sheet: Medicare ACOs Provide Improved Care While Slowing Cost Growth in 2014, available online at <https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2015-Fact-sheets-items/2015-08-25.html>).

We also recognize the needs of the Shared Savings Program are dynamic and will continue to change as CMS and ACOs gain more experience with the accountable care model being implemented on a national scale. We welcome and encourage stakeholders' engagement with CMS on future program improvements and policy considerations, including through the rulemaking process.

*Comment:* Some commenters requested that CMS address broader market dynamics, particularly in relation to aligning financial and quality targets between the Shared Savings Program and Medicare Advantage (MA). Several commenters pointed to this alignment as allowing for more equitable comparison between traditional FFS Medicare, MA and ACOs. Some pointed to the need for this alignment when indicating that Shared Savings Program ACOs and MA plans compete. A commenter explained that competition between traditional FFS Medicare, ACOs and MA plans would maximize value for Medicare beneficiaries and the Medicare program.

*Response:* We appreciate commenters' continued interest in developing the design of the Shared Savings Program to foster greater comparability between Medicare payment models. As explained in the June 2015 final rule, we continue to believe there are important distinctions between MA plans and the accountable care model in the Shared Savings Program. The Shared Savings Program is not a managed care program like MA. Under the Shared Savings Program, providers and suppliers receive traditional FFS Medicare payments, and Medicare FFS beneficiaries retain all rights and benefits under traditional Medicare, including the right to see any physician of their choosing. In addition, Medicare FFS beneficiaries do not enroll in the Shared Savings Program (see 80 FR 32696). However, in the 2016 proposed rule we acknowledged that one consideration in developing the proposed methodology for use of county-FFS data in calculating

expenditures for an ACO's regional service area was to align more closely with the MA ratesetting methodology (see 81 FR 5829). Although we have relied on our experience in other Medicare programs, including MA, to help develop program requirements and design elements for the Shared Savings Program, many Shared Savings Program requirements deviate from those in the other programs precisely because the intent of this program is not to recreate or replace MA or other Medicare programs (see 80 FR 32697).

As discussed elsewhere in this final rule, we are finalizing, with certain modifications, our proposal to determine an ACO's regional FFS expenditures based on the county FFS expenditures for the ACO's regional service area for populations of beneficiaries according to Medicare enrollment type (ESRD, disabled, aged/dual eligible, aged/non-dual eligible). Although this approach differs from the MA rate-setting methodology (with respect to calculation of values for the ESRD population, and the number of years of data used in the calculating county FFS expenditures), we believe it continues to be a substantial step towards aligning the Shared Savings Program benchmarking methodology with the MA rate-setting methodology.

#### *A. Modifications to the Benchmarking Methodology*

##### *1. Background on Establishing, Updating, and Resetting the Benchmark*

Section 1899(d)(1)(B)(ii) of the Act addresses how ACO benchmarks are to be established and updated. This provision specifies that the Secretary shall estimate a benchmark for each agreement period for each ACO using the most recent available 3 years of per beneficiary expenditures for Parts A and B services for Medicare FFS beneficiaries assigned to the ACO. Such benchmark shall be adjusted for beneficiary characteristics and such other factors as the Secretary determines appropriate and updated by the projected absolute amount of growth in national per capita expenditures for Parts A and B services under the original Medicare FFS program, as estimated by the Secretary. Such benchmark shall be reset at the start of each agreement period. In addition to the statutory benchmarking methodology established in section 1899(d) of the Act, section 1899(i)(3) of the Act grants the Secretary the authority to use other payment models, including payment models that would use alternative benchmarking methodologies, if the Secretary

determines that doing so would improve the quality and efficiency of items and services furnished under this title and the alternative methodology would result in program expenditures equal to or lower than those that would result under the statutory payment model.

In the November 2011 final rule establishing the Shared Savings Program, we adopted policies for establishing, updating and resetting the benchmark at § 425.602. Under this methodology, we use national FFS spending and trends as part of establishing, updating and resetting ACO-specific benchmarks. Specifically, we calculate a benchmark for each ACO using a risk-adjusted average of per capita Parts A and B expenditures for original Medicare FFS beneficiaries who would have been assigned to the ACO in each of the 3 calendar years prior to the start of the agreement period. In calculating an ACO's benchmark expenditures, we include individually beneficiary identifiable payments made under a demonstration, pilot or time limited program, and we make an adjustment to exclude IME payments and DSH and uncompensated care payments. We trend forward each of the first 2 benchmark years' per capita risk adjusted expenditures to third benchmark year (BY3) dollars based on the national average growth rate in Parts A and B per capita FFS expenditures verified by the CMS Office of the Actuary (OACT). In establishing the benchmark for an ACO's first agreement period, the first benchmark year is weighted 10 percent, the second benchmark year is weighted 30 percent, and the third benchmark year is weighted 60 percent. This weighting creates a benchmark that more accurately reflects the latest expenditures and health status of the ACO's assigned beneficiary population.

For each performance year, we adjust the ACO's historical benchmark for changes in the health status and demographic factors of the ACO's assigned beneficiaries (§ 425.604(a), § 425.606(a), § 425.610(a)). Consistent with section 1899(d)(1)(B)(ii) of the Act, we update the ACO's benchmark annually, based on our estimate of the projected absolute amount of growth in national per capita expenditures for Parts A and B services under the original FFS program. Additionally, as described further in section II.B of this final rule, we also adjust ACO historical benchmarks annually based on changes to the ACO's certified ACO Participant List. In making this adjustment, the historical benchmark period remains constant, but beneficiary assignment is

revised to reflect the influence of the ACO Participant List changes.

In trending forward the historical benchmark, adjusting for changes in beneficiary characteristics, and annually updating the benchmark by growth in national per capita Medicare FFS expenditures, we make calculations for populations of beneficiaries in each of the following Medicare enrollment types: ESRD, disabled, aged/dual eligible, aged/non-dual eligible. Furthermore, to minimize variation from catastrophically large claims, we truncate an assigned beneficiary's total annual Parts A and B FFS per capita expenditures at a threshold of the 99th percentile of national Medicare FFS expenditures for the applicable Medicare enrollment type (ESRD, disabled, aged/dual eligible, aged/non-dual eligible).

Under section 1899(d)(1)(B)(ii) of the Act and § 425.602(c) of the Shared Savings Program regulations, an ACO's benchmark must be reset at the start of each new agreement period. In the June 2015 final rule, we revised § 425.602(c) to specify that in resetting the historical benchmark for ACOs in their second or subsequent agreement period we: (1) Weight each benchmark year equally; and (2) make an adjustment to reflect the average per capita amount of savings earned by the ACO in its prior agreement period, reflecting the ACO's financial and quality performance, during that prior agreement period. The additional per capita amount is applied as an adjustment to the ACO's rebased historical benchmark for a number of assigned beneficiaries (expressed as person years) not to exceed the average number of assigned beneficiaries (expressed as person years) under the ACO's prior agreement period. If an ACO was not determined to have generated net savings in its prior agreement period, we do not make any adjustment to the ACO's rebased historical benchmark. We use performance data from each of the ACO's performance years under its prior agreement period in resetting the ACO's benchmark for its second or subsequent agreement period. In the June 2015 final rule, in which this adjustment was finalized, we stated that we believed it would be critical to revisit the policy of accounting for an ACO's savings generated in a prior agreement period when resetting its benchmark in conjunction with any future changes to the benchmarking methodology to incorporate regional FFS expenditures (see 80 FR 32791; see also 80 FR 32795 through 32796).

The June 2015 final rule also included a discussion of several options and

methods for incorporating regional factors when establishing, updating, and resetting the benchmark, and CMS committed to engaging in additional rulemaking around modifications to the Shared Savings Program's methodology for resetting benchmarks (see 80 FR 32791 through 32796; see also 79 FR 72839 through 72843 (discussing options for revising the methodology for resetting an ACO's historical benchmark)). The 2016 proposed rule expanded upon the issues discussed in the June 2015 final rule. The proposed changes (reviewed in greater detail within this final rule) focused on incorporating regional FFS expenditures into the methodology for establishing, adjusting, and updating an ACO's historical benchmark for its second or subsequent agreement period.

## 2. Integrating Regional Factors When Resetting ACOs' Benchmarks

### a. Overview

In the June 2015 final rule, we summarized comments received on three approaches to account for regional FFS expenditures in ACO benchmarks and technical issues related to these alternatives (80 FR 32791 through 32796). We committed to engaging in additional rulemaking to propose modifications to the Shared Savings Program's methodology for resetting ACO benchmarks. We signaled our anticipated policy direction by outlining an approach to rebasing that would account for regional expenditures and identified additional methodological issues we would need to address in implementing this approach (80 FR 32795 through 32796).

In the 2016 proposed rule, we acknowledged that any proposed changes to the benchmark rebasing policies would require consideration of tradeoffs among several criteria that were initially described in the June 2015 final rule (81 FR 5828):

- Strong incentives for ACOs to improve efficiency and to continue participation in the program over the long term.
- Benchmarks which are sufficiently high to encourage ACOs to continue to meet the three-part aim, while also safeguarding the Medicare Trust Funds against the possibility that ACOs' reset benchmarks become overly inflated to the point where ACOs need to do little to maintain or change their care practices to generate savings.
- Generating benchmarks that reflect ACOs' actual costs in order to avoid potential selective participation by (and excessive shared payments to) ACOs with high benchmarks.

Further, we explained the addition of the following guiding principles to our considerations for modifying the benchmarking methodology (81 FR 5828):

- **Transparency:** Developed based on identifiable sources of data, and where possible publicly available data and data sets, in order to allow stakeholders to understand and model impacts.
- **Predictability:** Enable ACOs to anticipate their updated benchmark targets and their likely performance under the program.
- **Simplicity:** Methodology can be explained in relatively simple terms and in sufficient detail to be readily understood by ACOs and stakeholders.
- **Accuracy:** Methodology generates benchmarks that are an accurate reflection of the ACOs' expenditures and relevant regional expenditures, and can be accurately implemented and calculated, validated and disseminated in a timely manner.
- **Maintain program momentum and market stability** by providing sufficient notice of methodological changes and phase-in of these changes.

Applying these principles, we proposed the following changes, to the methodology for resetting an ACO's benchmark for a second or subsequent agreement period beginning on or after January 1, 2017:

- Replace the national trend factors with regional trend factors for establishing the ACO's rebased historical benchmark, and remove the adjustment to explicitly account for savings generated under the ACO's prior agreement period.
- Make an adjustment when establishing the ACO's rebased historical benchmark, to reflect a percentage of the difference between regional FFS expenditures in the ACO's regional service area and the ACO's historical expenditures. A higher percentage would be used in calculating this adjustment to the ACO's rebased historical benchmark for the ACO's third agreement period and all subsequent agreement periods. We further proposed to apply this phased approach to transitioning to the use of a higher weight in the calculation of the regional adjustment for ACOs with 2012 and 2013 agreement start dates that elected to continue their participation in the program for a second 3-year agreement period effective January 1, 2016, beginning in their third agreement period (starting in 2019).
- Annually, update the rebased benchmark to account for changes in regional FFS spending, replacing the current update, which is based solely on

the absolute amount of projected growth in national FFS spending.

We proposed to define an ACO's regional service area to include any county where one or more assigned beneficiaries reside and to weight county-level FFS costs by the proportion of the ACO's assigned beneficiaries in the county. We proposed to calculate risk adjusted county FFS expenditures for the ACO's regional service area using the assignable beneficiary population, as a subset of the broader FFS population, residing in counties included in the ACO's regional service area. We proposed to align the calculation of regional FFS expenditures with the approach to calculating an ACO's benchmark and performance year expenditures. We also proposed a program-wide policy, to use beneficiaries eligible for ACO assignment instead of all FFS beneficiaries as the basis for program calculations using regional and national FFS expenditures. As part of the process of incorporating the revised rebasing methodology, we also proposed a number of technical changes to the program regulations to clarify the regulations text on the benchmarking methodology.

In the 2016 proposed rule we explained that the proposed approach to incorporating regional expenditures would make the ACO's cost target more independent of its historical expenditures and more reflective of FFS spending in its region (81 FR 5825). We also explained that adding the regional adjustment and replacing the current benchmark trend factor and annual update (calculated based on National FFS expenditures) with regional growth rates, would have mixed effects on ACOs overall by increasing or decreasing benchmarks for ACOs in various circumstances. For example, we explained that the proposed regional adjustment would likely benefit existing low spending ACOs operating in regions with relatively higher spending and/or higher growth in expenditures (81 FR 5834). We further explained that a phased-approach to transitioning to use of a higher weight in the calculation of the regional adjustment balanced our preference for quickly transitioning ACOs to a rebasing methodology that is more reflective of expenditures in the ACO's region than the ACO's historical expenditures with our concerns about the opportunity for arbitrage, and the potential for ACOs to alter their healthcare provider and beneficiary compositions or take other such actions in order to achieve more favorable performance relative to their region

without actually changing their efficiency (81 FR 5834 through 5836). We also explained that the use of regional trend factors in resetting ACO benchmarks and regional growth rates to update benchmarks annually would likely result in relatively higher benchmarks for ACOs that are low growth in their region compared to benchmarks for ACOs that are high growth relative to their region (81 FR 5838 through 5840).

We anticipated these changes would strengthen the incentives for ACOs to invest in infrastructure and care redesign necessary to improve quality and efficiency and meet the goals of the Shared Savings Program (81 FR 5859). However, we expressed uncertainty about the effect on the level of ACO participation, provider and supplier response to the financial incentives under the program, interactions with other value-based payment models and programs, and the ultimate effectiveness of the changes in care delivery (81 FR 5860).

In section II.A.2 of this final rule, we discuss our final actions on the proposals for modifying the Shared Savings Program benchmarking methodology. Table 2 summarizes the final actions discussed in this section of the final rule. We begin this discussion by addressing comments on broader considerations for revising the benchmarking methodology.

*Comment:* Most commenters addressed the proposed changes to the benchmarking methodology, with the majority expressing support, in general, for incorporating regional FFS expenditures into ACOs' benchmarks. Many commenters offered specific suggestions on the proposed policies.

Some commenters detailed concerns, more generally, about the sustainability of the current rebasing methodology. A principal concern raised by commenters is that the current rebasing methodology forces ACOs to continually beat their own performance, by using historical expenditures from the performance years under an ACO's prior agreement period to reset the benchmark. Commenters raised a variety of concerns about the effects of this approach, including: ACOs that have performed well in the past are penalized under this methodology, while those who have performed poorly are rewarded; ACOs with lower spending have relatively lower benchmarks (and less opportunity for reward) compared to those with higher historical spending, including ACOs operating in different markets (with differing spending trends) as well as ACOs operating within the same market; over time there will be

diminishing opportunities to produce savings, that are used in part to support ACO operations (including investments that result in the provision of high value care), and ACOs will ultimately be forced to leave the program or participation in the program will be discouraged more generally. Many commenters explained that making an ACO's benchmark more independent of its historical expenditures and performance and more reflective of FFS spending and the healthcare environment in the ACO's region would be an improvement over the current approach.

Several commenters recognized that incorporating regional factors when resetting ACO benchmarks accounts for geographic variation in healthcare utilization. While some commenters considered this a necessary methodological development to ensure the sustainability of the Shared Savings Program, a commenter specified that this would be antithetical to CMS' larger goal of decreasing variability in per beneficiary spending on a nationwide scale. A commenter suggested CMS delay finalizing the proposed changes in light of CMS' concerns (including the potential for arbitrage or behavioral changes by ACOs) and the uncertainties about the impact of the alternative rebasing methodology, and further suggested CMS revisit the proposed changes in future rulemaking, after further analysis and once the Merit-Based Incentive Payment System (MIPS) and Alternative Payment Model (APM) requirements are proposed. However, even among those commenters that raised concerns about the details of the proposed policies, very few suggested that CMS abandon altogether an approach for incorporating regional FFS expenditures into ACO benchmarks.

The discussion in the comments also reflects commenters' consideration of the tradeoffs CMS identified in the proposed rule related to providing sufficiently strong incentives for ACOs to improve efficiency and continue participation in the program, while guarding the Trust Funds against the possibility that over inflating certain ACOs' reset benchmarks would result in selective participation by and excessive payments to ACOs with high benchmarks. Commenters illuminated that the balance of these concerns is complicated due to the diversity of the program's participants and regional variations/market circumstances.

Many commenters recognized that the benchmarking methodology, including any changes adopted in this final rule, will be crucial for determining the profile/characteristics of organizations

that will have an incentive to enter and remain in the program over time. Comments discussed the effects of the proposed changes to the benchmarking methodology, including the following:

- Many commenters generally agreed that the proposed changes would encourage participation by ACOs that are historically efficient (low spending) in relation to their region, especially in high spending regions. Many commenters expressed support for the proposed policies to encourage participation by efficient ACOs. However, some commenters believe the resulting incentives would still be inadequate to encourage these ACOs to enter or remain in the program over the long term, citing concerns about diminishing returns when a component of the ACO's rebased historical benchmark continues to be based on expenditures under the ACO's prior agreement period and thereby reflects the ACO's past success.

- Some commenters expressed concern there may be little incentive for ACOs with spending equal to or higher than their region to enter the Shared Savings Program or continue participating under the proposals.

- Several commenters expressed concerns that the proposed changes could disadvantage certain ACOs, especially those in ACO-heavy markets and ACOs in existing low cost regions, as well as smaller ACOs comprised of geographically distant small- and mid-sized providers.

- Others expressed concern about the potential that the proposed changes would have unanticipated effects on particular organizations, pointing to the discussion in the proposed rule that "a wide range of potential outcomes" exist regarding financial performance under the proposed changes. Some commenters expressed uncertainty about the potential effects of the proposed changes and indicated that they lacked sufficient information to determine what outcomes they may have.

Some commenters addressed these concerns by suggesting CMS offer various benchmarking options to allow ACOs greater flexibility in determining the methodology that would be applied to determine their benchmark. Some commenters also suggested CMS stratify the regional benchmarking methodologies for historically low and high cost ACOs (in relation to their regions).

*Response:* We appreciate commenters' thoughtful remarks on the proposed changes to the benchmarking methodology, including the tradeoffs that we identified as relevant to the

consideration of any revisions to the methodology for resetting an ACO's historical benchmark for a second or subsequent agreement period. The discussion in the latter sections of this final rule reflect our continued consideration of these important issues during the development of the policies in this final rule, and we believe the policies we are finalizing represent a balance of these considerations. We also believe the policies we are finalizing are responsive to a principal concern among stakeholders, as reflected in the comments, about the way in which ACOs' past performance is reflected in their benchmarks over time.

As explained in the 2016 proposed rule, the policy modifications are designed to reduce the impact of past performance and better reflect regional expenditures. We continue to believe an approach that incorporates regional FFS expenditures into an ACO's rebased historical benchmark will have mixed effects, increasing or decreasing benchmarks for ACOs in various circumstances. However, we believe that taking an incremental approach to incorporating regional elements when resetting the ACO's benchmark offers a balance between requests for faster or slower phase-in of these changes, and is responsive to the circumstances of differently situated organizations as we transition to this revised approach. When taking these issues into consideration, on the whole, we believe that this approach is consistent with a sustainable vision for the future of the Shared Savings Program, under which a variety of organizations will have sufficient incentive to enter and continue in the program, working to achieve the program's goals of better care for individuals, better health for populations, and lower growth in expenditures.

While we acknowledge the variation across ACOs participating in the program, in terms of their patient populations, location, and organizational structure, among other factors, we do not believe it is desirable or operationally feasible to implement an approach that would allow each ACO to select from a menu of options for customizing the benchmark methodology that would apply in any given performance year or agreement period. Doing so would introduce considerable operational complexity into the program's benchmarking methodology. Further an approach that allows an ACO to choose the more favorable of several methodologies for establishing its cost target would exacerbate our concerns about the potential for benchmarks to become

overly inflated to the point where ACOs need to do little to maintain or change their care practices to generate savings. We are concerned that this flexibility could lead to opportunities for arbitrage and may dull incentives for ACOs to improve their performance under the Shared Savings Program.

*Comment:* Several commenters also, generally, agreed with the importance of transparency, predictability, simplicity, accuracy, and stability as guiding principles in developing a revised rebasing methodology, and provided feedback on how to accomplish these aims.

*Response:* We appreciate commenters' acknowledgement and support of the principles that guided our consideration of potential revisions to the methodology for resetting an ACO's historical benchmark for a second or subsequent agreement period. These principles also guided the development of our final policies, as reflected in the discussion throughout this section of this final rule.

*Comment:* A few commenters suggested alternative rebasing methodologies exceeding the scope of the modifications described in the proposed rule (for instance, allowing ACOs, particularly small and rural ACOs, to choose whether to move to the revised rebasing methodology; transitioning to pure regional benchmarks, or pure national benchmarks, or using a combination of ACO historical costs and blended regional/national costs in benchmarks; adopting the Next Generation ACO model methodology into the Shared Savings Program; and eliminating rebasing or reducing the frequency of rebasing). A commenter questioned whether CMS could establish a benchmark floor, an actuarial number beyond which CMS would not lower an ACO's benchmark. Another commenter suggested CMS adopt an option to allow Shared Savings Program ACOs to transition to a different payment model altogether such as a capitated payment model or population-based payments.

*Response:* Although we appreciate commenters' thoughtful recommendations for alternative methodologies for resetting the ACO's historical benchmark, and other approaches for improving the rewards under the Shared Savings Program, we consider these suggestions to be beyond the scope of this final rule, and decline at this time to adopt commenters' recommendations.

*Comment:* A commenter expressed concern about CMS' use of inconsistent terminology when describing the benchmarking methodology. In

particular, the commenter noted that CMS used the words "reset" or "rebase" interchangeably. The commenter also noted a lack of clarity regarding the use of "trend" or "trending." This commenter, pointing to the length of the program's rulemaking documents and the complexity of the policies discussed therein, encouraged CMS to be precise in its language.

*Response:* We thank the commenter for raising this concern about the language used in technical discussions within rulemaking for the Shared Savings Program. To clarify, we consider the references to reset/resetting and rebase/rebasing an ACO's historical benchmark to be synonymous (see for example, 76 FR 67912 (specifying ". . . the benchmark would be reset (or rebased) [at] the start of each agreement period.")) However, the use of the words trend and trending could have a meaning specific to the context in which the term is used. For example, we refer to the use of trend factors (or trending) when discussing the existing policy for restating BY1 and BY2 expenditures in terms of BY3 expenditures when establishing an ACO's historical benchmark. However, "trends" may refer more generally to historical Medicare spending and cost experience.

#### b. Regional Definition

As explained in the 2016 proposed rule (see 81 FR 5829 through 5830), we consider an ACO's region to be synonymous with the service area from which it derives its assigned beneficiaries. Furthermore, as discussed in this section of this final rule, issues related to the definition of an ACO's regional service area include: (1) The selection of the geographic unit of measure to define this area; and (2) identification of the population of beneficiaries to include in this area. Calculation of the FFS expenditures for this area is discussed in detail in sections II.A.2.b.2 and II.A.2.e.2 of this final rule.

A fundamental concept underlying our consideration of the definition of an ACO's regional service area is that this geographic definition bear a relationship to the area of residence of the ACO's assigned beneficiaries, as a means of accounting for the geographic spread of the ACO's assigned population. In some cases, an ACO's assigned beneficiary population may span multiple geographic boundaries, for example in cases where an ACO provides services to beneficiaries residing in multiple counties within a single state or multiple states. The approach of defining an ACO's regional service area

based on the area of residence of its assigned beneficiaries would therefore reflect regionally-related factors unique to the region the ACO serves, including the health status of the region's population, the geographic composition of the region (such as rural versus urban areas), and socio-economic differences within the regional population.

#### (1) Defining the ACO's Regional Service Area

In the 2016 proposed rule, we considered the geographic unit of measure to use in defining an ACO's regional service area for the purpose of determining the corresponding regional FFS expenditures to be used in calculations based on regional spending in the modified approach to establishing, adjusting and updating the ACO's rebased historical benchmark (see 81 FR 5829). We explained that these regional FFS expenditures would be used in determining the regional adjustment to an ACO's rebased historical benchmark and in calculating the growth rates in regional spending used in establishing and updating the ACO's rebased historical benchmark.

We proposed to determine an ACO's regional service area by the counties of residence of the ACO's assigned beneficiary population. We explained our belief that county-level data offers a number of advantages over the other options, including Core Based Statistical Areas (CBSAs), Metropolitan Statistical Area (MSAs), Combined Statistical Area (CSAs), States/territories, and Hospital Referral Regions (HRR). Our considerations included the following:

- Counties tend to be stable regional units compared to some alternatives, as the definition of county borders tends not to change.
- The agency has experience with identifying populations of beneficiaries by county of residence and calculating county-level rates based on their costs, including using county-level data to set cost targets for value based purchasing initiatives. CMS used counties to define the service areas of Physician Group Practice (PGP) demonstration sites (a predecessor of CMS' ACO initiatives) and used Parts A and B spending by county as part of setting benchmarks for these organizations. We also use county-level FFS expenditure data, in combination with other adjustments, to establish the benchmarks used for setting local MA rates.
- In terms of determining regional costs, smaller areas (such as counties) better capture regional variation in Medicare expenditures, and allow for more customized regional definitions for each ACO, but risk being dominated

by expenditures from a single ACO or group of ACOs, which could potentially reduce ACO benchmarks in clustered markets. We explained that we can guard against the potential bias from this effect by using a sufficiently large county-based population.

- Currently, we produce quarterly and annual reports for Shared Savings Program ACOs that include aggregate data on distribution of assigned beneficiary residence by county.

Consistent with this proposed definition of regional service area, we proposed to define regional costs as county FFS expenditures for the counties in which the ACO's assigned beneficiaries reside calculated using the methodology discussed in section II.A.2.e.2 of this final rule. We explained that use of county-level FFS data in calculating expenditures for an ACO's regional service area would permit ACOs to be viewed as being on the spectrum between traditional FFS Medicare and MA, a concept some commenters in response to the December 2014 proposed rule and stakeholders have urged CMS to articulate. Additionally, we noted that use of county FFS expenditure data, which are publicly available, would allow for increased transparency in ACO benchmark calculations and would ease ACOs' and stakeholders' access to data for use in modeling and predictive analyses.

These proposals were reflected in our proposed addition of a new definition of "ACO's regional service area" to § 425.20 and in a proposed new § 425.603 describing the calculations that would be used in resetting an ACO's historical benchmark for a second or subsequent agreement period. We sought comment on these proposals and on the alternatives for defining an ACO's regional service area, specifically use of CBSA, MSA, CSA or State/territory designations.

*Comment:* Many of the commenters addressing the regional definition favored the proposed use of counties of residence of an ACO's assigned beneficiaries as the geographic unit of measure in defining an ACO's regional service area. Commenters explaining their support for the proposal cited a variety of reasons, including: Counties provide a stable, clearly defined geographic unit; counties will be effective in capturing regional variation, and allow for greater customization of the ACO's regional definition; and use of county-level data will further align ACOs with MA and other CMS initiatives. Of the few comments on alternatives discussed in the proposed rule (CBSAs, MSAs, CSAs, HRRs, states/

territories), opinions tended to split for and against these approaches. A commenter pointed to the need for CMS to more consistently use the same geographic unit of measure for defining a region across its initiatives, preferring use of MSAs, which are also used by CMS in other payment systems and models. Several commenters raised alternatives not considered in the proposed rule. For instance, a commenter suggested CMS consider using a more sophisticated and granular methodology such as Primary Care Service Areas (PCSAs), pointing to consideration for use of this geographic unit in the Part B Drug Payment Model. Another commenter advised against using census regions.

*Response:* We are finalizing our proposal to define an ACO's regional service area by the counties of residence of the ACO's assigned beneficiary population. We continue to believe that using counties as the geographic unit of measure offers advantages over other approaches, as supported by some commenters. Counties tend to be stable geographic units. Use of counties in setting the ACO's regional service area more easily allows for the use of county FFS expenditures in calculating regional factors, an approach that will more closely align the Shared Savings Program methodology for incorporating regional FFS expenditures into ACO benchmarks with the MA rate-setting methodology. We have experience with use of county level data not only through MA but also previously with the PGP demonstration. In addition, we currently provide informational reports to Shared Savings Program ACOs that include aggregate data on distribution of assigned beneficiary residence by county. Given the short timeframe for implementing the changes in the benchmarking methodology described in this final rule, we believe this operational experience with use of county-level data within the Shared Savings Program will facilitate implementation of the revised methodology. We also believe that by using counties, rather than larger geographic units, we can more accurately reflect the geographic areas that the ACO serves. We decline at this time to use a different methodology to establish an ACO's regional service area, particularly alternatives that were not contemplated in the 2016 proposed rule, which may prove challenging to implement within a short period of time for the Shared Savings Program and without notice to ACOs and other stakeholders. We also recognize that CMS uses different geographic units of

measure across payment models, but continue to believe that use of counties, similar to the approach used in Medicare Advantage, is an appropriate methodology for the Shared Savings Program.

*FINAL ACTION:* We are finalizing our proposal to determine an ACO's regional service area by the counties of residence of the ACO's assigned beneficiary population. Furthermore, we are finalizing our proposal to define regional costs as county FFS expenditures for the counties in which the ACO's assigned beneficiaries reside calculated using the methodology discussed in greater detail in section II.A.2.e of this final rule. These final policies are reflected in the addition of a new definition of "ACO's regional service area" to § 425.20 and new § 425.603 describing the calculations that will be used in resetting an ACO's historical benchmark for a second or subsequent agreement period.

#### (2) Establishing the Beneficiary Population Used To Determine Expenditures for an ACO's Regional Service Area

In the 2016 proposed rule we explained that the population that is the basis for calculating regional FFS costs must be sufficiently large to produce statistically stable mean expenditure estimates (avoiding biases that result from small numbers), and must be representative of the demographic mix, health status and cost trends of the beneficiary population within the ACO's regional service area. Therefore, as discussed in section II.A.2.b.1 of this final rule, we proposed to define the ACO's regional service area to include any county where one or more of the ACO's assigned beneficiaries reside.

We also proposed to calculate county FFS expenditures using the expenditures for all assignable FFS beneficiaries (a subset of the broader FFS population) residing within the county, including ACO assigned beneficiaries. We stated that we believed that this approach would result in the most accurate and predictable regional expenditure factor for each ACO (81 FR 5831).

We detailed in a different section of the 2016 proposed rule proposals related to the definition of assignable FFS beneficiaries (81 FR 5843). (See also the discussion in section II.A.2.e of this final rule.) In discussing which expenditures should be included in these calculations, we explained that the overall FFS population includes beneficiaries who are not eligible for assignment to an ACO. Including expenditures for all FFS beneficiaries

would introduce bias into the calculation of the ACO's regional service area expenditures.

We also considered whether to include the ACO's assigned beneficiaries within the population used to determine expenditures for the ACO's regional service area. We concluded that attempting to identify regional FFS expenditures for only non-ACO beneficiaries (or customizing the calculation of regional FFS expenditures for each ACO by excluding its own beneficiaries) would add significant complexity and create potential bias. Furthermore, excluding the ACO's assigned beneficiaries from the population used to determine regional FFS expenditures may also produce biased results where an ACO tends to serve beneficiaries of a particular Medicare enrollment type, demographic or socio-economic status (for example, ACOs serving largely dual-eligible populations) and when an ACO tends to dominate (serve a large proportion of FFS beneficiaries) in a region.

We considered addressing the circumstance of ACOs that are dominant in their region, by expanding the scope of the ACO's region (for example, by including adjoining counties) to allow the ACO's regional service area to include a greater mix of beneficiaries who are not assigned to the ACO. However, we explained our belief that this approach may be challenging to apply consistently and accurately given the potential for variation of populations across and within regional areas, and would be a potentially cumbersome policy to maintain as ACOs continue to develop across the country. Therefore, we indicated we would monitor for cases where an ACO tends to serve a large proportion of FFS beneficiaries in its region, and consider the effect of these circumstances on ACO benchmarks. If warranted, we would explore developing adjustments to the definition of an ACO's regional service area to account for this circumstance in future rulemaking.

Further, we proposed to weight an ACO's regional expenditures relative to the proportion of its assigned beneficiaries in each county, determined by the number of the ACO's assigned beneficiaries residing in the county in relation to the ACO's total number of assigned beneficiaries. We explained that absent this weighting, we could overstate or understate the influence of the expenditures for a county where relatively few or many of an ACO's assigned beneficiaries reside.

These proposals on the calculation of county FFS expenditures and regional FFS expenditures were reflected in the

proposed new § 425.603. We sought comment on alternatives to the proposal to use assignable beneficiaries, including beneficiaries assigned to the ACO, in establishing the expenditures for an ACO's regional service area, such as using all Medicare FFS beneficiaries in determining these expenditures.

*Comment:* While some commenters expressed support for the proposal to include any county in which at least one assigned beneficiary resides in an ACO's regional service area, many other commenters opposed this proposal. Some commenters questioned whether including data from counties with small numbers of assigned beneficiaries sufficiently improves the accuracy of the benchmark to justify the added complexity and administrative burden. The most commonly suggested alternative was to specify a higher threshold for the minimum number of assigned beneficiaries residing in a county included in the ACO's regional service area. For instance, commenters suggested we include in the definition of the ACO's regional service area counties where at least 1 percent of an ACO's assigned beneficiaries reside. Commenters also pointed out that publicly available ACO assignment data files (made available to support modeling of the proposed policies) as well as the PGP Demonstration methodology, omitted counties with less than 1 percent of ACO assigned beneficiaries.

*Response:* We are finalizing our proposal to include in the definition of an ACO's regional service area any county where one or more beneficiaries assigned to the ACO reside. We continue to believe this approach is necessary to accurately reflect the diversity of the ACO's assigned beneficiary population and to provide a complete picture of the ACO's regional service area. Based on our initial modeling of this policy using preliminary assignment data for 433 ACOs participating in the program for performance year 2016, we observed that ACOs have on average about 7 percent of their assigned beneficiaries residing in counties in which less than 1 percent of the ACO's total assigned beneficiary population resides. In this analysis, we observed a median of approximately 6 percent of assigned beneficiaries residing in counties where less than 1 percent of the ACO's total assigned beneficiary population resides, a minimum of approximately 2 percent, and a maximum of approximately 44 percent. We also observed that for nearly 20 percent of these ACOs (78 of the 433) more than 10 percent of the ACO's assigned beneficiaries were

dispersed across counties in which less than 1 percent of the ACO's total assigned beneficiary population resides. Applying a threshold for including counties within the ACO's regional service area would likely affect ACOs differently depending on the size of the ACO's assigned beneficiary population residing in counties below the threshold because the remaining counties would need to be weighted proportionately higher, which could have a significant impact on the calculation of regional expenditures for an ACO. Further, we believe our approach to weighting county FFS expenditures, described later in this section of this final rule, will result in counties with very few assigned beneficiaries having a proportionately small effect on the expenditures for the ACO's regional service area.

*Comment:* The vast majority of commenters discussing the proposal to base regional FFS expenditures on assignable beneficiaries (instead of all FFS beneficiaries), favored an approach that would exclude from these calculations beneficiaries who would not meet the requirements for being assigned (such as non-utilizers of primary care services). A commenter expressed support for use of all Medicare beneficiaries from a particular region, instead of only assignable beneficiaries, in calculating regional expenditures. This commenter indicated that including expenditures for all Medicare FFS beneficiaries in these calculations accounts for beneficiaries seeking care within and outside the ACO, addresses concerns about smaller populations biasing the calculation, and is in line with other CMS initiatives that use calculations based on the entire Medicare population.

While some commenters favored the proposed inclusion of ACO assigned beneficiaries in the regional expenditure calculations, many opposed this proposal. Those opposed usually suggested that CMS exclude from these calculations either the ACO's assigned beneficiaries or all beneficiaries assigned to participants in any CMS ACO initiative (Shared Savings Program, Pioneer ACO Model, Next Generation ACO Model) or more broadly to participants in any alternative payment model. Commenters expressed concerns that including ACO beneficiaries' expenditures would skew regional expenditure calculations by reflecting ACOs' efforts to coordinate care and reduce expenditures for their assigned populations. Commenters indicated these concerns were more pronounced for ACOs that have significant market saturation, for

example, in cases where an ACO is dominant in its market, or where many ACOs have formed within the same market (referred to as “ACO-heavy” regions). A commenter expressed a concern which was also reflected in other comments, that this would create another dynamic where an ACO must compete against its own historical performance. Another commenter noted that inclusion of an ACO’s assigned population in a comparison group would be unusual in a commercial ACO contract.

Among the commenters expressing support for the inclusion of the ACO’s assigned beneficiaries in expenditure calculations for the ACO’s regional service area, some indicated that the approach would protect both ACOs and the Trust Funds. A commenter explained this approach would reduce the impact of the regional adjustment impact, particularly in less densely populated areas, but did not detail the reason for this belief. Another commenter specified that if ACOs are successful in limiting growth of expenditures, then including their beneficiaries in calculations of county FFS spending would serve to control the growth in calculated regional FFS spending, and ultimately allow the Medicare program to capture further savings as ACOs’ benchmarks move toward the regional average. Several commenters explained that removing the ACO’s assigned beneficiaries from the population used to determine regional FFS expenditures could bias results, but did not explain the nature of this potential bias. A commenter expressed concern that excluding the ACO’s assigned beneficiaries from the population used to determine regional FFS expenditures could effectively penalize ACOs for caring for the sickest patients, particularly if these ACOs are dominant in their markets. Some commenters also urged CMS to consider whether the proposed use of assignable beneficiaries in regional benchmark calculations could disadvantage rural ACOs, by showing artificially lower utilization rates in rural communities.

*Response:* We are finalizing as proposed the policy to include the expenditures for all assignable FFS beneficiaries (including ACO assigned beneficiaries) residing in the counties that make up the ACO’s regional service area in calculating county FFS expenditures.

We discuss in detail, in section II.A.2.e.3 of this final rule, the definition of assignable beneficiaries. Some commenters seemed to misunderstand the scope of beneficiaries included within the assignable population

(perceiving it as a broader population than the population currently used to calculate factors based on national FFS expenditures). To clarify, assignable FFS beneficiaries are a subset of the broader FFS population (see 81 FR 5843). The assignable beneficiary population, as defined in this final rule, would include any beneficiary receiving a primary care service from a primary care physician or from a physician with one of the primary specialty designations included in § 425.402(c). This primary care service must be one that is billed for under traditional FFS Medicare with a date of service during the 12-month assignment window as defined under § 425.20.

For the reasons discussed in the proposed rule, and as summarized previously in this section of the final rule, we continue to believe that including the ACO’s assigned beneficiaries within the assignable population used to calculate county FFS expenditures for the ACO’s regional service area will reduce the chance of bias in the calculations, particularly in the case of ACOs serving higher cost beneficiaries within the region. We believe that including the ACO’s assigned beneficiaries among the population used to calculate risk adjusted county level expenditures (applying full CMS–HCC risk adjustment, as discussed in section II.A.2.e.2 of this final rule) is critical to ensuring regional expenditures accurately reflect the cost and acuity of beneficiaries in the ACO’s region. Additionally, we have significant operational concerns with commenters’ suggestions that CMS remove each ACO’s assigned beneficiaries from the ACO’s regional service area. This approach would entail calculating county rates tailored for each ACO for each benchmark and performance year, as opposed to the proposed approach of calculating county rates program-wide and determining on an ACO-specific basis which county expenditures to use and how to weight these expenditures. We are deeply concerned that this alternative approach would not be transparent because of the highly individualized nature of the exclusions that would be required for each ACO’s county FFS expenditure calculations. In addition, we believe determining ACO-specific county-level FFS expenditures would be time intensive given the complexity of these calculations, and prevent timely provision of program reports based on these data to ACOs.

Furthermore, we continue to believe that the approach to determining county FFS expenditures based on assignable Medicare beneficiaries (as opposed to

all Medicare beneficiaries) may avoid bias in these calculations, including biases that may be more pronounced in certain geographic regions as a result of healthcare patterns and population demographics. In the 2016 proposed rule, we explained our belief that including expenditures for all FFS beneficiaries would introduce bias into the calculations of the ACO’s regional service area expenditures. We explained that regional FFS expenditures, which are calculated based on relatively smaller populations than the national FFS population currently used in benchmark calculations based on national FFS expenditures, may be more susceptible to the influence of this bias. For example, in counties where the health status of the overall beneficiary population leads more beneficiaries to be non-utilizers of services, a bias in the direction of relatively lower regional expenditures may be more pronounced. On the other hand, a bias in the direction of relatively higher regional expenditures may be more pronounced in counties where there are established patterns of accessing primary care services through specialists who are not the basis for assignment. We also noted that ultimately, such differences could factor more prominently in certain counties that are used to compute an ACO’s regional service area expenditures (see 81 FR 5830 and 5831). Thus, using only assignable beneficiaries in expenditure calculations avoids biases that could result from including non-utilizers, among other factors, and that would be present in calculations based on the larger Medicare FFS population.

*Comment:* Commenters concerned about the situation of ACOs that have a regional service area population that is too small (particularly as a result of excluding ACO assigned beneficiaries) suggested alternatives for expanding the ACO’s regional service area and encouraged CMS to adopt such an approach in the final rule (as opposed to monitoring the issue). Most commonly, commenters suggested including adjacent counties in the ACO’s regional definition (for example, citing the approach used in the Pioneer ACO model, or describing details of an alternative approach), as well as increasing the number of years of data included in the calculations (for example, using a 5-year rolling average for county-level spending estimates, along the lines of the approach used by MA). Some commenters suggested increasing the weight given to the counties that have a lower proportion of ACO assigned beneficiaries in relation

to the population of Medicare FFS beneficiaries. However, a commenter acknowledged that any methodology for expanding the scope of an ACO's region would be both cumbersome and challenging to apply consistently.

*Response:* We appreciate commenters' suggestions for alternative approaches to defining the ACO's regional service area. In section II.A.2.e.2 of this final rule, we address commenters' suggestions to use additional years of data to calculate county FFS expenditures. We decline at this time to adopt alternatives suggested by commenters for expanding the ACO's regional service area population, particularly in relation to requests to exclude ACO assigned beneficiaries from the assignable population. We do not believe these adjustments are necessary under the methodology we are finalizing for determining the ACO's regional service area using the assignable FFS beneficiary population, including ACO assigned beneficiaries. As we implement the revised rebasing methodology established with this final rule, we will consider the impact of including ACO assigned beneficiaries within the population used to calculate the regional FFS expenditures, including the potential for bias in regional FFS expenditure calculations for ACOs that are dominant in their regions and ACO-heavy regions. In the event we determine that any changes to are necessary to address these issues, we will address them in future rulemaking.

*Comment:* Although not discussed in the proposed rule, a few commenters made suggestions to include or exclude MA beneficiaries in the population used to determine expenditures for the ACO's regional service area.

*Response:* As an initial matter, we wish to clarify the following: (1) The assignable population under this final rule could include beneficiaries who are enrolled in MA during part of the 12-month assignment-window; and (2) the assignable population excludes beneficiaries who have no primary care services billed under traditional FFS Medicare and thus do not meet the definition of an "assignable beneficiary" under this final rule, such as beneficiaries who received services only through a MA plan for the entirety of the 12-month assignment window. Underlying our proposal to use assignable beneficiaries in calculating regional and national FFS expenditures was our intent to ensure these calculations were based on beneficiaries that have some chance of being assigned to the ACO. Accordingly, we decline at this time to include in regional FFS expenditure calculations beneficiaries

who have only received services through a MA plan during the 12-month assignment window used to determine assignable beneficiaries and who could not be eligible to be assigned to an ACO. However, we wish to clarify that some beneficiaries who meet the definition of "assignable beneficiary" adopted in this final rule will ultimately be excluded from assignment to an ACO for purposes of determining the ACO's benchmark or performance year expenditures because they fail to meet the assignment criteria specified under § 425.401(a).

*Comment:* Almost all commenters discussing the proposal to weight expenditures by the proportion of the ACO's assigned beneficiaries in each county supported the proposed approach. Commenters underscored the importance of this weighting for accurately reflecting expenditure levels in the ACO's market in regional calculations. Absent this weighting, CMS could over or understate the influence of expenditures for a county. A commenter indicated that the need to perform this weighting illustrated the inaccuracies and lack of precision with using county-level data, and recommended the use of an alternative methodology to define the ACO's regional service area (such as CBSAs, MSAs, and CSAs). Some commenters requested clarification of what the proposed methodology for establishing an ACO's regional service area would mean for ACOs that use a model of geographically distant providers to aggregate to the required minimum number of 5,000 assigned beneficiaries.

*Response:* We are finalizing as proposed the policy of weighting an ACO's regional expenditures relative to the proportion of its assigned beneficiaries in each county, determined by the number of the ACO's assigned beneficiaries residing in the county in relation to the ACO's total number of assigned beneficiaries. For the reasons discussed in the proposed rule and raised by commenters who supported this approach, we believe that weighting county-level FFS expenditures by the proportion of assigned beneficiaries in each county will accurately reflect expenditure levels in the ACO's market in regional FFS expenditure calculations.

We also note that the need to weight the expenditures is not necessarily specific to the choice of counties as the geographic unit in the regional definition. Some approach to weighting would be necessary in any methodology for calculating expenditures for an ACO's regional service area, since ACOs often serve beneficiaries in multiple counties within a state or across several

states as discussed in the 2016 proposed rule (81 FR 5831). As a result, we disagree with the comment indicating that use of weighting in a methodology for calculating regional FFS expenditures is somehow indicative of a lack of precision with using county-level data.

Further, in response to the request for clarification on the application of the weighting methodology to smaller ACOs with geographically dispersed ACO participants, we note that the methodology for determining an ACO's regional service area and calculating regional FFS expenditures will be applied consistently across ACOs, regardless of ACO size, composition, or geographic location.

We did not receive comments specifically addressing how county-level FFS expenditures should be weighted for purposes of determining regional FFS expenditures for the ACO's regional service area. In the proposed rule, we outlined an approach in the proposed § 425.603(f). However, following further consideration of this issue, we now believe that the proposed provision should be revised to more clearly reflect our intended approach. We wish to clarify that when determining expenditures for an ACO's regional service area, we intend to calculate each county's expenditures by enrollment type, and to weight these expenditures by the ACO's proportion of assigned beneficiaries in the county for the applicable enrollment type. We will then aggregate these values, across counties within the ACO's regional service area, for each population by Medicare enrollment type. This will result in a separate value for each of the four populations identified by Medicare enrollment type, representing county-weighted regional FFS expenditures for that Medicare enrollment type. We will apply to each of these aggregate expenditure values (specific to a Medicare enrollment type) a weight reflecting the ACO's overall proportion of assigned beneficiaries in that Medicare enrollment type, as determined in relation to its entire assigned population for the relevant benchmark or performance year in order to determine the ACO's risk adjusted regional expenditures for that enrollment type. We are making clarifying revisions to the provision at § 425.603(f) to reflect this approach.

*FINAL ACTION:* We are finalizing our proposal to define the ACO's regional service area to include any county where one or more assigned beneficiaries reside, and to reflect this policy through the addition of a new definition of "ACO's regional service

area” to § 425.20. We are finalizing several proposals, among others described elsewhere in this final rule, on the calculation of county FFS expenditures and an ACO’s regional FFS expenditures as reflected in new § 425.603 to: (1) Include expenditures for all assignable FFS beneficiaries (including ACO assigned beneficiaries) residing within the county to calculate the county’s FFS expenditures; and (2) weight an ACO’s regional expenditures relative to the ACO’s proportion of its assigned beneficiaries in each county, determined by the number of the ACO’s assigned beneficiaries residing in the county in relation to the ACO’s total number of assigned beneficiaries. As discussed in this section of this final rule, we are making revisions to § 425.603(f) to clarify the weighting of county-level expenditures by the ACO’s proportion of beneficiaries by Medicare enrollment type (ESRD, disabled, aged/dual eligible, aged/non-dual eligible) in each county for purposes of determining the ACO’s regional expenditures. We will monitor the effects of this methodology on calculations of regional FFS expenditures, particularly for bias in the calculations among ACOs that are dominant in their regions, as well as in ACO-heavy regions, and will address any necessary adjustments to this methodology through future rulemaking.

#### c. Applying Regional Expenditures to the ACO’s Rebased Benchmark

##### (1) Background

In the 2016 proposed rule (81 FR 5832), we summarized our discussion of benchmark alternatives in recent rulemaking, indicating there is an array of options for incorporating regional expenditures in ACO benchmarks. We explained our agreement with commenters on the previous rulemaking regarding the benefits of incorporating regional expenditures in rebased benchmarks, and indicated our interest in moving to an alternative rebasing approach that builds on the program’s existing benchmarking methodology established under the authority of section 1899(d)(1)(B)(ii) of the Act and codified in the Shared Savings Program regulations at § 425.602.

As we stated in the proposed rule, over 400 ACOs have voluntarily entered the Shared Savings Program under the financial models (Track 1 and Track 2) established in the November 2011 final rule and as modified by the June 2015 final rule (adding a choice of Track 3 for agreement periods beginning January 1, 2016). Furthermore, 147 ACOs with 2012 and 2013 agreement start dates

elect to continue their participation in the program for a second 3-year agreement period effective January 1, 2016, to which the current rebasing methodology, finalized in the June 2015 final rule applies. We explained that the value proposition of the program’s financial models, which is largely determined by the methodology used to establish ACO benchmarks, is an important consideration for organizations deciding whether to engage (or continue to engage) in this new approach to the delivery of health care. Therefore, in considering how to incorporate regional expenditures into the benchmarking methodology, we expressed our belief that building from the existing benchmarking methodology will help maintain the stability of the program and ultimately result in revised policies that are more easily understood by ACOs and program stakeholders, and more readily implemented by CMS.

Principally, we considered using the Secretary’s discretion under section 1899(d)(1)(B)(ii) of the Act to adjust the historical benchmark by “such other factors as the Secretary determines appropriate” in order to incorporate regional FFS expenditures into the rebased historical benchmark. In the 2016 proposed rule (81 FR 5832 through 5836), we discussed two approaches to calculating an adjustment to an ACO’s rebased historical benchmark to account for regional FFS expenditures for the ACO’s regional service area, and described how the adjustment would be applied to the rebased historical benchmark.

We discussed our belief that although the plain language of section 1899(d)(1)(B)(ii) of the Act demonstrates Congress’ intent that the benchmark established for a Shared Savings Program ACO would reflect the ACO’s historical expenditures in the 3 most recent years prior to the start of the ACO’s agreement period, Congress also recognized that this historical benchmark should be adjusted “for beneficiary characteristics and such other factors as the Secretary determines appropriate.” Therefore, to the extent an ACO’s rebased benchmark continues to be based on the ACO’s historical expenditures in the 3 years preceding the start of the new agreement period, we expressed our belief that adjusting those historical expenditures to account for regional FFS expenditures for the ACO’s regional service area falls within the Secretary’s discretion to make adjustments to the historical benchmark for “other factors” under section 1899(d)(1)(B)(ii) of the Act.

We explained that we currently make several adjustments to an ACO’s

historical benchmark under the Secretary’s discretion under section 1899(d)(1)(B)(ii) of the Act, including to: (1) Adjust benchmark year expenditures to exclude IME and DSH payments (§ 425.602(a)(1)(i)); (2) adjust the historical benchmark for the addition and removal of ACO participants (§ 425.602(a)(8)); (3) adjust the rebased historical benchmark to account for the average per capita amount of savings generated during the ACO’s previous agreement period (§ 425.602(c)(2)(ii)); and (4) adjust the historical benchmark for changes in demographics and health status of the ACO’s performance year assigned beneficiary population (§§ 425.604(a)(1) through (3), 425.606(a)(1) through (3), 425.610(a)(1) through (3)). We expressed our belief that it is appropriate to further adjust ACO historical benchmarks to reflect FFS expenditures in the ACO’s regional service area. Furthermore, in relation to the use of regional FFS expenditures in developing the ACO’s rebased benchmark, we explained our belief that it is appropriate to forgo making an additional adjustment to account for savings generated by the ACO in its prior agreement period (81 FR 5832).

##### (2) Adjusting the Reset ACO Historical Benchmark To Reflect Regional FFS Expenditures

In the 2016 proposed rule we described two options for calculating the regional FFS adjustment and the ACO’s rebased historical benchmark. The first option would be to calculate a regional adjustment based on a regionally-trended version of the ACO’s prior historical benchmark. The second option would be based on a regional average determined using county FFS expenditures (81 FR 5832 and 5833). We proposed to adopt the second option.

Specifically, we proposed to calculate the ACO’s rebased historical benchmark using the current rebasing methodology established in the June 2015 final rule under which an ACO’s rebased benchmark is calculated based on the 3 years prior to the start of its current agreement period. Consistent with the current policy we would equally weight the 3 benchmark years. However, in trending forward benchmark year (BY) 1 and BY2 expenditures to BY3 dollars, we proposed to use regional growth rates (instead of national growth rates) for Parts A and B FFS expenditures (81 FR 5833 and 5838).

Furthermore, in calculating the ACO’s rebased historical benchmark, we proposed not to apply the current adjustment to account for savings generated by the ACO under its prior agreement period. We explained our

observation that for ACOs generating savings, a rebasing methodology that accounts for regional FFS expenditures would generally leave a similar or slightly greater share of measured savings in an ACO's rebased benchmark for its ensuing agreement period. By contrast, for ACOs generating losses, a rebasing methodology that accounts for regional FFS expenditures would tend to carry forward a significant portion of measured losses into their rebased benchmarks and push benchmarks lower than the current rebasing policy. We expressed our belief that in transitioning to a benchmark rebasing methodology that incorporates an adjustment for regional FFS expenditures, it is important to forgo the current adjustment to account for shared savings generated by the ACO under its prior agreement period.

We proposed to calculate the regional FFS adjustment to the ACO's rebased historical benchmark based on a regional average determined using county FFS expenditures. The calculation of regional average expenditures would generally involve the following key steps:

- Calculate risk adjusted regional per capita FFS expenditures using county level Parts A and B expenditures for the ACO's regional service area for each Medicare enrollment type (ESRD, disabled, aged/dual eligible, aged/non-dual eligible); weighted based on the proportion of ACO assigned beneficiaries residing in each county for the most recent benchmark year. We also proposed a risk adjustment approach that would be used in these calculations to adjust for differences in health status between an ACO and its regional service area (81 FR 5846 through 5848; and as discussed in detail elsewhere within this section of this final rule).

- Weight the resulting regional expenditures by the proportion of assigned beneficiaries for the most recent benchmark year for each Medicare enrollment type (ESRD, disabled, aged/dual eligible, aged/non-dual eligible).

We described in detail and sought comment on the alternative option, under which we would calculate the regional FFS adjustment based on a regionally-trended version of the ACO's prior historical benchmark (81 FR 5833). In comparing the features of the two options, we expressed our belief that using regional average expenditures offered a preferred approach. While we believed both options would avoid penalizing ACOs that improve their spending relative to that of their region, the approach of using regional average

expenditures would not depend on older historical data in calculations as would be required under the alternative involving calculation of a regionally-trended amount. In general, from an operational standpoint, we anticipated that using a regional average as part of calculating regional FFS expenditures for an ACO's regional service area would be easier for ACOs and other stakeholders to understand as well as for us to implement in comparison to the alternative considered, and would more closely align with the MA ratesetting methodology.

We also considered how the adjustment based on regional FFS expenditures should be applied to the ACO's rebased historical benchmark. Our preferred approach was to use the following steps to adjust the ACO's rebased historical benchmark:

- Calculations of the ACO's rebased historical benchmark and regional average expenditures, as described previously in this section of the final rule, would result in average per capita values of expenditures for each Medicare enrollment type (ESRD, disabled, aged/dual eligible, aged/non-dual eligible).

- For each Medicare enrollment type (ESRD, disabled, aged/dual eligible, aged/non-dual eligible) we would determine the difference between the average per capita regional amount and the average per capita amount of the ACO's rebased historical benchmark. These values may be positive or negative. For example, for a particular Medicare enrollment type, if the value of the ACO's rebased historical benchmark is greater than the regional average amount, the difference between these values will be expressed as a negative number.

- Multiply the resulting difference, for each Medicare enrollment type by a percentage determined for the relevant agreement period. The value of this percentage is described in detail later in this section of the final rule. The products (one for each Medicare enrollment type) resulting from this step are the amounts of the regional adjustments that will be applied to the ACO's historical benchmark.

- Apply the adjustment to the ACO's rebased historical benchmark by adding the adjustment amount for the Medicare enrollment type to the truncated, trended and risk adjusted average per capita value of the ACO's rebased historical benchmark for the same Medicare enrollment type.

- Multiply the adjusted value of the ACO's rebased historical benchmark for each Medicare enrollment type by the proportion of the ACO's assigned

beneficiary population for that Medicare enrollment type, based on the ACO's assigned beneficiary population for benchmark year 3 of the rebased historical benchmark.

- Sum expenditures across the four Medicare enrollment types to determine the ACO's adjusted rebased historical benchmark.

In a separate section of the 2016 proposed rule, we considered issues related to risk adjustment when using regional expenditures in resetting ACO benchmarks, including considerations raised in prior rulemaking (see 81 FR 5846 through 5848). We discussed our concern that using CMS-HCC risk scores for an ACO's assigned beneficiary population in resetting the ACO's benchmark has the potential to benefit ACOs that have systematically engaged in coding initiatives during their prior agreement period. We explained that this effect would have been limited in the corresponding performance years due to the application of our current approach to risk adjusting during the agreement period according to the ACO's newly and continuously assigned beneficiary populations. We noted that initial financial performance results (for the performance years ending December 31, 2013 and 2014) do not show strong evidence that concerns about systematic coding practices by ACOs have materialized, but complete data are not yet available to analyze the effect of coding initiatives in the initial rebasing of ACO benchmarks, as initial program entrants (ACOs with 2012 and 2013 agreement start dates) only began their second agreement periods on January 1, 2016.

To balance our concerns regarding ACO coding practices with the recommendations of commenters received through earlier rulemaking, we proposed to risk adjust to account for the health status of the ACO's assigned population in relation to FFS beneficiaries in the ACO's regional service area as part of the methodology for determining the adjustment to the ACO's rebased historical benchmark to reflect regional FFS expenditures, and indicated we would rigorously monitor for the impact of coding initiatives on ACO benchmarks and make necessary refinements to the program's risk adjustment methodology through future rulemaking if program results show adverse impacts due to increased coding intensity. We outlined the methodology of the proposed risk adjustment approach. We indicated that we would compute for each Medicare enrollment type a measure of risk-adjusted regional expenditures that would account for the differences between the average CMS—

HCC risk scores of the ACO's assigned beneficiaries and the average CMS-HCC risk scores in the ACO's regional service area. This adjustment would also capture differences in patient mix between the ACO's assigned population and the FFS population in the ACO's regional service area. We noted our belief that this combined approach (risk adjustment in combination with monitoring for coding intensity) was reasonable given the lack of strong evidence to date that ACOs are engaging in more intensive coding practices and given a number of factors, described in the 2016 proposed rule (81 FR 5847 through 5848), that we believe would mitigate the potential impact of coding intensity on ACO financial calculations. We noted that the proposed approach would not apply in the calculation of benchmarks for ACOs in their first agreement period or in the second agreement period for ACOs that started the program in 2012 and 2013 and started a new agreement period on January 1, 2016. We also noted that for all ACOs we would continue to use the current methodology to adjust the ACO's benchmark annually to account for the health status and demographic factors of the ACO's performance year assigned beneficiaries (according to the newly and continuously assigned populations).

We sought comment on this proposed approach and on the alternatives considered that might be employed in the future to limit the impacts of intensive coding while still accounting for changes in health status within an ACO's assigned beneficiary population, including: (1) Applying the methodology currently used to adjust the ACO's benchmark annually to account for the health status and demographic factors of the ACO's performance year assigned beneficiaries (according to newly and continuously assigned populations) when rebasing the ACO's historical benchmark; or (2) developing a coding intensity adjustment by looking at risk score changes over time for beneficiaries assigned to the ACO for at least two consecutive years, as well as in each respective diagnosis collection year (similar to the population referred to as stayers under the MA methodology) relative to the greater FFS population.

In another section of the 2016 proposed rule, we proposed program-wide changes to the methodology used to adjust the ACO's benchmark for changes in ACO participant (TIN) composition (81 FR 5850 and 5851). In that discussion, we proposed to redetermine the regional FFS adjustment to account for changes to the

ACO's certified ACO Participant List. Specifically, we would redetermine the ACO's regional service area during the reference year (benchmark year 3 (BY3)) based on the residence of the ACO's assigned beneficiaries for the reference year determined using the new ACO Participant List. We would also use this assigned population to determine the ACO's proportion of beneficiaries by Medicare enrollment type (ESRD, disabled, aged/dual eligible, aged/non-dual eligible) to be used in calculating the regional adjustment. We would then redetermine the regional FFS adjustment to the ACO's rebased historical benchmark, based on regional average expenditures for the ACO's updated regional service area. In redetermining the regional FFS adjustment, we would also adjust for differences between the health status of the ACO's assigned beneficiaries determined using the new ACO Participant List and the population of assignable beneficiaries in the ACO's regional service area based on the reference year (BY3). Although we will discuss our proposed revisions to the methodology for adjusting benchmarks to account for changes in ACO participant composition in more detail in section II.B of this final rule, we believe it is appropriate to address the issue of redetermining the regional FFS adjustment based on changes in the ACO's participant composition in this section of this final rule.

Consistent with our proposal to incorporate an adjustment for regional expenditures into an ACO's rebased benchmark, we proposed to revise § 425.602 in order to limit the scope of the provision to establishing, adjusting, and updating the benchmark for an ACO's first agreement period. We proposed to explain how the benchmark would be reset for a subsequent agreement period, including the methodology for adjusting an ACO's rebased historical benchmark to reflect FFS expenditures in the ACO's regional service area in the ACO's second or subsequent agreement period starting on or after January 1, 2017, in a new provision of the Shared Savings Program regulations at § 425.603. We also proposed to include the risk adjustment approach to account for differences in health status between the ACO's assigned beneficiary population and the broader FFS population in the ACO's regional service area in the revised benchmark rebasing methodology under § 425.603. In addition, we proposed to specify in the new provision at § 425.603 that CMS will redetermine the regional

adjustment amount annually based on the ACO's assigned beneficiaries for BY3 determined using the most recent certified ACO Participant List for the relevant performance year.

Furthermore, we proposed to make conforming and clarifying revisions to the provisions of § 425.602, including to: Revise the title of the section; remove paragraph (c) and incorporate this paragraph in the new § 425.603; and add a paragraph that describes the adjustments made to the ACO's historical benchmark during an ACO's first agreement period to account for changes in severity and case mix for newly and continuously assigned beneficiaries as presently specified under § 425.604, § 425.606, and § 425.610. We also proposed to specify in § 425.20 that the acronym "BY" stands for benchmark year.

We sought comments on our proposals for incorporating regional expenditures into rebased ACO benchmarks and on the alternative approach of using a regionally-trended amount developed from the ACO's historical benchmark for a prior agreement period instead of regional average expenditures to adjust the ACO's rebased historical benchmark. In particular, we welcomed comments on the design of the approaches for calculating the regional adjustment to the ACO's rebased historical benchmark described in the 2016 proposed rule, as well as any concerns about implementing the regional adjustment.

*Comment:* A few commenters supported the proposal to eliminate the adjustment to the ACO's historical benchmark for savings achieved by the ACO in the previous agreement period. However, most commenters strongly opposed the proposal to discontinue the current adjustment to the ACO's rebased benchmark for savings generated in the prior agreement period. Commenters explained that eliminating the adjustment makes it harder for ACOs that have successfully met the goals of the program in a prior agreement period to achieve future savings. These commenters were critical of CMS' explanation that incorporating regional expenditures sufficiently offsets the loss of the adjustment for savings in the prior agreement period. Some commenters specified that removing the adjustment would undermine the sustainability of the program, citing concerns including the following:

- Further reducing benchmarks for ACOs with higher historical costs compared to their region that would be negatively affected by the introduction of a regional adjustment. Several commenters suggested that retaining the

adjustment could have the effect of more gradually lowering the rebased benchmarks for ACOs harmed by the integration of regional expenditures over subsequent agreement periods.

- Discouraging successful ACOs from remaining in the program as they face increasingly lower benchmarks and diminishing returns, with a commenter indicating that the current adjustment helps the many existing ACOs that have generated savings but not been eligible to share in those savings.

- The need to provide further incentives to retain ACOs with comparatively lower historical spending compared to their regions.

Some commenters pointed to CMS' rationale for the adjustment specified in earlier rulemaking as reason to retain it.<sup>1</sup> Several commenters pointed to the need to allow for additional time to evaluate the effects of the adjustment, which was applicable beginning in 2016, before changing the policy. Some commenters urged CMS to evaluate the rationale for accounting for savings in a prior agreement period separately from its consideration of incorporating regional cost data into benchmarks, believing these to be distinct issues that have distinguishable effects on ACOs. A commenter, urged that the adjustment be retained, pointing to the need for alignment between federal and state value based payment programs, citing as an example a state of New York initiative that has committed to including shared savings (or losses) when calculating its program benchmarks.

Many commenters favored CMS maintaining the current adjustment. Some commenters made suggestions, creating opposing alternatives, for CMS broadening or narrowing the amount of the adjustment. Although not discussed in the proposed rule, several

commenters suggested incrementally lowering the adjustment amount over time. For example, a commenter suggested adding a percentage of prior savings that would be reduced in relation to the proposed phase-in to a higher weight in calculating the regional adjustment. A commenter, anticipating that ACOs in efficient, low-cost areas will be harmed by the proposed transition to benchmarks reflecting regional expenditures, encouraged CMS to abandon the proposed benchmark rebasing changes, including the removal of the adjustment for prior savings and the proposed regional FFS adjustment to the ACO's rebased benchmark, and recommended CMS continue to explore alternative methodologies for rebasing ACO benchmarks.

Some comments regarding the adjustment for savings generated in a prior agreement period seemed to reflect commenters' misunderstanding of the methodology for calculating the adjustment described in the June 2015 final rule (see 80 FR 32788 through 32791). For example, some commenters incorrectly described the methodology as based on savings earned (indicating only the amount of shared savings payments to eligible ACOs) as opposed to savings generated (accounting for savings by ACOs that may have lowered expenditures, but not by enough to earn a shared savings payment). A commenter stated that the current adjustment accounts for half of the savings achieved by the ACO. However, the adjustment takes into account the ACO's final sharing rate, which depends on the ACO's track as well as its quality performance.

*Response:* We believe our intent to propose eliminating the adjustment for prior savings was made clear in the discussion in the June 2015 final rule of moving to a rebasing approach that accounts for regional FFS costs and trends. In outlining our preferred methodology, we specified we would calculate the ACO's rebased historical benchmark—based on the 3 most recent years prior to the start of the ACO's new agreement period—including equally weighting these benchmark years but excluding the addition of a portion of savings generated over the same 3 most recent years (80 FR 32796). We also specified that in a future rule we would put forward details on a revised rebasing approach that would address, among other issues, how the revised benchmark rebasing methodology using ACO and regional cost trends fits in with the existing approach for establishing the ACO's historical benchmark for its first agreement period and the modifications to the rebasing

methodology finalized in the June 2015 final rule. We also indicated that we would consider whether additional adjustment would be needed to transition ACOs to the revised benchmark rebasing methodology when they have been previously rebased under the methodology established with the June 2015 final rule (80 FR 32796).

We continue to believe that for ACOs generating savings, a rebasing methodology that accounts for regional FFS expenditures would generally leave a similar or slightly greater share of measured savings in an ACO's rebased benchmark for its ensuing agreement period. We disagree with comments suggesting that we either maintain the current adjustment without modification or broaden the scope of the adjustment for savings generated in the ACO's prior agreement period to make it more generous. We believe that as a result, benchmarks could become overly inflated for some ACOs (particularly those benefiting from the regional FFS adjustment) to the point where ACOs would need to do little to maintain or change their care practices to generate savings. Further, continued application of the current adjustment for savings generated in an ACO's prior agreement period, without modification, further ties an ACO's historical benchmark to its past performance, rather than making an ACO's benchmark more reflective of FFS spending in its region, an important aim of the revisions to the rebasing methodology in this final rule.

Therefore, as proposed, we will apply the revised rebasing methodology in the new regulation at § 425.603 to reset an ACO's historical benchmark for a second or subsequent agreement period beginning in 2017 and subsequent years, and will not include an adjustment for savings generated in the ACO's prior agreement period.

*Comment:* Most commenters discussing the regional adjustment to the ACO's rebased historical benchmark favored the proposed use of regional average expenditures in the calculation. Some commenters cited reasons for preferring the proposed approach instead of the alternative considered in the proposed rule, under which we would calculate the regional FFS adjustment using a regionally-trended amount based on an ACO's historical benchmark from a prior agreement period, including that the use of regional averages more closely aligns with the MA rate-setting methodology and would not depend on older historical data. A commenter explained that the reliance on older historical data under the regionally-trended approach would decrease the attainability and

<sup>1</sup> For example, in the June 2015 final rule we explained our belief that the adjustment for savings generated in the ACO's prior agreement period is important for encouraging ongoing program participation by ACOs that were successful in achieving the three-part aim in their first agreement, by lowering expenditures and improving both the quality of care provided to Medicare FFS beneficiaries and the overall health of those beneficiaries. Absent this adjustment, an ACO that previously achieved success in the program may elect to terminate its participation in the program rather than face a lower benchmark that reflects the lower costs for its patient population during the three most recent prior years (see 80 FR 32788). However, as noted elsewhere in this final rule, in the June 2015 final rule we stated our belief that it would be critical to revisit the policy of accounting for an ACO's savings generated in a prior agreement period when resetting its benchmark in conjunction with any future changes to the benchmarking methodology to incorporate regional FFS expenditures (see 80 FR 32791). See also discussion of the policy in the December 2014 proposed rule (79 FR 72838 through 72839).

accuracy of the resulting benchmarks over time. In particular, the commenter indicated that the: (1) Comparison of ACO assigned beneficiaries to non-ACO assigned beneficiaries will not remain stable over time as ACO participation in the Shared Savings Program grows or declines in a region; and (2) risk adjustment under this approach may not be adequate to account for changes in the ACO's composition over time in relation to its region.

A few commenters expressed support for the alternative (use of a regionally-trended amount) or a somewhat similar approach. For example, a commenter cited concerns that use of regional averages would disadvantage ACOs with historically high-cost providers, such as skilled nursing facilities, and ultimately incent ACOs to remove these providers as participants in order to generate savings below their benchmark. Another commenter, detailing findings based on extensive modeling, favored an approach under which the historical benchmark for the initial agreement period would be updated for subsequent agreement periods to account for regional spending growth and for compositional changes in ACO beneficiaries or providers without rebasing it to reflect the historical costs for the ACO from the most recent years prior to the start of the subsequent agreement period.

Some commenters addressed the anticipated effects of the regional FFS adjustment on benchmarks of ACOs with spending relatively lower and higher than their region. Commenters explained that the proposed approach rewards an ACO with lower spending than its region by increasing the ACO's benchmark value. For an ACO with higher spending than its region, the proposed approach was anticipated to decrease the ACO's benchmark value. Some commenters expressed particular concern about the latter group, explaining that the proposed policy could create a disincentive for continued participation by ACOs that were successful in earning shared savings payments in their initial agreement period, but have spending higher than the regional average for their regional service area.

**Response:** We are finalizing our proposal to calculate the regional adjustment to the ACO's historical benchmark as a percentage of the difference between the average per capita expenditure amount for the ACO's regional service area and the average per capita amount of the ACO's rebased historical benchmark for each Medicare enrollment type (ESRD, disabled, aged/dual eligible, aged/non-

dual eligible). We continue to believe there are benefits to using a regional average in calculating the adjustment, rather than the alternative approach of using a regionally-trended amount, including: greater alignment with the MA rate-setting methodology; lack of dependence on older historical data; greater transparency for ACOs and other stakeholders; and easier integration and alignment with our existing approach to adjusting the historical benchmark when an ACO makes ACO Participant List changes.

We agree with commenters that the regional FFS adjustment will have differing effects on an ACO's benchmark depending on whether the ACO's spending is relatively lower or higher than the spending for its regional service area. As discussed in this section of this final rule, we outlined our preferred approach to calculating the adjustment in the 2016 proposed rule (see 81 FR 5833 and 5834). We specified that we would determine the difference between the average per capita regional amount and the average per capita amount of the ACO's rebased historical benchmark for each Medicare enrollment type (ESRD, disabled, aged/dual eligible, aged/non-dual eligible). We indicated that the difference would be expressed as a negative number if the value of the ACO's rebased historical benchmark for a particular Medicare enrollment type is greater than the regional average amount for that enrollment type. The difference would be expressed as a positive number if the value of the ACO's rebased historical benchmark for a particular Medicare enrollment type is less than the regional average amount. We anticipate the regional adjustment value will differ by Medicare enrollment type for each ACO, and it will be possible to have a mix of positive and negative values for the regional adjustment amount across these Medicare enrollment types.

Generally, we anticipate several aspects of the revised rebasing methodology will mitigate concerns about the potential negative effects of the regional adjustment. First, as discussed in section II.A.2.b of this final rule, we believe the inclusion of ACO assigned beneficiaries in the calculation of regional FFS expenditures will be important in capturing the cost and health status of the beneficiary population served by the ACO. For example, for a high spending ACO operating in a lower spending region, including the ACO's assigned population in the regional FFS expenditures would likely result in a relatively higher regional adjustment value than if these beneficiaries were

excluded. Second, we anticipate the risk adjustment methodology used in calculating the regional FFS adjustment will help mitigate the incentive for ACOs to avoid relatively higher cost providers and higher cost, higher acuity beneficiaries. As discussed in section II.A.2.e.2 of this final rule, we will use CMS-HCC scores to risk adjust county FFS expenditures when determining expenditures for the ACO's regional service area, thereby accounting for the severity of health status and case mix of this population. Additionally, as discussed elsewhere in this section of this final rule, we are finalizing our proposal to account for the difference in health status between the ACO's population and the ACO's regional service area in calculating the regional FFS adjustment. Under this approach, if an ACO's population is healthier than the assignable beneficiaries in the ACO's regional service area, with lower average risk scores for the relevant period, the risk adjustment would reduce the amount of the regional FFS adjustment. Similarly, if the ACO's assigned beneficiary population is comparably sicker than the assignable beneficiaries in the ACO's regional service area, with higher average risk scores for the relevant period, the risk adjustment would increase the amount of the regional FFS adjustment. Third, we believe our proposed phase-in approach, as described in section II.A.2.c.3. of this final rule, will ease the transition to this revised methodology for ACOs with historical spending higher than that of their region.

With respect to a more technical consideration for calculating the regional FFS adjustment, we note that the proposed regulations text specified that in calculating the regional adjustment we would determine the ACO's regional expenditures for benchmark year 3. We did not receive comments specifically addressing this proposal. We are finalizing the policy of using benchmark year 3 data in calculating the regional average used to determine the regional FFS adjustment as proposed. We believe that calculating the regional adjustment based on data from the most recent year prior to the start of the ACO's new agreement period will ensure the adjustment reflects the most recent historical expenditures. Although there were no comments directed specifically to the number of years of data used in calculating the regional adjustment, we believe comments suggesting CMS consider use of additional years of data in calculating county FFS expenditures (described in section II.A.2.e.2 of this final rule) raise

an important issue. These comments provoked our consideration of the possibility of using additional years of data in calculating the regional average, including what factors to use to trend the multiple years of data in computing the regional average. We anticipate continuing to explore this issue as we gain experience with the methodology described in this final rule. For example, we will consider whether use of additional years of data would add greater precision to calculation of regional averages. In the event we determine that any changes to the methodology would be appropriate, we would address this issue in future rulemaking, particularly in advance of applying a higher weight (70 percent) in the regional adjustment calculation as discussed in section II.A.2.c.3. of this final rule.

*Comment:* Many commenters expressed support for CMS' proposal to adjust for an ACO's risk relative to that of assignable beneficiaries in its region when determining the regional adjustment to the rebased historical benchmark. A commenter expressed support generally for a risk adjustment approach that adequately accounts for the higher costs of ACOs that include providers and health systems that care for the sickest patients and are providing medically necessary care to chronically-ill populations. Further, a commenter recommended that in blending regional FFS spending with ACO historical spending, the per capita spending for each should be similarly risk adjusted.

However, a commenter disagreed with CMS' proposal to compute a measure of risk-adjusted regional expenditures for each Medicare enrollment type that would account for differences in the average CMS-HCC score of the ACO's assigned beneficiary population and the average CMS-HCC risk scores in the ACO's regional service area, describing this as a change in methodology. This commenter expressed concern about the accuracy of using averages in risk adjustment calculations.

Some commenters raised a variety of concerns about the Shared Savings Program's use of the CMS-HCC prospective risk adjustment model, or offered alternative risk adjustment approaches. For example, some commenters encouraged CMS to consider factors beyond CMS-HCC risk scores when performing risk adjustment in the Shared Savings Program, including socio-economic and/or socio-demographic factors. Some commenters questioned whether the CMS-HCC risk adjustment model could effectively account for increasing acuity in a

patient's condition over time, clinically complex patients, case mix among patient populations, and geographic variation. A commenter explained that concerns regarding the current risk adjustment methodology have the effect of discouraging participation in the program. A few commenters supported better aligning risk adjustment in the Shared Savings Program with MA, for example, suggesting that the Shared Savings Program adopt the proposed refinements to the MA risk adjustment model aimed at improving the accuracy of payments to plans serving low-income and dual eligible beneficiaries. Other commenters suggested greater transparency by CMS in regards to its use of CMS-HCC scores. For example commenters suggested making publicly available additional resources on the specifications of the CMS-HCC risk adjustment process and developing educational resources about improved coding for providers.

*Response:* We are finalizing our proposal to risk adjust to account for the health status of the ACO's assigned population in relation to FFS beneficiaries in the ACO's regional service area as part of the methodology for adjusting the ACO's rebased historical benchmark to reflect regional FFS expenditures in the ACO's regional service area as proposed. We will use full CMS-HCC risk scores in performing this adjustment. We agree with comments received in support of our proposal. We believe that failure to risk adjust regional FFS expenditures to reflect differences between the risk of the ACO's assigned beneficiary population and the risk of the broader FFS population in the ACO's regional service area would provide an incentive for ACOs to avoid serving sicker beneficiaries, an undesired result.

While the incorporation of risk-adjusted regional expenditures into historical benchmarks is a new approach, we disagree that the use of average risk scores when performing risk adjustment constitutes a change of methodology. Our current methodology risk-adjusts expenditures between years using mean CMS-HCC risk scores among an ACO's assigned beneficiaries within a particular enrollment type. We therefore believe that the approach for risk-adjusting the regional adjustment amount that we are adopting in this final rule is consistent with current risk-adjustment practices.

We appreciate the concerns raised by commenters and the suggestions offered for refining the Shared Savings Program's general risk adjustment methodology, which relies on the CMS-HCC prospective risk adjustment model.

We consider these suggestions beyond the scope of this final rule. We decline at this time to adopt commenters' suggestions for use of alternative risk adjustment models, for example accounting for socio-economic or socio-demographic factors outside of the CMS-HCC risk adjustment model. To the extent that new information, such as social determinants of health, is incorporated into the CMS-HCC risk adjustment model in the future, we will account for this when using risk scores in the Shared Savings Program methodology.

*Comment:* Few commenters directly addressed CMS' plan to rigorously monitor for coding intensity efforts in combination with the agency's proposal to risk adjust for the health status of an ACO's assigned beneficiaries relative to the FFS population in its regional service area. A few commenters appreciated CMS' concerns about the potential for upcoding and a commenter explicitly supported the agency's monitoring plans, noting that differences in coding practices between ACO clinicians and other FFS clinicians should be taken into account when blending regional FFS spending into ACO benchmarks to ensure equity.

A number of commenters expressed the belief that additional coding intensity adjustments are not justified, given the various mitigating factors cited by CMS in the 2016 proposed rule such as routine changes in the assignment of beneficiaries to the ACO from year to year, and the inability of ACOs to submit supplemental codes as occurs in MA. Some commenters specified that the proposed use of regional trend calculations in resetting the benchmark served as a mitigating factor as well. Another commenter warned that even if high levels of coding are observed, this could be the direct result of providing more comprehensive, patient-centered care and that provider efforts to care for complex, chronically ill patients should not be penalized.

Several commenters expressed opinions, sometimes conflicting, on what type of coding intensity adjustment CMS should adopt for the Shared Savings Program if some type of adjustment is deemed necessary. Several commenters supported an approach similar to that used in MA in which a coding intensity adjustment is developed based on beneficiaries assigned for at least 2 consecutive risk adjustment data years. Another commenter expressed opposition to adopting a MA-like approach because they believe it unfairly penalizes

physician organizations engaged in accurate coding practices.

Although CMS sought comment on whether the methodology currently used to adjust the ACO's benchmark annually to account for the health status and demographic factors of the ACO's performance year assigned beneficiaries (according to newly and continuously assigned populations) should also be applied when rebasing the ACO's historical benchmark, many commenters expressed their opposition to the current use of this methodology in adjusting an ACO's benchmark for each performance year and requested that the agency revise the policy. A chief concern raised by many commenters is that the approach does not accurately reflect the potential for individuals to become sicker and more expensive to care for over time (circumstances referred to by some commenters as resulting in a higher "disease burden"). Several commenters noted that it was unreasonable to assume that a provider organization, however effective, can manage a population such that patient conditions never worsen. Some commenters added that this policy particularly disadvantages ACOs that care for more complex patients, such as those that include tertiary care facilities or academic medical centers. A commenter noted that while it appreciated concerns about the potential for upcoding, it believed such concerns to be irrelevant relative to the negative impact it perceives the current policy for risk adjusting an ACO's benchmark for each performance year has on program participants.

A number of commenters also expressed the belief that the continued use of the newly/continuously assigned policy as a remedy for upcoding lacks justification. A commenter believed that CMS has not provided evidence that actual upcoding is occurring among ACOs, or that it would occur in the future. Another commenter opined that any adjustments for coding intensity should reflect actual, not perceived, coding intensity. Among other concerns raised about the methodology, a commenter opined that the approach transfers too much risk to ACOs and is responsible for deterring ACOs from entering two-sided risk models. Another commenter noted that the policy makes the role of the risk scores opaque to participating providers, making it difficult to anticipate how risk scores may affect performance.

In light of the previously noted concerns, many commenters urged CMS to allow risk scores to increase year-over-year within an agreement period

for the continuously assigned beneficiary population, or to allow them to increase within limits. A commenter recommended that if CMS is unwilling to allow risk scores to increase year-over-year for all ACOs, the agency should consider allowing increases for participants in two-sided risk models, which could encourage progression to higher levels of risk. Another commenter thought that CMS should, at a minimum, develop a list of conditions that are high cost and not subject to efforts to improve documentation and coding (for example, ESRD and cancer) and allow the CMS-HCC score for beneficiaries with these conditions to increase to reflect the increased illness of the beneficiary.

Some commenters suggested approaches for limiting the impact of intensive coding not discussed in the 2016 proposed rule. For example, some commenters recommended that if CMS deems a coding adjustment necessary, the agency should consider a method that compares CMS-HCC risk scores with changes in self-reported health status through the Consumer Assessment of Healthcare Providers and Systems (CAHPS) survey. Several other commenters thought CMS should consider approaches used by the Next Generation ACO model, including accounting for the difference in average CMS-HCC risk scores for the baseline and performance-year assigned beneficiaries, and limiting the change in an ACO's average risk score between the baseline and performance year to plus or minus 3 percent.

*Response:* We appreciate the suggestions made by commenters regarding the development of a coding intensity adjustment for the Shared Savings Program. We also appreciate commenters' feedback on the current policy for adjusting an ACO's historical benchmark for the health status of the ACO's performance year assigned population. At this time, we believe that continued use of this policy in the determination of an ACO's updated benchmark in combination with the use of full CMS-HCC risk adjustment in the calculation of the rebased historical benchmark strikes a balance between the need to recognize changes in beneficiary health status over time with the need to protect against intensive coding practices.

We plan to monitor for the impact of coding initiatives on ACO benchmarks, particularly as we gain more experience with the new rebasing methodology. In the event that a formal coding intensity adjustment is deemed necessary in the future, we would make necessary refinements to the program's risk

adjustment methodology through future rulemaking.

*FINAL ACTION:* We are finalizing our proposals to revise the methodology used to rebase ACO benchmarks for new agreement periods starting on or after January 1, 2017 to incorporate a regional FFS adjustment to the ACO's rebased historical benchmark. We are finalizing the proposed approach to calculating the regional FFS adjustment using average per capita expenditures for benchmark year 3 for assignable beneficiaries in the ACO's regional service area, and to risk adjust to account for the health status of the ACO's assigned population in relation to the assignable FFS beneficiaries in the ACO's regional service area in determining the regional FFS adjustment. We are also finalizing our proposal to add new § 425.603 that incorporates our policies for resetting, adjusting and updating the benchmark for a second or subsequent agreement period.

We did not receive any comments on the specific proposal to redetermine the regional FFS adjustment to account for changes to the ACO's certified ACO Participant List. We believe this redetermination is necessary to ensure that the regional FFS adjustment reflects the ACO's participant composition under the new ACO Participant List. Therefore, we are finalizing our proposal to redetermine the regional FFS adjustment, consistent with the current approach to adjusting an ACO's historical benchmark to account for changes in the ACO's certified ACO Participant List during the agreement period. This policy is also incorporated in new § 425.603.

We are also finalizing as proposed the conforming and clarifying revisions to the provisions of § 425.602, including to: Revise the title of the section; remove paragraph (c) and incorporate this paragraph in new § 425.603 to address the methodology for establishing, adjusting, and updating the historical benchmark for ACOs that entered a second agreement period in 2016; and to add a paragraph that describes the adjustments made to the ACO's historical benchmark during an ACO's first agreement period to account for changes in severity and case mix for newly and continuously assigned beneficiaries as presently specified under § 425.604, § 425.606, and § 425.610. We are also finalizing as proposed a change to § 425.20, to specify that the acronym "BY" stands for benchmark year.

### (3) Transitioning to a Higher Weight in Calculating the Adjustment for Regional FFS Expenditures

In the 2016 proposed rule, we considered both the potential positive and negative consequences of quickly transitioning to use of a greater weight (70 percent) in calculating the regional adjustment to ACOs' rebased historical benchmarks. We explained our belief that placing a greater weight on regional expenditures in adjusting an ACO's historical benchmark will encourage existing low spending ACOs in higher spending and/or higher growth regions to enter and continue their participation in the Shared Savings Program. We reiterated our view, expressed in the June 2015 final rule, that the benchmarking methodology should be revised to help ensure that an ACO that has previously achieved success in the program will be rebased under a methodology that encourages its continued participation in the program (see 80 FR 32788). Further, we again noted the importance of quickly moving to a benchmark rebasing approach that accounts for regional FFS expenditures and trends in addition to the ACO's historical expenditures and trends (see 81 FR 5834).

We also explained our concern that existing low spending ACOs operating in regions with relatively higher spending and/or higher growth in expenditures may be positioned to generate savings under the proposed revisions to the rebasing methodology because of the regional adjustment to their rebased historical expenditures rather than as a result of actual gains in efficiency, creating an opportunity for arbitrage. In particular, we expressed concern about the potential for ACOs to alter their healthcare provider and beneficiary compositions or take other such actions in order to achieve more favorable performance relative to their region without actually changing their efficiency. We anticipated these effects would be more pronounced the larger the percentage that is applied to the difference between the average expenditures for the ACO's regional service area and the ACO's rebased historical expenditures when calculating the regional adjustment. However, we expressed our belief that there is uncertainty around the magnitude of these possible negative consequences of adjusting the ACO's rebased benchmark based on regional expenditures in the ACO's regional service area which have yet to be observed. We noted that we believed these concerns are likely to be outweighed by the benefits of

encouraging more efficient care through a benchmark rebasing methodology that encourages continued participation by ACOs that are efficient relative to their regional service area by placing greater weight on regional expenditures when resetting the ACO's benchmark over subsequent agreement periods. We explained that the use of a higher percentage in calculating the regional adjustment would create strong incentives for higher spending ACOs to be more efficient relative to their regional service areas while also improving the quality of care provided to their beneficiaries. Furthermore, we explained that this approach would also ensure that ACOs' rebased benchmarks continue to reflect in part their historical spending.

To balance these concerns, we proposed to adopt a phased approach to transitioning to greater weights in calculating the adjustment amount, expressed as a percentage of the difference between regional average expenditures for the ACO's regional service area and the ACO's rebased historical expenditures. Under this approach we would increase the weight used in calculating the adjustment over time, making an ACO's benchmark gradually more reflective of expenditures in its region and less reflective of the ACO's own historical expenditures. This proposed phase-in approach included the following features:

- Maintain the current methodology for establishing the benchmark for an ACO's first agreement period in the Shared Savings Program based on the historical expenditures for beneficiaries assigned to the ACO with no adjustment for expenditures in the ACO's regional service area in order to provide continued stability to the program and the momentum for attracting new organizations. As over 400 ACOs have voluntarily entered the program under this methodology, we believe the current methodology is an important part of facilitating entry into the program by organizations located throughout the nation that have differing degrees of experience with accountable care models and have varying provider compositions.
- Increase the percentage used in calculating the regional adjustment amount, applied to the ACO's rebased historical benchmark, over subsequent agreement periods.

++ We proposed to calculate the regional adjustment in the ACO's second agreement period by applying a weight of 35 percent to the difference between regional average expenditures for the ACO's regional service area and

the ACO's rebased historical benchmark expenditures.

++ We proposed that in the ACO's third and subsequent agreement periods, the percentage used in this calculation would be set at 70 percent unless the Secretary determines a lower weight should be applied as specified through future rulemaking.

We discussed that in making a determination of whether a lower weight should be used in calculating the adjustment, the Secretary would assess what effects the regional adjustment (and other modifications to the program made under this rule) are having on the Shared Savings Program, considering factors such as, but not limited to: The effects on net program costs; the extent of participation in the Shared Savings Program; and the efficiency and quality of care received by beneficiaries. As part of this determination, the Secretary may also take into account other factors, such as the effect of implementation of the Medicare Access and CHIP Reauthorization Act of 2015 (MACRA) on the Shared Savings Program by incentivizing physicians and certain other practitioners to participate more broadly in alternative payment models (APMs).

We noted that such a determination could potentially occur in advance of the first application of this higher percentage. For example, the determination could be made in advance of the agreement period beginning January 1, 2020, which is the start of the third agreement period for ACOs that entered the program in January 2014 and the first group of ACOs to which the revised rebasing methodology being adopted in this final rule will apply. Any necessary modifications to program policies as a result of the Secretary's determination, such as reducing the long-term weight used in calculating the regional adjustment below 70 percent or making other program changes (for example, refinements to the risk adjustment methodology) would be proposed in future rulemaking, such as through the calendar year (CY) 2020 Physician Fee Schedule rule. Subsequently, we would periodically assess the effects of the regional adjustment over time and address any needed modifications to program policies in future rulemaking.

- For ACOs that started in the program in 2012 and 2013 and started their second agreement period on January 1, 2016, we proposed to apply this phased approach when rebasing for their third and fourth (and subsequent) agreement periods, as discussed in section II.A.2.f. of this final rule.

We explained our belief that this phased approach to moving to a higher percentage in calculating the adjustment for regional expenditures would give ACOs sufficient notice of the transition to benchmarks that reflect regional expenditures. Furthermore, we believed this approach to phasing in the use of a greater percentage to calculate the regional adjustment provides a smoother transition for ACOs to benchmarks reflective of regional FFS expenditures, giving ACOs more time to prepare for this change and therefore ultimately maintaining the stability of ACOs, the Shared Savings Program and the markets where ACOs operate. Accordingly, we proposed to incorporate these policies regarding the transition to greater weights in calculating the regional adjustment amount in the new regulation at § 425.603.

We sought public comment on our proposed approach to phase in the weight used in calculating the regional adjustment. We were particularly interested in understanding commenters' thoughts and suggestions about the percentage that should be used in calculating the adjustment for regional FFS expenditures. We also sought comment on the alternatives we considered in the proposed rule including: (1) Limiting the weight used in the calculation of the adjustment to 50 percent (instead of 70 percent) in the ACO's third and subsequent agreement period; (2) a more gradual transition to use of a higher percentage in calculating the adjustment (such as 35 percent in the second agreement period, 50 percent in the third agreement period, and 70 percent in the fourth and subsequent agreement period); and (3) a phase-in approach that uses regional (instead of national) FFS expenditures to trend benchmark year expenditures when establishing and updating the benchmark during an ACO's first agreement period (for agreement periods beginning on or after January 1, 2017). We also sought comment on alternative approaches to address our concerns about selective program participation and arbitrage opportunities that would facilitate our use of a higher percentage in calculating the amount of the adjustment.

*Comment:* A few commenters shared CMS' concerns about the potential for negative consequences that could result from transitioning to use of factors based on regional FFS expenditures in resetting ACO historical benchmarks, including selective participation creating an opportunity for arbitrage. These commenters were somewhat divided as to the ultimate outcome of

these changes. For example, a commenter explained that benchmarking ACOs against their region will have the effect of more seamlessly encouraging transformative physician care, while simultaneously discouraging agreements with entities unwilling or unable to make meaningful changes in care delivery. Further, this commenter encouraged CMS to implement safeguards that deter the negative consequences of transitioning to the use of factors based on regional FFS expenditures in resetting ACO benchmarks (for instance, protecting against ACOs that increase their spending to lock in a higher benchmark, and protecting against benchmarks becoming overly inflated to the point where ACOs need to do little to maintain or change their care practices to generate savings). Another commenter, concerned about discouraging participation by ACOs with expenditures higher than their regions and those with losses in their first agreement period, and behavioral responses by providers to the revised methodology (for example, ACO avoidance of high-cost beneficiaries), encouraged CMS to delay finalizing the proposed modifications. A commenter identified the availability of traditional FFS, under which providers and suppliers can continue to be paid based on the quantity of services provided (thereby maintaining their status quo for reimbursement rather than entering value based payment models), as being a greater concern for the Trust Funds than the potential threat of arbitrage by ACOs under the revised rebasing methodology. The commenter also noted that the fact that only a portion of ACOs have actually been eligible to share in savings to date is an indication that there is little reason for concern about arbitrage by ACOs. Another commenter counseled that the arbitrage concerns overestimate the flexibility of markets, pointing to the existence of ongoing relationships between healthcare providers, tied to a range of risk bearing contracts, as an example of a mitigating factor. A few commenters specifically encouraged CMS to engage in ongoing monitoring of the effects of the changes, if implemented, with a commenter suggesting CMS address arbitrage concerns by requiring additional reporting by ACOs regarding their use of shared savings payments.

*Response:* We greatly appreciate commenters' careful consideration of the concerns we specified in the 2016 proposed rule, including the participation incentives that could result from the transition to a rebasing

methodology that places a greater weight on a regional FFS adjustment over time. We decline to delay finalizing the changes to rebasing methodology altogether because of concerns about the potential negative effects that could result from these changes, as recommended by a commenter. For the reasons we described in the 2016 proposed rule (and reiterated in this final rule), we believe a phased approach to transitioning to a higher weight in calculating the regional adjustment offers the appropriate balance between our concerns about the potential negative effects of a revised rebasing approach that places a greater weight on regional FFS expenditures and the anticipated benefits of the revised rebasing policies for the sustainability of the program. Elsewhere in this section of this final rule, we discuss in detail issues related to the application of the revised rebasing methodology to ACOs with higher spending than their region. In addition, we will consider the concerns raised in the comments as we monitor the effects of the revised rebasing methodology and as we consider whether further modifications to the rebasing policies are necessary. Any changes to the rebasing methodology would be addressed in future rulemaking.

*Comment:* Most of the commenters discussing the phase-in of the weights used in calculating the adjustment, generally expressed support for taking an incremental approach to incorporating regional elements when resetting an ACO's benchmark. Some commenters expressed support for the proposed phased-approach to applying an increasing weight in calculating the regional adjustment: To initially calculate the adjustment using a 35 percent weight in rebasing the ACO's second agreement period benchmark and then increase to using a 70 percent weight for subsequent agreement periods. A commenter explained that the proposed phased approach to incorporating regional spending into the benchmark gives ACOs ample time to adjust to the methodological changes. Several commenters were supportive of monitoring the weight (percentage) used in calculating the regional adjustment over time, to assure balance is struck in setting benchmarks. A commenter expressed support for examining the results of the adjustment before switching to a higher weight for the regional spending component. A commenter emphasized the need to assess the effects of the modifications to the benchmarking methodology and to make needed revisions to the policies in

future rulemaking in order to ensure small entities and hospitals (more generally), particularly those in rural and underserved areas, are not placed at a disadvantage.

Many commenters urged CMS to provide more options and greater flexibility to ACOs (referred to by some as establishing a “glide path”) as they transition to benchmarks containing regional cost data. A few commenters cited the importance of this flexibility to encourage continued participation by small and rural ACOs. Commenters’ suggestions focused on allowing ACOs the choice of the proposed approach, as well as options for a faster or slower phase-in, ultimately reaching a weight of 70 percent, over the course of one to three agreement periods (beginning with the ACO’s first agreement period), including options for incremental increases in the weight used to calculate the regional adjustment within an agreement period.

Some commenters suggested that CMS apply the phase-in differently for individual ACOs depending on certain characteristics, such as their historical spending, financial performance in the program, or their participation in performance-based risk tracks (Tracks 2 and 3). Some commenters suggested phasing-in the weight differently depending on whether an ACO’s historical expenditures were above or below the regional average, encouraging adoption of faster phase-in options to more quickly benefit ACOs with low spending compared to their region, and slower phase-in options to mitigate the anticipated benchmark reductions for ACOs with high spending compared to their region. Commenters suggested allowing additional flexibility on the pace of the phase-in for high performing ACOs and ACOs entering a performance-based risk model (Track 2 or 3).

Many commenters suggested a variety of alternatives to afford ACOs greater choice over the timing of applicability (in particular for ACOs that entered the Shared Savings Program in 2012 and 2013 and started their second agreement period January 1, 2016, as discussed in greater detail in section II.A.2.f of this final rule), and the phase-in to the proposed maximum percentage (for example, within an agreement period).

Commenters supporting incorporation of regional cost data into an ACO’s benchmark for its first agreement period in the Shared Savings Program cited perceived benefits including: consistent application of the benchmarking methodology across the program; the potential to create more equitable benchmarks within a market (noting

that urban and suburban ACOs tend to have overlapping service areas); and attracting new participants to the Shared Savings Program. When discussing the weight that should be applied when calculating the regional adjustment for an ACO’s first agreement period, commenters suggested a range of options, typically with a maximum weight of either 30 or 35 percent. Some commenters suggested applying an increasing weight when calculating the adjustment for the ACO’s first agreement period, such as 10 percent in year 1, 20 percent in year 2, and 30 percent (or 35 percent) in year 3.

Several commenters suggested alternative approaches to the methodology proposed, such as: (1) Applying a 100 percent weight when calculating the regional FFS adjustment for ACOs with costs lower than their region, and zero percent weight when calculating the adjustment for ACOs with costs higher than their region; (2) an alternative methodology for calculating the adjustment that would both lower the weight on the regional component and slow its rate of increase; and (3) setting limits on the amount of reduction in the benchmark value that could occur as a result of the regional FFS adjustment.

*Response:* We are finalizing with modifications our proposal to phase-in a higher weight in calculating the regional adjustment over time starting in an ACO’s second agreement period beginning in 2017 and subsequent years and to apply this phased approach to ACOs that entered the program in 2012 and 2013 (that started a second agreement period on January 1, 2016) when rebasing for their third and subsequent agreement periods (as discussed in section II.A.2.f of this final rule). We are persuaded by commenters’ concerns that the phase-in outlined in the proposed rule would be too rapid for ACOs with relatively higher spending compared to their region, for which the regional FFS adjustment will be negative and result in lower benchmark values. We are especially concerned that the revised benchmarking methodology could result in attrition from the Shared Savings Program by ACOs that are striving to meet the program’s goals, including ACOs that have been previously successful in generating shared savings. We agree with comments suggesting a phase-in approach that applies differing weights in the regional adjustment calculation depending on whether an ACO’s historical expenditures were above or below the regional average for the same period. Specifically, we agree with the commenters that suggested use of a

lower weight in calculating the adjustment for ACOs with higher spending compared to their region.

Accordingly, we are finalizing an approach that will apply a lower weight in calculating the regional adjustment the first and second time that an ACO’s benchmark is rebased under the revised rebasing methodology, for those ACOs determined to have spending higher than their region. However, we will ultimately apply a weight of 70 percent in calculating the adjustment for all ACOs beginning no later than the third time the ACO’s benchmark is rebased using the revised methodology. Under this approach, we will make an initial determination about whether the ACO has higher spending compared to its regional service area as part of establishing the ACO’s rebased historical benchmark for the applicable agreement period. Consistent with the approach we are finalizing for redetermining the regional FFS adjustment when an ACO makes changes to its certified ACO Participant List within an agreement period, we will also redetermine whether the ACO has higher spending compared to its region, and therefore whether the lower weight should be used in calculating the regional adjustment.

The determination of whether to apply the lower weight in calculating the regional FFS adjustment will include the following steps:

- For each Medicare enrollment type (ESRD, disabled, aged/dual eligible, aged/non-dual eligible) we will determine the difference between the average per capita expenditure amount for the ACO’s regional service area and the average per capita amount of the ACO’s rebased historical benchmark. We will multiply the difference for each Medicare enrollment type by the proportion of the ACO’s assigned beneficiary population for that Medicare enrollment type, based on the ACO’s assigned beneficiary population for benchmark year 3 of the rebased historical benchmark.

- Take the sum of the differences weighted by the ACO’s proportion of assigned beneficiaries by Medicare enrollment type (determined in the previous step). As summarized in Table 2, the result of this step will determine the percentage weight applied in calculating the regional FFS adjustment:

++ If this sum is a net positive value, we will apply the proposed weights for calculating the regional FFS adjustment for the agreement period: 35 percent the first time the benchmark is rebased using the revised methodology; 70 percent the second time the benchmark

is rebased under this methodology, and in all subsequent agreement periods.

++ If this sum is a net negative value, we will apply a relatively lower weight in calculating the regional FFS adjustment in the first two rebasings for which the regional adjustment applies:

25 percent the first time the benchmark is rebased under the revised methodology; and 50 percent the second time the benchmark is rebased under this methodology. A weight of 70 percent will be used in the calculation

of the regional adjustment for ACOs that are determined to have higher spending compared to their regional service area during the third rebasing in which this regional adjustment is applied, and in all subsequent agreement periods.

TABLE 2—PERCENTAGE WEIGHT APPLIED IN CALCULATING THE REGIONAL FFS ADJUSTMENT

Agreement period (for example, 2014 starters renewing for 2017)	ACO's spending relative to its region	Weight used to calculate regional adjustment (percent)
Performance year within an agreement period to which regional adjustment is applied for the first time (for example, second agreement period beginning in 2017).	ACO spending is higher than its regional service area.	25
	ACO spending is lower than its regional service area.	35
Performance year within an agreement period to which regional adjustment is applied for the second time (for example, third agreement period beginning in 2020).	ACO spending is higher than its regional service area.	50
	ACO spending is lower than its regional service area.	70
Performance year within an agreement period to which regional adjustment is applied for the third time (for example, fourth agreement period beginning in 2023 and subsequent years).	ACO spending is higher than its regional service area.	70
	ACO spending is lower than its regional service area.	70

After making the determination of the weight to be applied in calculating the regional FFS adjustment, we follow the remaining steps for calculating the regional FFS adjustment described in section II.A.2.c.2 of this final rule:

- Multiply the difference between the average per capita expenditure amount for the ACO's regional service area and the average per capita amount of the ACO's rebased historical benchmark for each Medicare enrollment type by the applicable percentage shown in Table 2. This is the adjustment amount for each Medicare enrollment type.

- Apply the adjustment to the ACO's rebased historical benchmark by adding the adjustment amount for the Medicare enrollment type to the truncated, trended and risk adjusted average per capita value of the ACO's rebased historical benchmark for the same Medicare enrollment type.

- Multiply the adjusted value of the ACO's rebased historical benchmark for each Medicare enrollment type by the proportion of the ACO's assigned beneficiary population for that Medicare enrollment type, based on the ACO's assigned beneficiary population for benchmark year 3 of the rebased historical benchmark.

- Sum expenditures across the four Medicare enrollment types to determine the ACO's adjusted rebased historical benchmark.

We reiterate that, as we explained in the 2016 proposed rule, the Secretary will assess what effects the regional adjustment (and other modifications to the program made under this rule) are

having on the Shared Savings Program to determine whether a lower weight (than 70 percent) should be used in calculating the regional adjustment. Any necessary modifications to program policies as a result of the Secretary's determination, such as reducing the long-term weight used in calculating the regional adjustment below 70 percent or making other program changes would be proposed in future rulemaking.

We believe this phased approach represents a middle ground between the comments supporting the proposal, as well as recommendations for relatively faster or slower phase-in of the adjustment based on the historical costs of the ACO compared to its region. We chose the lower weights of 25 percent (compared to 35 percent) and 50 percent (compared to 70 percent) to balance providing a more gradual phase in to ACOs with higher spending compared to their region with our projected estimates of the impact of this policy on the Medicare Trust Funds. We believe these lower weights align with commenters' suggestions for application of a weight less than 35 percent (for example, between 10 percent and 30 percent), as well as our consideration of a more gradual phase-in of the adjustment by applying weights of 35 percent, 50 percent, and 70 percent in calculating the regional adjustment over the course of 3 agreement periods under the revised rebasing methodology as discussed in the 2016 proposed rule.

Incrementally lowering benchmarks for ACOs determined to have higher spending than their region over the

course of multiple agreement periods will afford these ACOs time to adapt to the revised rebasing methodology. This gradual phase in may be especially important for successful ACOs with relatively higher costs that may otherwise leave the program if faced with a more rapid phase-in to a rebased benchmark reflecting factors based on regional FFS expenditures. We decline to forgo applying the regional adjustment altogether to ACOs with costs higher than their region, as recommended by the comment suggesting use of a zero percent weight in calculating the regional adjustment for these ACOs. We believe such an approach, which would ensure that the benchmark for these ACOs would continue to be based largely on their own historical spending, would undermine the purpose of a policy that seeks to incrementally make an ACO's benchmark less dependent on its own historical spending and more reflective of spending in its regional service area.

We also continue to believe this phased approach mitigates our concerns about the opportunity for arbitrage that could result from establishing higher benchmarks for ACOs with relatively lower spending compared to their region; a concern that is heightened when considering a more rapid phase-in to a higher weight in calculating the regional adjustment. Specifically, an approach that would more quickly produce more generous benchmarks for ACOs could hasten organizations to alter their behavior or composition to

better position themselves to achieve favorable performance relative to their region under this methodology without actually changing their efficiency. For this reason, we decline to adopt alternative approaches recommended by commenters that would apply higher weights in the regional adjustment calculation for ACOs that are lower spending compared to their regions (such as applying a 100 percent weight in calculating the adjustment).

The approach we are finalizing recognizes that changes in the ACO's certified ACO Participant List during an agreement period could result in changes in the ACO's historical spending patterns and accordingly would result in a change to the weight used in calculating the regional adjustment. We believe this approach is responsive to commenters' requests for a flexible approach, particularly because it would ensure that we always apply the most advantageous weight in calculating the adjustment for each performance year within the agreement period according to whether the ACO's historical spending based on its most recent certified ACO Participant List is relatively higher or lower compared to spending in its regional service area.

We decline at this time to adopt commenters' suggestions to apply differing weights in the calculation of the regional adjustment depending on other characteristics of ACOs, such as past performance in the Shared Savings Program, or participation in a performance-based risk track. At this time, we believe the most significant consideration in determining the weight applied in the calculation of the regional adjustment is the level of the ACO's historical spending compared to its regional service area. Consistent with our decision to finalize the proposal to remove the adjustment for savings generated under the ACO's prior agreement period in calculating the ACO's rebased historical benchmark, as we discuss in section II.A.2.c.2 of this final rule, we also decline to otherwise account for an ACO's prior savings in determining the regional FFS adjustment that is applied to the ACO's rebased historical benchmark.

We are concerned that offering the broader flexibility suggested by commenters, including allowing ACOs to choose from a menu of options for when the revised rebasing methodology would apply and the weight that would be used to calculate the regional adjustment, may invite selective participation by those ACOs that would be most advantaged by the new benchmarking methodology, thereby increasing the opportunity for arbitrage.

As previously noted in this final rule, we do not believe it would be operationally feasible to apply customized benchmarking methodologies to ACOs across the program.

In contrast, we believe commenters make a convincing argument for a phased approach to incorporating regional factors into ACO benchmarks beginning with the ACO's initial agreement period in the Shared Savings Program. We find particularly persuasive the suggestion that this approach may offer the optimal glide-path for ACOs, and also result in greater consistency across program benchmark calculations. However, given the diversity of comments suggesting faster and slower phase-in of the regional adjustment, we believe it will be important to gain experience with the use of the regional adjustment as part of the rebasing methodology before seeking to adopt the adjustment as part of the methodology used to establish the ACO's first agreement period benchmark. Therefore, we plan to explore, the possibility of extending the phase-in by applying the regional adjustment to an ACO's first agreement period benchmark with a weight equal to or lower than 35 percent, in combination with using alternative factors to trend the ACO's historical benchmark (BY1 and BY2 to BY3) and to update the benchmark during the agreement period (discussed in section II.A.2.d. of this final rule). Any changes to the methodology used to establish an ACO's benchmark for its first agreement period would be addressed in future rulemaking.

**FINAL ACTION:** We are finalizing with modifications a phased approach to transitioning to greater weights in calculating the regional adjustment amount, which is expressed as a percentage of the difference between regional average expenditures for the ACO's regional service area and the ACO's rebased historical expenditures. This approach maintains the current methodology for establishing the benchmark for an ACO's first agreement period in the Shared Savings Program based on the historical expenditures for beneficiaries assigned to the ACO with no adjustment for expenditures in the ACO's regional service area, and the current methodology for resetting the historical benchmark for the second agreement period for ACOs that entered the program in 2012 and 2013 and started a new agreement period on January 1, 2016.

We will apply the regional adjustment to the ACO's rebased historical benchmark for ACOs entering a second

or subsequent agreement period in 2017 and subsequent years. We will use the following phased-approach to determine the weight used in calculating the adjustment, which includes applying a lower weight the first and second time the ACO's benchmark is rebased using the regional adjustment if the ACO is determined to have spending higher than its region:

- The first time that an ACO's benchmark is rebased using the regional adjustment:

- ++ CMS uses a weight of 35 percent of the difference between the average per capita expenditure amount for the ACO's regional service area and the ACO's rebased historical benchmark amount, if the ACO is determined to have lower spending than its regional service area;

- ++ The percentage used in this calculation will be set at 25 percent if the ACO is determined to have higher spending than its regional service area.

- The second time that an ACO's benchmark is rebased using the regional adjustment:

- ++ CMS uses a weight of 70 percent of the difference between the average per capita expenditure amount for the ACO's regional service area and the ACO's rebased historical benchmark amount if the ACO is determined to have lower spending than the ACO's regional service area, unless the Secretary determines a lower weight should be applied, as specified through future rulemaking;

- ++ The percentage used in this calculation will be set at 50 percent if the ACO is determined to have higher spending than the ACO's regional service area.

- The third or subsequent time that the ACO's benchmark is rebased using the regional adjustment, the percentage used in this calculation will be set at 70 percent unless the Secretary determines a lower weight should be applied, as specified through future rulemaking.

- If CMS adjusts the ACO's benchmark during the term of the agreement period to reflect the addition or removal of ACO participants or ACO providers/suppliers, CMS will redetermine whether the ACO is considered to have lower spending or higher spending compared to the ACO's regional service area for purposes of determining the percentage to be used in calculating the regional adjustment.

We are incorporating this phased approach to transitioning to greater weights in calculating the regional adjustment in new § 425.603.

As discussed in section II.A.2.f of this final rule, this phased approach will apply to ACOs that entered the program

in 2012 and 2013 and started their second agreement period on January 1, 2016, for the first time in calculating their rebased historical benchmark for their third agreement period (beginning in 2019).

d. Parity Between Establishing and Updating the Rebased Historical Benchmark

(1) Background

In the 2016 proposed rule we provided background on policies regarding the historical benchmark trend factors and annual benchmark updates during the agreement period, including our previous consideration of whether to base these trend and update factors on State, local or regional expenditures instead of national FFS expenditures (see 81 FR 5836 through 5838).

In the initial rulemaking to establish the Shared Savings Program, we identified the need to trend forward the expenditures in each of the 3 years making up the historical benchmark. As explained in earlier rulemaking, because the statute requires the use of the most recent 3 years of per-beneficiary expenditures for Parts A and B services for FFS beneficiaries assigned to the ACO to estimate the benchmark for each ACO, the per capita expenditures for each year must be trended forward to current year dollars before they are averaged using the applicable weights to obtain the benchmark (see 76 FR 19609). In the November 2011 final rule, we finalized an approach under § 425.602(a)(5) for trending forward benchmark expenditures based on national FFS Medicare growth rates for each of the following populations of beneficiaries: ESRD, disabled, aged/dual eligible, aged/non-dual eligible (76 FR 67924 and 67925). We also explained that making separate calculations for specific groups of beneficiaries—specifically the aged/dual eligible, aged/non-dual eligible, disabled, and ESRD populations—accounts for variation in costs of these groups of beneficiaries, resulting in more accurate calculations (76 FR 67924). We considered using national, State or local growth factors to trend forward historical benchmark expenditures (76 FR 19609 through 19610 and 76 FR 67924 through 67925).

Among other considerations, we explained that the anticipated net effect of using the same trending factor based on the national growth rate for all ACOs would be to provide a relatively higher benchmark for low growth/low spending ACOs and a relatively lower benchmark for high growth/high spending ACOs. ACOs in high cost, high

growth areas would therefore have an incentive to reduce their rate of growth more to bring their costs more in line with the national average; while ACOs in low cost, low growth areas would have an incentive to continue to maintain or improve their overall lower spending levels (see 76 FR 67925). We also explained that use of the national growth rate could also disproportionately encourage the development of ACOs in areas with historical growth rates below the national average (see 76 FR 19610). These ACOs would benefit from having a relatively higher benchmark, which would increase the chances for shared savings. On the other hand, ACOs in areas with historically higher growth rates above the national average would have a relatively lower benchmark, and might be discouraged from participating in the program (see 76 FR 19610).

In contrast, as we explained in the initial rulemaking to establish the Shared Savings Program, trending expenditures based on State or local area growth rates in Medicare Parts A and B expenditures may more accurately reflect the experience in an ACO's area and mitigate differential incentives for participation based on location (see 76 FR 19610). We considered, but did not finalize, an option to trend the benchmark by the lower of the national projected growth rate or the State or the local growth rate (see 76 FR 19610 and 76 FR 67925). This option balanced providing a more accurate reflection of local experience with not rewarding historical growth higher than the national average. We believed this method would instill stronger saving incentives for ACOs in both high growth and low growth areas (see 76 FR 19610).

Section 1899(d)(1)(B)(ii) of the Act states that the benchmark shall be updated by the projected absolute amount of growth in national per capita expenditures for Parts A and B services under the original Medicare FFS program, as estimated by the Secretary. Further, the Secretary's authority under section 1899(i)(3) of the Act, for implementing other payment models, allows for alternatives to using national expenditures for updating the benchmark, as long as the Secretary determines the approach improves the quality and efficiency of items and services furnished under Medicare and does not result in additional program expenditures.

In the initial rulemaking, we finalized our policy under § 425.602(b) to update the historical benchmark annually for each year of the agreement period based on the flat dollar equivalent of the

projected absolute amount of growth in national per capita expenditures for Parts A and B services under the original Medicare FFS program as specified under section 1899(d)(1)(B)(ii) of the Act. Further, consistent with the final policies for calculating the historical benchmark (among other aspects of the Shared Savings Program's financial models) the calculations for updating the benchmark are made for each of the following populations of beneficiaries: ESRD, disabled, aged/dual eligible, aged/non-dual eligible (76 FR 67926 and 67927). In developing this policy, we also considered using our authority under section 1899(i)(3) of the Act to update the benchmark by the lower of the projected absolute amount of growth in national per capita expenditures and the projected absolute amount of growth in local/state per capita expenditures (see 76 FR 19610 and 19611).

Among other considerations, we explained that using a flat dollar increase, which would be the same for all ACOs, provides a relatively higher expenditure benchmark for low growth, low spending ACOs and a relatively lower benchmark for high growth, high spending ACOs. Therefore, ACOs in high spending, high growth areas must reduce their rate of growth more (compared to ACOs in low spending, low growth areas) to bring their costs more in line with the national average (see 76 FR 19610). We also indicated that these circumstances could contribute to selective program participation by ACOs favored by the national flat-dollar update, and ultimately result in Medicare costs from shared savings payments that result from higher benchmarks rather than an ACO's care coordination activities (see 76 FR 19610 through 19611 and 19635). Incorporating more localized growth factors reflects the expenditure and growth patterns within the geographic area served by ACO participants, potentially providing a more accurate estimate of the updated benchmark based on the area from which the ACO derives its patient population (76 FR 19610).

In the June 2015 final rule, we discussed comments received on benchmark rebasing alternatives discussed in the December 2014 proposed rule that would include using regional FFS expenditures, instead of national FFS expenditures, to develop the historical benchmark trend factors and to update the benchmark during the agreement period (79 FR 72839; 79 FR 72841 through 72843; 80 FR 32792, 32794). We indicated our plan to consider further what additional

adjustments should be made to the benchmarking methodology when moving to a rebasing approach that accounts for regional FFS trends, including whether to incorporate regional FFS expenditures in updating an ACO's historical benchmark each performance year or to maintain the policy under which we update an ACO's benchmark based on the projected absolute amount of growth in national per capita expenditures for Parts A and B services under the original FFS program (80 FR 32796).

## (2) Regional Growth Rate as a Benchmark Trending Factor

We proposed to replace the national trend factors currently used for trending an ACO's BY1 and BY2 expenditures to BY3 in calculating an ACO's rebased historical benchmark with regional trend factors derived from a weighted average of risk adjusted FFS expenditures in the counties where the ACO's assigned beneficiaries reside. Further, we proposed to calculate and apply these trend factors for each of the following populations of beneficiaries: ESRD, disabled, aged/dual eligible, aged/non-dual eligible. We proposed to incorporate these changes in a new regulation at § 425.603.

To align with the proposed methodology for calculating regional FFS expenditures for an ACO's regional service area, we considered the following approach for calculating regional FFS trend factors:

- For each benchmark year, calculate risk adjusted county FFS expenditures for the ACO's regional service area. County FFS expenditures would be determined consistent with other proposals discussed in the 2016 proposed rule, by using total county-level FFS Parts A and B expenditures for assignable beneficiaries, excluding IME, DSH, and uncompensated care payments, but including beneficiary identifiable payments made under a demonstration, pilot or time limited program; regional expenditures would be calculated for each Medicare enrollment type (ESRD, disabled, aged/dual eligible, aged/non-dual eligible);

- For each benchmark year, compute a weighted average of risk adjusted county-level FFS expenditures using weights that reflect the proportion of an ACO's assigned beneficiaries residing in each county within the ACO's regional service area. Calculations would be done by Medicare enrollment type (ESRD, disabled, aged/dual eligible, aged/non-dual eligible) based on the ACO's benchmark year assigned population.

- Compute the average growth rates from BY1 to BY3, and from BY2 to BY3, using the weighted average of risk-adjusted county level FFS expenditures for the respective benchmark years, for each Medicare enrollment type.

We explained that we would apply these regional trend factors to the ACO's historical benchmark expenditures, which are also adjusted based on the CMS-HCC model, to account for the severity and case mix of the ACO's assigned beneficiaries in each benchmark year.

We discussed that using regional trend factors, instead of national trend factors to trend forward expenditures in the benchmark period, would further incorporate regional FFS spending and population dynamics specific to the ACO's regional service area in the ACO's rebased benchmark. We explained our belief that there are number of relevant considerations for moving to use of regional trend factors, including the following:

- Regional trend factors would more accurately reflect the cost growth experience in an ACO's regional service area compared to use of national trend factors.

- Regional trend factors would reflect the change in the health status of the FFS population that makes up the ACO's regional service area, the region's geographic composition (such as rural versus urban areas), and socio-economic differences that may be regionally related.

- Regional trend factors could better capture location-specific changes in Medicare payments (for example, the area wage index) compared to use of national trend factors.

We also considered how use of regional trend factors in resetting ACO benchmarks could affect participation by relatively high- and low-growth ACOs operating in regions with high and low growth in Medicare FFS expenditures. We anticipated the following:

- Using regional trend factors would result in relatively higher benchmarks for ACOs that are low growth in relation to their region compared to benchmarks for ACOs that are high growth relative to their region. Therefore, use of regional FFS trends could disproportionately encourage the development of and continued participation by ACOs with rates of growth below that of their region. These ACOs would benefit from having a relatively higher benchmark, which would increase their chances for shared savings. On the other hand, ACOs with historically higher rates of growth above the regional average would have a

relatively lower benchmark and may be discouraged from participating if they are not confident of their ability to bring their costs in line with costs in their region.

- In using regional growth rates specific to an ACO's regional service area and composition (by Medicare enrollment type), there would likely be significant variation in the growth rates between health care markets in different regions of the country and even between ACOs operating in the same markets. This approach would be a departure from the current methodology, which applies a single set of national growth factors calculated for each benchmark year by Medicare enrollment type (ESRD, disabled, aged/dual eligible, aged/non-dual eligible). However, ACOs familiar with the composition of their assigned population and cost trends in their regional service area may find they can more readily anticipate what these trend factors may be. We indicated that stakeholders may find it helpful to observe differences in county FFS expenditures using the data files made publicly available in conjunction with the 2016 proposed rule.

We sought comment on the proposed change to the rebased historical benchmark trend factor. We also considered and sought comment on several alternative approaches, including:

- Using regional trend factors for trending forward an ACO's BY1 and BY2 expenditures to BY3 in establishing and resetting historical benchmarks under the approach to resetting ACO benchmarks established with the June 2015 final rule (under which we equally weight the benchmark years, and account for savings generated under the ACO's prior agreement period), as an alternative to adopting the approach to adjusting rebased benchmarks to reflect FFS expenditures in the ACO's regional service area, as discussed in the 2016 proposed rule.

- Applying regional trend factors for trending forward BY1 and BY2 expenditures to BY3 in establishing the benchmark for an ACO's first agreement period under § 425.602(a), allowing this policy to be applied consistently program-wide beginning with an ACO's first agreement period.

*Comment:* Some commenters discussed issues relevant both to the proposal to replace national growth rates with regional growth rates for trending the rebased benchmark (BY1 and BY2 expenditures to BY3) and the proposed use of regional growth rates instead of a national flat dollar amount to update the benchmark each performance year. The following

summary reflects these more general considerations, while later in this section of this final rule we discuss comments specific to each of these proposals. Comments were somewhat divided between support for and concerns about the proposals on using regional FFS expenditures instead of national FFS expenditures in calculating trend and update factors. Broader considerations reflected in the comments, relevant to both proposals include the following:

- Among commenters supporting the proposed use of regional growth rates instead of factors based on national FFS expenditures in benchmark calculations, some believed this approach generally would result in benchmarks that better reflect the regional patterns in spending and costs. Additionally, several commenters explained that the use of national FFS expenditures as a component of the benchmark does not accurately reflect what is possible for ACOs to achieve, in terms of controlling growth in Medicare spending, within their geographic area or with respect to their assigned patient population.

- Some commenters disagreed with the proposed use of regional growth rates in benchmark calculations, perceiving that these modifications could negatively impact benchmarks by, for example: (1) Allowing individual provider anomalies to have a material impact on an ACO's benchmark; (2) lowering benchmarks (compared to the current methodology) for ACOs in low growth regions, with a commenter noting that ACOs in higher-growth areas would be rewarded with higher benchmarks; (3) lowering benchmarks in regions where ACOs have been successful in reducing growth in expenditures (particularly for successful ACOs that are dominant in a region, or ACO-heavy regions).

- Some commenters were concerned about the discussion in the proposed rule indicating that the proposed changes could have mixed effects, increasing and decreasing benchmarks for ACOs depending on their circumstances.

- Several commenters expressed support for adopting the use of regional trend and update factors across all ACOs, including ACOs within their first agreement period. A commenter explained that applying different methodologies in the first and subsequent agreement periods adds complexity and reduces predictability of the benchmark values.

A few commenters noted CMS' larger goal of reducing regional variation in health care utilization and costs. A

commenter expressed concern that using regional factors to formulate benchmarks for Shared Savings Program ACOs may exacerbate geographic variation and is antithetical to CMS' broader goal of reducing this variation. However, another commenter stated that use of regional expenditure growth rates rather than national expenditure growth rates in benchmark calculations will better facilitate CMS' goal of encouraging Shared Savings Program ACOs to transition to risk bearing arrangements.

*Response:* We appreciate commenters' support of the proposed use of growth rates based on regional FFS expenditures to trend forward BY1 and BY2 expenditures to BY3 when establishing the ACO's rebased historical benchmark and to annually update the ACO's rebased historical benchmark, as well as comments describing concerns with use of regional growth rates in these calculations. We agree with comments indicating the use of regional growth rates for the trend and update factors will have mixed effects on ACOs' rebased benchmarks, increasing or decreasing the benchmark values depending on the growth rates determined for the ACO's regional service area as we described in the 2016 proposed rule and reiterate in this final rule. As discussed in greater detail in section II.A.2.d.3 of this final rule, we plan to explore through future rulemaking alternative approaches to calculating the trend and update factors that may help mitigate concerns raised by some commenters about the potential disadvantages for some ACOs of transitioning from national to regional trend and update factors. We also plan to explore through future rulemaking suggestions by some commenters to begin to incorporate regional factors in the ACO's first agreement period.

On the whole, for the reasons described in the 2016 proposed rule and echoed in some comments, we believe these policy changes are an important step towards making an ACO's rebased historical benchmark more reflective of the ACO's regional service area including better reflecting the region's cost experience, location-specific Medicare payment changes, as well as the health status of the region's FFS population. We believe these changes to the methodology are responsive to stakeholders' requests that we incorporate regional FFS expenditures into the ACO's rebased historical benchmark, and therefore are critical to ensuring the sustainability of the program.

*Comment:* Commenters also offered suggestions specific to the proposed use

of regional growth rates for trending the rebased benchmark. Although some commenters were supportive of the proposed methodology for calculating the growth rates to be used as trend factors in establishing an ACO's rebased historical benchmark, a commenter conditioned support for use of regional trend factors on the ACO's spending being compared to spending for the regional Medicare FFS population excluding beneficiaries assigned to the ACO or any other ACO in the region. Some commenters disagreed with the proposed change from using national FFS expenditures to using regional FFS expenditures to calculate the trend factors used to establish an ACO's rebased historical benchmark, for reasons previously described in this section of this final rule.

*Response:* We are finalizing as proposed the use of regional growth rates to calculate the trend factor for establishing an ACO's rebased historical benchmark. We appreciate commenters' support for this approach, which we believe will more quickly transition the program to benchmark calculations reflecting spending, and spending growth, in the ACO's regional service area and is consistent with the approach we are finalizing for calculating the annual update to the ACO's rebased historical benchmark. For these reasons, we decline the suggestion by some commenters to continue using trend factors based on national FFS expenditures in establishing an ACO's rebased historical benchmark.

In section II.A.2.b of this final rule, we discuss comments suggesting exclusion of ACO assigned beneficiaries from the population used to determine expenditures for the ACO's regional service area, and the reasons why we believe it is appropriate to include ACO assigned beneficiaries when calculating regional FFS expenditures. For the same reasons, we believe it is appropriate to include expenditures for these ACO assigned beneficiaries when determining regional trend and update factors.

*Comment:* A few commenters recommended alternative approaches to using regional growth rates for trending benchmark expenditures to establish an ACO's rebased historical benchmark not discussed in the proposed rule. For example, a commenter suggested a methodology that would account for both national and regional FFS expenditure trends, expressing concern that replacing the national trend factor with only a regional trend factor would pose additional challenges for ACOs in low-cost regions to meet the benchmark. Another commenter suggested allowing

ACOs a choice of regional or national trend factors, explaining that this choice would allow each ACO to take into consideration the many competitive factors driving change within its local market.

*Response:* We decline to adopt any of the alternative approaches recommended by commenters for calculating the trend factors. Elsewhere in this section of this final rule we discuss concerns that use of regional growth rates in benchmark calculations for the trend factors and the annual update will result in relatively lower benchmarks for ACOs in regions where spending growth is limited compared to areas with higher spending growth. In section II.A.2.d.3 of this final rule, we discuss our plan to explore an alternative approach to calculating the annual update, and also the benchmark trend factors, using standardized national FFS expenditures. We believe this approach has the potential to address the concerns raised by the commenter that suggested using an approach to determining trend factors that accounts for both national and regional FFS expenditure trends. We also decline at this time to adopt the commenter's suggestion for an approach that (by design) would allow ACOs the choice between trend factors (national or regional). Such an approach could lead to opportunities for arbitrage and may dull incentives for ACOs to improve their performance under the Shared Savings Program, as well as create additional operational complexities for implementing the policy.

*Comment:* Some commenters supported using a similar approach to calculate both the trend factors used in establishing the ACO's rebased historical benchmark and the annual update to the rebased benchmark, as described in the 2016 proposed rule. A commenter expressed concern that the descriptions of the calculations for the proposed regional trend factors and annual update were based on different parameters but arrived at the same outcome.

*Response:* In the 2016 proposed rule (81 FR 5838 and 5839), we outlined the steps for calculating the regional growth rates for the regional trend factors used in establishing the ACO's rebased benchmark and for the annual update to the ACO's rebased benchmark. We appreciate the commenter's attention to the details in the descriptions of our proposed methodologies for trending and updating the benchmark. The methodologies used to calculate the growth rates for the trend factor and annual update are the same: for both the

trend factor and the annual update, we will determine risk-adjusted county FFS expenditures for the ACO's regional service area, calculated by Medicare enrollment type (ESRD, disabled, aged/dual eligible, aged/non-dual eligible) for the relevant reference years, and determine the percentage change in regional FFS expenditures for the ACO's regional service area. However, there are certain necessary differences in the reference years used for purposes of trending and updating the benchmark. Specifically, the trend factors represent the growth rates between the ACO's historical benchmark years (trend factor of BY1 and BY2 to BY3), whereas the annual update represents the growth rate between benchmark year 3 and the performance year. Therefore, both growth rates will reflect changes in expenditures for the ACO's regional service area (according to the counties of residence of the ACO's assigned beneficiaries) for each of the 2 reference years used in determining the applicable growth rate. We believe that the approaches are generally consistent and together they will result in a benchmark that consistently reflects the rate of growth in expenditures for the ACO's region.

**FINAL ACTION:** We are finalizing as proposed the use of regional growth rates, derived from a weighted average of risk adjusted FFS expenditures for the ACO's regional service area, determined by the counties where the ACO's assigned beneficiaries reside, to trend forward an ACO's BY1 and BY2 expenditures to BY3 in calculating an ACO's rebased historical benchmark. We will calculate and apply these trend factors for each of the following populations of beneficiaries: ESRD, disabled, aged/dual eligible, aged/non-dual eligible. We are incorporating this methodology at § 425.603(c)(5).

### (3) Updating the Reset Benchmark During the Agreement Period

Using the authority of section 1899(i)(3) of the Act, we proposed to include a provision in a new regulation at § 425.603 to specify that for ACOs in their second or subsequent agreement period whose rebased historical benchmark incorporates an adjustment to reflect regional expenditures, the annual update to the benchmark will be calculated as a growth rate that reflects growth in risk adjusted regional per beneficiary FFS spending for the ACO's regional service area. Further, we proposed to calculate and apply separate update factors based on risk adjusted regional FFS expenditures for each of the following populations of beneficiaries: ESRD, disabled, aged/dual

eligible, aged/non-dual eligible. We proposed that this approach would replace the annual update to the historical benchmark for each year of the agreement period based on the flat dollar equivalent of the projected absolute amount of growth in national per capita expenditures for Parts A and B services under the original Medicare FFS program under section 1899(d)(1)(B)(ii) of the Act. We explained our considerations in developing this proposal and sought comment on the proposed methodology.

We considered the following issues in developing our proposed modification to the methodology for updating the ACO's rebased historical benchmark:

- Using an update factor based on the regional FFS expenditures for the ACO's regional service area to update an ACO's rebased historical benchmark during the ACO's second or subsequent agreement period would align with our proposal to use regional FFS expenditures in developing the trend factors for the rebased historical benchmark (to trend BY1 and BY2 expenditures to BY3) and our proposal to adjust the ACO's rebased historical benchmark to reflect regional FFS expenditures.

- Updating the benchmark based on regional FFS expenditures annually, during the course of the agreement period, would result in a benchmark used to determine shared savings and shared losses for a performance year that reflects trends in regional FFS growth for the ACO's regional service area for the corresponding year. We explained that calculating the update factor using regional FFS expenditures would better capture the cost experience in the ACO's region, the health status and socio-economic dynamics of the regional population, and location-specific Medicare payments, when compared to using national FFS expenditures.

- Adopting this approach would require our use of authority under section 1899(i)(3) of the Act as it is a departure from the methodology for annually updating the benchmark specified under section 1899(d)(1)(B)(ii) of the Act.

We considered using the following approach to calculate the regional update amount for each Medicare enrollment type (ESRD, disabled, aged/dual eligible, aged/non-dual eligible):

- For each calendar year corresponding to a performance year, calculate risk adjusted county FFS expenditures for the ACO's regional service area. As described in the 2016 proposed rule, county FFS expenditures would be determined using total county-level FFS Parts A and B

expenditures for assignable beneficiaries, excluding IME, DSH, and uncompensated care payments, but including beneficiary identifiable payments made under a demonstration, pilot or time limited program, truncated and risk adjusted for each Medicare enrollment type (ESRD, disabled, aged/dual eligible, aged/non-dual eligible). The ACO's regional service area would be defined based on the ACO's assigned beneficiary population used to perform financial reconciliation for the relevant performance year.

- Compute a weighted average of risk adjusted county-level FFS expenditures with weights based on the proportion of an ACO's assigned beneficiaries residing in each county of the ACO's regional service area. Calculations would be done by Medicare enrollment type (ESRD, disabled, aged/dual eligible, aged/non-dual eligible) based on the ACO's assigned population used to perform financial reconciliation for the relevant performance year.

- Although not specified in the 2016 proposed rule, a necessary step in this calculation is computing the growth rates as the ratio of weighted average risk-adjusted county level FFS expenditures for the applicable 2 years. To clarify, we would determine the regional growth rates by comparing expenditures determined in the previous step for the relevant performance year with expenditures for BY3.

We considered whether to calculate a flat dollar equivalent of the projected absolute amount of growth in regional per capita expenditures for Parts A and B FFS services, or whether to calculate the percentage change in growth in regional FFS expenditures for the ACO's regional service area. We discussed issues related to use of a growth rate or a flat dollar amount in the initial rulemaking to establish the Shared Savings Program, including our view that a growth rate would more accurately reflect each ACO's historical experience, but could also perpetuate current regional differences in medical expenditures (see 76 FR 19609 through 19610 and 76 FR 67924). Based on the reasons discussed in the earlier rulemaking, we noted our belief that using growth rates to determine the annual update would more effectively capture changes in the ACO's regional service area expenditures and changes in the health status of the ACO's population in comparison to the health status of the population of the ACO's regional service area over time. We explained that using a growth rate to update ACOs' benchmarks would also result in proportionately larger updates

for higher spending ACOs in the region and lower updates for lower spending ACOs in the region and would strike a balance with the flat-dollar average regional expenditures used to adjust the ACOs historical benchmark.

We further described the anticipated effects of the proposed change to the methodology for calculating the update to an ACO's rebased historical benchmark, including:

- The use of an update factor based on regional FFS spending offers different incentives compared to an update factor reflecting only growth in national FFS spending. For instance, accounting for national FFS spending in an ACO's benchmark update would provide a relatively higher expenditure benchmark for low spending ACOs in low growth areas and a relatively lower benchmark for high spending ACOs in high growth areas. In contrast, accounting for changes in regional FFS spending between the benchmark and the performance year by updating the benchmark according to changes in regional FFS expenditures would ensure that the benchmark continues to reflect recent trends in FFS spending growth in the ACO's region throughout the duration of the ACO's agreement period.

- The use of an update factor based on regional FFS spending will likely result in significant variation in annual benchmark updates for individual ACOs, reflecting the cost experience in each ACO's individualized regional service area along with changes in the health status of the population of patients served by the ACO as well as changes in the types of Medicare entitlement status in the ACO's assigned beneficiary population. The degree of year-to-year change in expenditures will likely vary in both existing low- and high-growth regions and could also vary significantly from expectations. We explained, based on our past experience with calculating the 2012 national FFS growth factors (as used for interim reconciliation for the 2012 starters), the potential for negative updates and corresponding decreases in benchmark values.

We also considered how to apply the update to the ACO's rebased historical benchmark adjusted for expenditures in the ACO's regional service area. We specified that the update would be applied after all adjustments are made to the ACO's rebased benchmark. We detailed a sequence for these adjustments and the application of the update that would maintain the overall structure of the program's current methodology, and align with the other revisions to the methodology used to calculate an ACO's rebased historical

benchmark described in the 2016 proposed rule.

We explained it would be necessary to use the discretionary authority in section 1899(i)(3) of the Act to adopt a policy under which we would calculate the benchmark update using regional FFS expenditures. Section 1899(i)(3) of the Act authorizes the Secretary to use other payment models in place of the payment model outlined in section 1899(d) of the Act as long as the Secretary determines these other payment models will improve the quality and efficiency of items and services furnished to Medicare beneficiaries, without additional program expenditures. We explained our belief that updating an ACO's rebased historical benchmark based on regional FFS spending, rather than national FFS spending, would have positive effects for the Shared Savings Program and Medicare beneficiaries. As described in the regulatory impact analysis of the 2016 proposed rule, we noted the proposed changes to the payment model used in the Shared Savings Program, including updating the ACO's rebased historical benchmark based on regional FFS spending, were anticipated to increase overall participation in the program, improve incentives for ACOs to invest in effective care management efforts, and increase the accuracy of benchmarks in capturing the experience in an ACO's regional service area compared to the use of national FFS expenditures. Therefore, we believed these changes would result in improved quality of care furnished to Medicare beneficiaries, and greater efficiency of items and services furnished to these beneficiaries, as more ACOs enter and remain in the Shared Savings Program and continue to work to meet the program's three-part aim of better care for individuals, better health for populations and lower growth in expenditures.

We noted that section 1899(i)(3)(B) of the Act provides that the requirement that the other payment model not result in additional program expenditures "shall apply . . . in a similar manner as [subparagraph (b) of paragraph (2) of section 1899(i)] applies to the payment model under [section 1899(i)(2)]." Section 1899(i)(2) of the Act provides discretion for the Secretary to use a partial capitation model rather than the payment model described in section 1899(d) of the Act. Section 1899(i)(2)(B) of the Act provides that payments to an ACO for items and services for beneficiaries for a year under the partial capitation model shall be established in a manner that does not result in spending more for such ACO for such

beneficiaries than would otherwise be expended for such ACO for such beneficiaries for such year if the model were not implemented, as estimated by the Secretary.

We explained that we had not previously addressed this provision in rulemaking. We stated our belief that we could use a number of approaches to address this statutory requirement, for example: Through an initial estimation that the model does not result in additional expenditures that spans multiple years of implementation; by a periodic assessment that the model does not result in additional program expenditures; or by structuring the model in a way such that CMS could not spend more for an ACO for such beneficiaries than would otherwise be expended for such ACO for such beneficiaries for such year if the model were not implemented. However, because section 1899(i)(3)(B) of the Act states only that the requirement that the payment model not result in additional program expenditures must be applied in "a similar manner" to the requirement under section 1899(i)(2)(B) of the Act, we explained our belief that we have some discretion to tailor this requirement to the payment framework that is being adopted under the other payment model.

The regulatory impact analysis of the 2016 proposed rule discussed our analysis of the requirement under section 1899(i)(3)(B) of the Act that the other payment model must not result in additional program expenditures, and our initial assessment of the costs associated with a payment model that includes changes to the manner in which we update the benchmark during an ACO's agreement period. We compared all current policies and proposed policies to policies that could be implemented under section 1899(d)(1)(B)(ii) of the Act, and assessed that for the period spanning 2017 through 2019 there would be net federal savings. Therefore, we believed that the proposed alternative payment model under section 1899(i)(3) of the Act, which includes the use of regional FFS expenditures to update an ACO's rebased historical benchmark and the use of FFS expenditures of assignable beneficiaries to calculate the national benchmark update for ACOs in their first agreement period and those ACOs that started a second agreement period on January 1, 2016, as well as policies established using the authority of section 1899(i)(3) of the Act in earlier rulemaking, meets the requirement under section 1899(i)(3)(B) of the Act. We anticipated that the costs of this alternative payment model would be

periodically reassessed as part of the impact analysis for subsequent rulemaking regarding the payment models used under the Shared Savings Program. However, we explained that in the event we do not undertake additional rulemaking, we intend to periodically reassess whether a payment model established under authority of section 1899(i)(3) of the Act continues to improve the quality and efficiency of items and services furnished to Medicare beneficiaries, without resulting in additional program expenditures. If we determine the payment model no longer satisfies the requirements of section 1899(i)(3) of the Act, for example if the alternative payment model results in net program costs, we would undertake additional notice and comment rulemaking to make adjustments to our payment methodology to assure continued compliance with the statutory requirements.

We clarified that the current methodology for calculating the annual update would continue to apply in updating an ACO's historical benchmark during its first agreement period, as well as in updating the rebased historical benchmark for the second agreement period for ACOs that started in the program in 2012 or 2013, and entered their second agreement period on January 1, 2016. That is, for these ACOs, we would continue to update the historical benchmark annually for each year of the agreement period based on the flat dollar equivalent of the projected absolute amount of growth in national per capita expenditures for Parts A and B services under the original Medicare FFS program. Consistent with the discussion in section II.A.2.e.3 of this final rule, these calculations will be performed based on assignable beneficiaries.

We also discussed and sought comment on alternatives to the proposed approach, including: (1) Calculating the update factor as the flat dollar equivalent of the projected absolute amount of growth in regional per capita expenditures for Parts A and B services for the ACO's regional service area; and (2) using regional FFS expenditures, instead of national FFS expenditures, to update an ACO's historical benchmark beginning with its first agreement period.

*Comment:* In section II.A.2.d.2 of this final rule, we describe and respond to comments regarding the use of regional growth rates in trending the ACO's rebased historical benchmark and updating the ACO's rebased historical benchmark annually during the agreement period. Commenters also

offered suggestions specific to the proposed use of regional growth rates for updating the rebased benchmark. Some commenters expressed support for the proposed use of growth rates based on regional FFS expenditures to annually update the ACO's rebased historical benchmark. A commenter seemed to support this approach because it would yield larger update amounts for ACOs in higher growth regions, compared to the current use of an update factor based on national FFS expenditures.

Of the few comments discussing whether the annual update should be calculated using regional growth rates or regional flat dollar amounts, commenters expressed a preference for the use of regional growth rates. Some commenters explained their preference for CMS to use the same formula to determine the regional trend and update factors. Because CMS proposed that regional trend factors would be calculated as growth rates, these commenters opposed use of regional flat dollar amounts in calculating the annual update in order to assure a consistent methodology would be used to trend and update the ACO's rebased historical benchmark using factors based on regional FFS expenditures.

Some commenters opposed the proposed use of regional FFS expenditures, instead of national FFS expenditures, to determine the annual update to the ACO's rebased historical benchmark. Some commenters expressed concern that the proposed approach would have a variable impact on ACOs across the country, increasing and decreasing benchmarks for ACOs depending on the circumstances. A principal concern expressed by these commenters was that the proposed methodology would result in relatively lower update amounts for ACOs in low growth areas (including as a result of ACOs' success in lowering growth in expenditures) compared to the update amounts for ACOs in higher growth areas. A commenter further explained that the wrong incentives will result because for regions where there is a substantial amount of managed care, or a dominant, successful ACO, the rate of FFS spending growth per capita in the region would be limited and the update to ACO benchmarks would be lowered by the success of risk-based coordinated care. Another commenter indicated a similar concern specific to ACO-heavy regions, pointing to a discussion of the issue in the 2016 proposed rule regulatory impact analysis (81 FR 5859).

Some commenters suggested CMS forgo the proposed modification, and some recommended alternative

approaches to use of regional growth rates for updating the ACO's rebased benchmark, including the following:

- Several commenters (including MedPAC) expressed support for modifying the benchmark update methodology to better account for changes in factors outside the ACO's control that affect regional spending, but expressed concern about the proposal to move to use of regional FFS expenditures in calculating the annual update. MedPAC explained that ACOs' incentives to control spending growth would be limited if the update to the benchmark would be reduced by their success in reducing spending growth, particularly in circumstances where an ACO is dominant in its region. MedPAC suggested CMS investigate continuing to use a national update amount, and excluding IME, DSH and uncompensated care payments as provided under our current regulations, but also adjusting for changes in factors outside the ACO's control that affect regional spending such as area wage index changes (for example the region's hospital wage index). Along similar lines, another commenter suggested CMS adopt the Next Generation ACO model methodology. The Next Generation ACO Model is currently testing a benchmarking method that includes use of a prospectively calculated trend-adjustment factor, applied to baseline claims, which includes a national projected trend adjusted for regional changes in geographic adjustment factors (such as area wage index (AWI) and geographic practice cost index (GPCI)). See Next Generation ACO Model Benchmarking Methods (December 15, 2015), available online at <https://innovation.cms.gov/Files/x/nextgenaco-methodology.pdf>.
- Allow ACOs a choice between the higher of the national or regional update amount, particularly in the agreement period when the rebasing methodology including factors based on regional FFS expenditures is applied to the ACO for the first time.
- Reduce the frequency of, or eliminate altogether, the benchmark update.

**Response:** We are finalizing as proposed the use of regional growth rates to calculate the annual update to the ACO's rebased historical benchmark. We believe this approach will more quickly transition the program to benchmark calculations reflecting spending and spending growth in the ACO's regional service area.

However, we do share commenters' concerns about creating significant variation in the update amount across

ACOs participating in the Shared Savings Program. We are also concerned about the longer term effects on participation resulting from relatively lower benchmark updates for regions with lower growth rates, reflecting ACOs' success in lowering growth in expenditures in those regions or a more general pattern of lower growth in the regions. We considered the approach suggested by MedPAC, under which the benchmark update would be calculated using standardized national FFS expenditures, adjusted for factors including the area wage index, to be an elegant alternative to use of regional growth rates in calculating the benchmark update. We are not adopting this approach in this final rule because this option was not discussed in the proposed rule, and therefore ACOs and other stakeholders have not had an opportunity to comment on this approach. Further, we would need to undertake additional analysis and modeling of this approach before deciding whether to propose it.

We anticipate exploring an alternative approach to calculating the update similar to MedPAC's recommendation, and may address the details of this approach in future rulemaking. Under this approach we would consider standardizing national FFS expenditures, for example: By calculating the benchmark update using a national growth rate adjusted for factors including IME, DSH, uncompensated care, as well as the AWI and GPCI; or by removing all geographic based payments and other add on payments similar to the approach for standardizing claims under the Physician Value Based Payment Modifier and Hospital Value-Based Purchasing programs. See for example, Basics of Payment Standardization (June 2015) and Detailed Payment Standardization Methods (updated May 2015), available at <http://www.qualitynet.org/dcs/ContentServer?c=Page&pagename=QnetPublic%2FPage%2FQnetTier4&cid=1228772057350>. We also believe the Innovation Center's experience with the Next Generation ACO Model methodology will be informative when evaluating use of geographic adjustments within the Shared Savings Program benchmarking methodology.

We would also explore, through future rulemaking, how broadly to apply an alternative approach, including whether to apply the same methodology consistently in calculating both the trend factors and the annual update. We would also consider whether to apply the same methodology consistently

across the program for benchmark calculations, regardless of whether the ACO is participating in its first, or a subsequent agreement period. For example, we may consider calculating the trend and update factors using regional growth rates, as provided in this final rule, in benchmark calculations for an ACO's first agreement period. Alternatively, we may consider applying consistently across the program an alternative approach to calculating the regional trend and update factors, such as using standardized national FFS expenditures. Another consideration would be whether to apply an alternative approach to calculating the trend and update factors, such as using standardized national FFS expenditures, only in calculating an ACO's first agreement period benchmark, as a means of facilitating ACOs' transition to a benchmarking methodology in subsequent agreement periods that includes use of regional growth rates to trend and update the benchmark.

**FINAL ACTION:** Under the authority of section 1899(i)(3) of the Act, we are finalizing our proposal that for ACOs in their second or subsequent agreement period whose rebased historical benchmark incorporates an adjustment to reflect regional expenditures, the annual update to the benchmark will be calculated as a growth rate that reflects growth in risk adjusted regional per beneficiary FFS spending for the ACO's regional service area, for each of the following populations of beneficiaries: ESRD, disabled, aged/dual eligible, aged/non-dual eligible. We are incorporating this methodology at § 425.603(d). We note that this final provision includes some minor revisions to the proposed regulatory language in order to ensure that the final methodology for updating the rebased benchmark is described accurately and consistently.

We note that section IV.E of this final rule contains an updated assessment of all policies that are being implemented under the authority of section 1899(i)(3). Specifically, we compared all current policies along with the policies that are being adopted in this final rule to policies that could be implemented under section 1899(d)(1)(B)(ii) of the Act, and concluded that for the period from 2017 to 2019 there would be net federal savings. As discussed in the proposed rule, we anticipate that the costs of this alternative payment model will be periodically reassessed as part of the impact analysis for subsequent rulemaking regarding the payment models used in the Shared Savings Program. However, in the event we do

not undertake additional rulemaking, we intend to periodically reassess whether the payment model established under the authority of section 1899(i)(3) of the Act continues to improve the quality and efficiency of items and services furnished to Medicare beneficiaries, without resulting in additional program expenditures. If we determine the payment model no longer satisfies the requirements of section 1899(i)(3) of the Act, for example if the alternative payment model results in net program costs, we will undertake additional notice and comment rulemaking to make adjustments to our payment methodology to assure continued compliance with the statutory requirements. In adopting this approach, we believe that the alternative payment model under section 1899(i)(3) of the Act that is set forth in this final rule, which includes using regional FFS expenditures to update an ACO's rebased historical benchmark, using FFS expenditures of assignable beneficiaries to calculate the national benchmark update for ACOs in their first agreement period and those that started a second agreement period on January 1, 2016, as well as existing policies established using the authority of section 1899(i)(3) of the Act, meets the requirement of section 1899(i)(3)(B) of the Act.

e. Parity Between Calculation of ACO, Regional and National FFS Expenditures

(1) Background

In the November 2011 final rule, we established a methodology for determining ACO benchmark and performance year expenditures for Medicare FFS beneficiaries assigned to the ACO. Under that methodology, we take into account payments made from the Medicare Trust Funds for Parts A and B services for assigned Medicare FFS beneficiaries, including individually beneficiary identifiable payments made under a demonstration, pilot or time limited program, when computing average per capita Medicare expenditures under the ACO. We exclude IME payments and DSH and uncompensated care payments from both benchmark and performance year expenditures. This adjustment to benchmark expenditures falls under the Secretary's discretion established by section 1899(d)(1)(B)(ii) of the Act to adjust the benchmark for beneficiary characteristics and such other factors as the Secretary determines appropriate. However, section 1899(d)(1)(B)(i) of the Act only provides authority to adjust expenditures in the performance period for beneficiary characteristics and does

not provide authority to adjust for "other factors." Therefore, to remove IME and DSH payments from performance year expenditures, we used our authority under section 1899(i)(3) of the Act, which authorizes use of other payment models, in order to make this adjustment (see 76 FR 67920 through 67922). We allow for a 3-month run out of claims data and apply a claims completion factor (percentage), to more accurately determine an ACO's benchmark and performance year expenditures (76 FR 67837 and 67838). To minimize variation from catastrophically large claims we truncate an assigned beneficiary's total annual Parts A and B FFS per capita expenditures at the 99th percentile of national Medicare FFS expenditures as determined for each benchmark year and performance year (76 FR 67914 through 67916).

We perform many of these calculations separately for each of the following populations of beneficiaries: ESRD, disabled, aged/dual eligible, aged/non-dual eligible. For example, we calculate benchmark and performance year expenditures, determine truncation thresholds, and risk adjust ACO expenditures separately for each of these four Medicare enrollment types. As part of this methodology, we account for circumstances where a beneficiary is enrolled in a Medicare enrollment type for only a fraction of a year, through a process that results in a calculation of "person years" for a given year. We calculate the number of months that each beneficiary is enrolled in Medicare in each Medicare enrollment type, and divide by 12. When we sum the fraction of the year enrolled in Medicare for all the beneficiaries in each Medicare enrollment type, the result is total person years for the beneficiaries assigned to the ACO.

We currently apply these policies consistently across the program, as specified in the provisions for establishing, updating and resetting the benchmark under § 425.602, and for determining performance year expenditures under § 425.604 for Track 1 ACOs and under § 425.606 for Track 2 ACOs. Further, in developing Track 3, we determined that it would be appropriate to calculate expenditures consistently program-wide (see 80 FR 32776 through 32777). Accordingly, the provisions in § 425.602 governing establishing, updating, and resetting the benchmark also apply to ACOs under Track 3, and we adopted the same approach for determining performance year expenditures as is used in Track 1 and Track 2 in § 425.610 for Track 3 ACOs.

(2) Calculation of County FFS Expenditures

As part of our proposal to adjust the historical benchmark to reflect regional FFS expenditures, we expressed our belief that it is important to calculate FFS expenditures for an ACO's region in a manner consistent with the methodology used to calculate the ACO's benchmark and performance year expenditures. Several sections of the 2016 proposed rule discussed proposals related to calculating county FFS expenditures: one section described proposals for determining county FFS expenditures (see 81 FR 5831 and 5832); a separate section described related proposals for adjusting county FFS expenditure data to assure parity between regional FFS expenditure calculations and other program expenditure calculations (81 FR 5841 through 5843). Further, the discussion of the definition of the ACO's regional service area included a proposal to use statewide (instead of county level) values for the ESRD population (81 FR 5829 and 5830). We are consolidating our discussion of these proposals within this section of this final rule.

Consistent with our proposed definition of regional service area, we proposed to define regional costs as county FFS expenditures for the counties in which the ACO's assigned beneficiaries reside. We proposed that the calculations of county FFS expenditures would be undertaken separately according to the following populations of beneficiaries (identified by Medicare enrollment type): ESRD, disabled, aged/dual eligible, aged/non-dual eligible (see 81 FR 5830). We explained that consistent with the use of beneficiary person years in calculating ACO benchmark and performance year expenditures for each Medicare enrollment type, we would also calculate beneficiary person years when determining county FFS expenditures for each Medicare enrollment type (see 81 FR 5841 through 5843).

We proposed to compute per capita expenditures and average risk scores for the ESRD population at the state level, and to apply those state-level values to all counties in the state. We explained that this approach would address issues associated with small numbers of ESRD beneficiaries in certain counties that can lead to statistical instability in expenditures for this complex population, and is consistent with the approach used in MA. We explained that our concern about small numbers of ESRD beneficiaries was particularly acute for ACOs operating in rural areas

that tend to be more sparsely populated (see 81 FR 5830).

To increase predictability and stability, and avoid bias, we proposed to apply the same approach to calculating county FFS expenditures for factors based on regional expenditures as is currently used in calculating benchmark and performance year expenditures. We explained consistent application of program methodology in calculating FFS expenditures would result in more predictable and stable calculations across the program over time, for example as ACOs transition from a benchmarking methodology that incorporates factors based on national FFS expenditures to one that incorporates factors based on regional FFS expenditures. In addition, use of an alternative approach to calculating regional FFS expenditures could introduce bias because different types of payments could be included in or excluded from these expenditures, as compared to historical benchmark expenditures and performance year expenditures.

Therefore, we proposed to take the following steps in calculating county FFS expenditures used to determine expenditures for an ACO's regional service area:

- Determine county FFS expenditures based on the expenditures of the assignable population of beneficiaries in each county, where assignable beneficiaries are identified for the 12-month period corresponding to the applicable calendar year (see section II.A.2.e.3 of this final rule). We will make separate expenditure calculations according to the following populations of beneficiaries (identified by Medicare enrollment type): ESRD, disabled, aged/dual eligible, aged/non-dual eligible.

- Calculate assignable beneficiary expenditures using the payment amounts included in Parts A and B FFS claims with dates of service in the 12-month calendar year for the relevant benchmark or performance year, allowing for a 3-month claims run out and applying a completion factor. The completion factor will be calculated based on national FFS assignable beneficiary expenditures (see section II.A.2.e.3 of this final rule).

++ These calculations will exclude IME, DSH, and uncompensated care payments.

++ These calculations will take into consideration individually beneficiary identifiable payments made under a demonstration, pilot or time limited program.

- Truncate a beneficiary's total annual Parts A and B FFS per capita expenditures at the 99th percentile of

national Medicare FFS assignable beneficiary expenditures as determined for the relevant year, in order to minimize variation from catastrophically large claims (see section II.A.2.e.3 of this final rule). We would determine truncation thresholds separately for each of the four Medicare enrollment types (ESRD, disabled, aged/dual eligible, aged/non-dual eligible).

- Adjust county FFS expenditures for severity and case mix of assignable beneficiaries in the county using prospective CMS- Hierarchical Condition Category (HCC) risk scores. We would determine average risk scores separately for each of the four Medicare enrollment types (ESRD, disabled, aged/dual eligible, aged/non-dual eligible).

We explained our plan to make county level data used in Shared Savings Program calculations publicly available annually. For example, a publicly available data file would indicate for each county: Average per capita FFS assignable beneficiary expenditures and average risk scores for all assignable beneficiaries by Medicare enrollment type (ESRD, disabled, aged/dual eligible, aged/non-dual eligible). In response to requests from ACOs and other stakeholders for data to allow for modeling of the proposed changes to the benchmark rebasing methodology, CMS made new data files available through the Shared Savings Program Web site, to coincide with the issuance of the 2016 proposed rule (<https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/Statutes-Regulations-Guidance.html>). These files included: average per capita county-level FFS spending and risk scores for three historical years; and ACO-specific data on the total number of assigned beneficiaries residing in each county where at least 1 percent of the ACO's assigned beneficiaries reside, for three historical years. We described these data files and considerations for their use, including comparability of ACO-specific data across programmatic datasets in the proposed rule (81 FR 5867 through 5868).

We proposed to incorporate this methodology for calculating county FFS expenditures in a new regulation at § 425.603. We sought comment on this proposed methodology as well as any additional factors we would need to consider in calculating risk adjusted county FFS expenditures for an ACO's regional service area.

*Comment:* The few commenters addressing the sections of the rule containing proposals for determining county FFS expenditures, as well as the related section describing parity between regional FFS expenditure

calculations and other program expenditure calculations, were generally supportive of the proposed approach. However, a commenter expressed concerns that the proposed approach to calculating regional expenditures will incorporate historical geographic payment disparities that have never been adequately addressed in fee schedule and wage index rulemaking. Commenters offered specific suggestions regarding the proposals, as described in the remaining comment and response summaries within this section of this final rule.

Several commenters expressed support for the proposal to calculate expenditures by Medicare enrollment type (ESRD, disabled, aged/dual eligible, aged/non-dual eligible). Commenters generally shared CMS' concern about small numbers of ESRD beneficiaries at the county-level. While a few commenters believed that the proposed use of state level data would adequately address this concern as well as align with the methodology used in MA, many commenters expressed uncertainty about whether using state-level data for the ESRD population would be the best solution. These commenters urged CMS to release additional data and further explain how use of state-level data is the optimal solution, with some suggesting CMS revisit this issue in future rulemaking. Commenters offered a variety of alternatives, including: approaches similar to alternatives for ensuring a sufficiently large regional population, and several approaches that would rely on an ACO's historical costs for its assigned ESRD population. Some commenters preferred use of county-level data for the ESRD population. A commenter suggested use of statewide values only if county level values did not meet a threshold of sufficient statistical stability. A commenter explained that applying state-level data for all counties within a state may skew results for certain ACOs, in particular those ACOs operating only in certain areas of a state.

*Response:* We are finalizing as proposed the use of county level data to determine regional FFS expenditures for the assignable beneficiary population in the ACO's regional service area. We will perform these calculations separately according to the following populations of beneficiaries (identified by Medicare enrollment type): ESRD, disabled, aged/dual eligible, aged/non-dual eligible. However, we are making a modification to the methodology for calculating county FFS expenditures.

Based on commenters' recommendations, we carefully

considered alternatives to the proposed approach of aggregating the expenditures for the ESRD population at the state level and applying this value consistently to each county within the State. Specifically, we reconsidered the option of using county-level data for the ESRD population, and determined that it would be appropriate to finalize a policy of calculating expenditures for the ESRD population at the county level. We believe there are a number of advantages of calculating expenditures for the ESRD population at the county level, consistent with the approach we proposed and are finalizing for determining county level expenditures for the other populations of beneficiaries (disabled, aged/dual eligible, aged/non-dual eligible). We believe a consistent approach to calculating expenditures for each Medicare enrollment type will be less operationally burdensome compared to an approach that calculates expenditures for the ESRD population differently than the expenditures for the disabled, aged/dual eligible, and aged/non-dual eligible populations. We also anticipate this consistency will allow for greater comparability between the values for each Medicare enrollment type to facilitate analysis by CMS and ACOs of expenditure trends for these populations over time. Further, this approach will reflect the variation in expenditures within states and the regional service areas that ACOs serve, a concept supported by comments underscoring the importance of reflecting regional spending variation in the methodology for resetting the ACO's historical benchmark.

We believe our concern about the small numbers of ESRD beneficiaries at the county level will be mitigated by certain factors. For one, while ESRD beneficiaries exhibit higher mean expenditures, they also exhibit significantly lower variation due in part to the stability of regular dialysis services for which payments are bundled in a highly standardized fashion. Second, we are finalizing an approach of weighting regional FFS expenditures by the proportion of assigned beneficiaries by Medicare enrollment in each county as discussed in section II.A.2.b.2 of this final rule. Specifically, for ACOs with a small proportion of ESRD beneficiaries within their assigned beneficiary population, the county-level ESRD expenditures will have a relatively low weight within the ACO's regional FFS expenditures. On the other hand, in the case of ACOs serving a large proportion of ESRD beneficiaries within a county, this

approach could accommodate commenters' requests that the regional FFS expenditures more directly reflect the historical costs for the ACO's assigned ESRD beneficiaries. Additionally, we believe that the methodology for truncating the assignable beneficiary expenditures used to determine county FFS expenditures at the 99th percentile of national Medicare FFS assignable beneficiary expenditures will help reduce the potential for variation in county expenditure values with respect to the ESRD population in the same way as for the disabled, aged/dual eligible and aged/non-dual eligible populations.

We appreciate commenters' support for a methodology for determining regional FFS expenditures for use in the Shared Savings Program benchmark rebasing methodology that aligns with the MA rate-setting methodology. Although the approach we are finalizing does not follow the MA methodology for aggregating expenditures for the ESRD population statewide, and applying these values to each county in the state, we believe our overall approach for calculating county level expenditures risk adjusted using CMS-HCC prospective risk scores is a substantial step towards aligning with the MA rate-setting approach.

We decline at this time to adopt an alternative approach that (by design) only bases regional FFS expenditures for the ESRD population on the ACO's assigned ESRD beneficiaries, because it would systematically tie an ACO's rebased historical benchmark to its past performance, rather than allowing an ACO's benchmark to be more reflective of FFS spending in its region.

With respect to the commenter's concern that the proposed methodology for calculating regional expenditures would incorporate geographic payment disparities, we recognize there are geographic variations in Medicare payments. However, it is beyond the scope of this final rule, as well as the Shared Savings Program in general, to address broader Medicare payment policies regarding geographic adjustments.

*Comment:* Some commenters suggested increasing the number of years of data included in the calculations of county FFS expenditures, for example, using a 5-year rolling average for county-level spending estimates, along the lines of the approach used by MA.

*Response:* We are finalizing without modification our proposal to calculate county FFS expenditures for assignable beneficiaries residing in a county using the payment amounts included in Parts

A and B FFS claims with dates of service in the 12-month calendar year for the relevant benchmark or performance year, allowing for a 3-month claims run out and applying a completion factor, and adjusted for other factors as described elsewhere in this section of this final rule. We believe that use of a single year of data in calculating county FFS expenditures will be approximately equivalent to using multiple years of data that have been trended using regional growth factors developed using historical FFS expenditures for the county. We believe using growth factors to trend forward historical county data would be approximately equivalent to the use of county level expenditures for the applicable year because each growth factor would be derived from the same historical county data it would be tasked with inflating.

*Comment:* Some commenters expressed support for the proposed adjustment to exclude IME, DSH and uncompensated care payments from the calculation of county FFS expenditures. Although a commenter suggested further normalizing payment methodologies to account for differences in payment policies for certain rural providers, for example rural health clinics (RHCs) and hospitals receiving the status of sole community hospital. A commenter also expressed support for including individually beneficiary identifiable payments made under a demonstration, pilot or time limited program in the determination of county FFS expenditures. This commenter underscored the importance of including these payments to give an accurate representation of actual FFS payments during the measurement period, and urged that we allow adequate time for other CMS payment demonstrations to complete final reconciliation to ensure that our calculation of county FFS expenditures accounts for actual FFS expenditures.

*Response:* We appreciate commenters' support for adjusting county FFS expenditures for IME, DSH and uncompensated care payments and for including individually beneficiary identifiable payments made under a demonstration, pilot, or time limited program, to remain consistent with the methodology used in calculating ACO and national FFS expenditures. We are finalizing these policies, as proposed.

Currently, the Shared Savings Program coordinates across initiatives within CMS to obtain the most recent available, final non-claims based beneficiary-identifiable payments for use in program financial calculations and informational reports.

We decline to adopt the commenter's recommendations to account for differences in cost and payment among providers and suppliers, such as RHCs and sole community hospitals, in calculating county FFS expenditures. As explained in response to related considerations in the November 2011 final rule, we continue to believe this approach would create an inaccurate and inconsistent picture of ACO spending and may limit innovations in ACOs' redesign of care processes or cost reduction strategies (76 FR 67919 and 67920).

*Comment:* A commenter expressed support, in general, for an approach that minimizes the impact of catastrophically large claims in the calculation of the benchmark. Several commenters offered alternatives to the proposal to truncate a beneficiary's total annual Parts A and B FFS per capita expenditures at the 99th percentile of national Medicare FFS assignable beneficiary expenditures as determined for the relevant year. A commenter disagreed with limiting the population used to calculate the truncation threshold to assignable beneficiaries (instead of all FFS beneficiaries). Another commenter, concerned about the potential for year-to-year variability in threshold amounts, suggested CMS explore approaches that would provide greater predictability for these values, such as fixed absolute dollar thresholds.

*Response:* We are finalizing without modification our proposal to truncate a beneficiary's total annual Parts A and B FFS per capita expenditures when determining county FFS expenditures, and to define the truncation threshold as the 99th percentile of national Medicare FFS assignable beneficiary expenditures as determined for the relevant year for the applicable Medicare enrollment type (ESRD, disabled, aged/dual eligible, aged/non-dual eligible). We do not believe the concern raised by the commenter about the increase in the truncation thresholds as a result of using expenditures for assignable beneficiaries instead of all FFS beneficiaries is sufficient to warrant modification to the proposal. We estimate that the approach of using expenditures for assignable beneficiaries would result in approximately a 0.1 percent increase in the amount of the truncation thresholds. We believe this differential is small and therefore does not warrant either a change in approach or a delay in adopting a policy change that we believe will result in less biased calculations. We also decline at this time to revise the methodology for calculating the thresholds to specify a fixed amount that would not vary based

on year-to-year changes in population and payment amounts, as suggested by a commenter. In the 2016 proposed rule we did not propose or seek comment on an alternative basis for truncating claims such as using a flat dollar amount (that does not vary year to year) instead of an annually determined percentile, and at this time we do not believe this alternative would be a preferred approach. As we explained in the November 2011 final rule, we believe that truncating claims at the 99th percentile (as opposed to alternative suggestions for differing threshold amounts) achieves an appropriate balance between limiting catastrophic costs and continuing to hold ACOs accountable for those costs that are likely to be within their control (see 76 FR 67914 and 67915).

*Comment:* A number of commenters expressed general support for CMS' proposed approach for calculating risk-adjusted county expenditures using CMS-HCC risk scores. While no commenters explicitly opposed this proposal, several commenters raised concerns about CMS-HCC risk adjustment more broadly and some offered suggestions for improving or refining the program's general risk adjustment methodology. For a more detailed description of these comments, see section II.A.2.c.2. of this final rule.

*Response:* We are finalizing our proposal to risk adjust county FFS expenditures by Medicare enrollment type, using the CMS-HCC risk scores. We appreciate the general support received from commenters on our proposed approach for calculating risk-adjusted county expenditures. We acknowledge the concerns raised by commenters about the program's general risk adjustment methodology, which relies on CMS-HCC risk scores, and appreciate the suggestions for improvement. As we gain more experience in the Shared Savings Program we will continue to evaluate the appropriateness and effectiveness of our risk adjustment methodology and, as necessary, will propose refinements through future notice and comment rulemaking.

*Comment:* While commenters applauded the release of data to support modeling of the proposed benchmarking changes, some voiced dissatisfaction with the data and pointed to concerns indicating a "persisting lack of transparency." For instance, some commenters believed that too little time was allowed for ACOs and other stakeholders to model the proposed changes, and that insufficient data were released (for example, requesting county level instead of statewide ESRD data,

and citing a lack of data to support modeling of the proposed revisions to the methodology for adjusting an ACO's benchmark for changes in ACO participant composition). Some comments included analyses based on publicly available data and other data sources, as described in more detail in section IV.G. of this final rule. Several commenters pointed to the complexity of the proposed changes and difficulty in accessing complete data to support modeling as reasons for CMS to provide resources and tools to help ACOs and other stakeholders understand the impact of the changes adopted in this final rule.

Some commenters applauded CMS' stated intention to release annual data files. Some commenters underscored the need for these annual files to be comprehensive (for example, ACO assigned beneficiary data should include counties with less than 1 percent of the assigned population to align with the definition of the ACO's regional service area, if finalized as proposed) and timely (for example, data should be made available in time to be used to support organizations' participation decisions). A commenter encouraged CMS to provide comparable data, to the extent feasible, for beneficiaries enrolled in MA plans, as a step towards aligning Medicare payments across ACOs and MA. A commenter further urged CMS to supply data related to benchmark calculations directly to ACOs, including data on the performance of other providers in the ACO's region, change over time, and risk adjustment.

*Response:* We appreciate commenters' feedback on the release of the data to support modeling of the proposed changes to the Shared Savings Program benchmark rebasing methodology. It is our goal to encourage transparency and understanding of program calculations. To this end we provided detailed descriptive information in the 2016 proposed rule on our proposed approach for implementing the proposed revisions to the rebasing methodology, and made publicly available informational data files as well as descriptive details on the parameters for and limitations in using these data.

We anticipate releasing annual data files to support our goal of transparency in program calculations, as well as to allow ACOs and other stakeholders to model impacts. We believe it is important for these data to be as complete and accurate as possible and, consistent with our methodology for performing financial reconciliation, will include claims data with a 3-month claims run out. As a result, we

anticipate releasing county-level expenditure and risk score data following the conclusion of the calendar year to which the data relate. We believe this dataset will provide ACOs and other program stakeholders the inputs needed to calculate the regional adjustment to their historical benchmark as well as to understand the level of county level expenditures in their regional service area, including any changes to that level once multiple years of data are available.

In addition, we plan to make public ACO-specific, aggregate data on counties of residence for the ACO's assigned population for each performance year so the public at large has a better understanding of the ACOs in various counties and regions across the country. We anticipate including these details on county of residence for ACO assigned beneficiaries as part of the annual Shared Savings Program public use files on ACO financial and quality performance.

In response to the commenter's request for release of comparable MA data, we note that MA rates and statistics are publicly available through the CMS Web site (available at <https://www.cms.gov/medicare/health-plans/medicareadvtspecratestats/>). We encourage stakeholders to review these data in combination with the informational data files that CMS plans to release related to the revised Shared Savings Program benchmark rebasing methodology we are finalizing in this final rule.

We also anticipate updating the operational guidance documents available to the public and ACOs, to facilitate understanding by ACOs, other stakeholders, and the public (more generally) of the changes to the Shared Savings Program's benchmarking methodology resulting from this final rule.

We recognize there may be additional opportunities to improve program transparency. Therefore, we thank the commenters for their suggestions and will continue to look for ways we can engage with ACOs and other program stakeholders.

**FINAL ACTION:** We are finalizing our proposed methodology for calculating county FFS expenditures in new § 425.603, with one modification. We are finalizing as proposed the use of county level data to determine regional FFS expenditures for the assignable beneficiary population in the ACO's regional service area, and to perform these calculations separately according to the following populations of beneficiaries (identified by Medicare enrollment type): ESRD, disabled, aged/

dual eligible, aged/non-dual eligible. However, we are not finalizing our proposal to aggregate the expenditures for the ESRD population at the state level and to apply this value consistently to each county within the State. Instead, we are finalizing a policy of calculating expenditures for the ESRD population at the county level. We are also finalizing our proposal to calculate county FFS expenditures in the same way that is currently used to calculate ACO expenditures in order to assure parity with the calculation of ACO benchmark and performance year expenditures as specified under the Shared Savings Program regulations.

### (3) Modifying the Calculation of National FFS Expenditures, Completion Factors, and Truncation Thresholds Based on Assignable Beneficiaries

In the 2016 proposed rule we explained our belief that it is timely to reconsider the beneficiary population that should be used in program calculations for the national FFS population at the same time as we are establishing our policies for determining regional FFS expenditures, including the beneficiary population that will be used in those calculations. Several elements of the existing Shared Savings Program financial calculations are based on expenditures for all Medicare FFS beneficiaries regardless of whether they are eligible to be assigned to an ACO, including: The national growth rates used to trend forward expenditures during the benchmark period; the projected absolute amount of growth in national per capita expenditures for Parts A and B services used to update the benchmark; the completion factors applied to benchmark and performance year expenditures; and the truncation thresholds set at the 99th percentile of national Medicare FFS expenditures. In calculating these factors based on national FFS expenditures, we take into account Parts A and B expenditures for all Medicare FFS beneficiaries, and exclude IME payments and DSH and uncompensated care payments to align with our methodology for calculating benchmark and performance year expenditures.

We explained our concern that using expenditures for all Medicare FFS beneficiaries, including beneficiaries ineligible for assignment, in calculating factors that are based on the expenditures of the broader FFS population as opposed to using only expenditures for the narrower population of FFS beneficiaries eligible for assignment to an ACO, can bias those calculations. There may be differences in the health status and

health care cost experience of Medicare beneficiaries excluded from the assignment "pre-step" compared to those who are eligible for assignment, based on their health conditions and the providers from whom they receive care. Thus, including the expenditures for non-assignable beneficiaries, such as non-utilizers of health care services, can result in lower overall per capita expenditures. These biases may have a more pronounced effect in calculations of regional FFS expenditures, which are based on relatively smaller populations of beneficiaries, as compared to calculations based on the national FFS population.

We described how we identify the pool of "assignable" Medicare beneficiaries (a subset of the larger population of Medicare FFS beneficiaries) as a pre-step to the two-step assignment process under § 425.402 for determining the beneficiaries who will be assigned to an ACO. We explained our preferred approach would be to apply a similar logic to identify the beneficiary population that would be used in program calculations for both national and regional FFS populations. As part of this pre-step, we determine if a beneficiary received at least one primary care service from a physician within the ACO whose services are used in assignment:

- For performance year 2016 and subsequent performance years, the beneficiary must have received a primary care service, as defined under § 425.20, with a date of service during the 12-month assignment window, as defined under § 425.20.
- The service must have been furnished by a primary care physician as defined under § 425.20 or by a physician with one of the primary specialty designations included in § 425.402(c). Therefore, beneficiaries who have not received any primary care service, or who have only received primary care services from physicians with a primary specialty code not specified in § 425.402(c) (see 80 FR 32753 through 32754, Table 5 Physician Specialty Codes Excluded From Assignment Step 2), or from non-physician practitioners are excluded from assignment to an ACO.

This pre-step is designed to satisfy the statutory requirement under section 1899(c) of the Act that beneficiaries be assigned to an ACO based on their use of primary care services furnished by physicians (80 FR 32756; § 425.402(b)(1)).

We discussed that one factor related to calculating expenditures for assignable beneficiaries is the assignment window used to identify

this population, with options including: The 12-month period used to assign beneficiaries to Track 1 and 2 ACOs based on a calendar year, and an off-set 12-month period used to assign beneficiaries prospectively to an ACO in Track 3. (See definition of assignment window under § 425.20 and related discussion in the June 2015 final rule at 80 FR 32699.) We expressed our belief that it is important to calculate regional and national FFS expenditures consistently across the three tracks of the program, so as not to advantage or disadvantage an organization simply on this basis. This consistency would help to ensure a level playing field in markets where multiple ACOs are present, and would also simplify program operations. Accordingly, we proposed to calculate county FFS expenditures and average risk scores, as well as factors based on national FFS expenditures, using the assignable beneficiary population identified using the assignment window for the 12-month calendar year corresponding to the benchmark or performance year. This is the same assignment window that is currently used to assign beneficiaries under Track 1 and Track 2. We specified our plan to monitor for observable differences in the health status (for example, as identified by CMS-HCC risk scores) and expenditures of the assignable beneficiaries identified using the 12-month calendar year assignment window, as compared to assignable beneficiaries identified using an assignment window that is the off-set 12-month period prior to the benchmark or performance year (for example, October through September preceding the calendar year). In the event that we conclude that additional adjustments (for instance, as part of risk adjusting county FFS expenditures) are necessary to account for the use of assignable beneficiaries identified using an assignment window that is different from the assignment window used to assign beneficiaries to the ACO, we would address this issue through future rulemaking.

We clarified that we will continue to apply an update based on national FFS expenditures to ACOs in their first agreement period and for ACOs that entered their second agreement period on January 1, 2016. However, to the extent that we were proposing to change our methodology in order to use only assignable beneficiaries instead of all Medicare FFS beneficiaries in calculating the benchmark update based on national FFS expenditures, we believed we would need to use the authority under section 1899(i)(3) of the

Act to adopt other payment models to implement this change.

Section 1899(d)(1)(B)(ii) of the Act states that the benchmark shall be updated by the projected absolute amount of growth in national per capita expenditures for Parts A and B services under the original Medicare FFS program, as estimated by the Secretary. The plain language of section 1899(d)(1)(B)(ii) of the Act demonstrates Congress' intent that the benchmark update be calculated based on growth in expenditures for the national FFS population, as opposed to a subset of this population. Therefore, in order to allow us to use only assignable beneficiaries in determining the amount of growth in per capita expenditures for Parts A and B services for purposes of determining the benchmark update for ACOs in their first agreement period and those ACOs that started a second agreement period on January 1, 2016, we believed it was necessary to rely upon our authority under section 1899(i)(3) of the Act. Section 1899(i)(3) of the Act authorizes the Secretary to use other payment models in place of the payment model outlined in section 1899(d) of the Act as long as the Secretary determines these other payment models will improve the quality and efficiency of items and services furnished to Medicare beneficiaries, without additional program expenditures.

We explained our belief that using our authority under section 1899(i)(3) of the Act to adopt a payment model that includes calculating the benchmark update for ACOs in their first agreement period and for ACOs that started a second agreement period on January 1, 2016, using national FFS expenditures for assignable beneficiaries, rather than for all FFS beneficiaries, would improve the quality and efficiency of items and services furnished to Medicare beneficiaries. We believed this approach would increase the accuracy of benchmarks, by determining the national update using a population that more closely resembles the population that could be assigned to ACOs. Further, we believed using assignable beneficiaries across all program calculations based on national and regional FFS expenditures would result in factors that are generally more comparable. As a result, these calculations will be more predictable and stable across the program over time, for example as ACOs transition from a benchmarking methodology that incorporates national FFS expenditures to one that incorporates factors based on regional FFS expenditures. Ultimately, we believed this policy could increase

overall participation in the program, thereby resulting in more organizations working to meet the program's three-part aim of better care for individuals, better health for populations and lower growth in expenditures.

As explained in section II.A.2.d.3 of this final rule, section 1899(i)(3)(B) of the Act also specifies that the other payment model must not result in additional program expenditures. We discussed our analysis of this requirement, and our initial assessment that for the period spanning 2017 through 2019 there would be net federal savings associated with a payment model under section 1899(i)(3) of the Act that includes the proposed changes to the manner in which we update the benchmark during an ACO's agreement period as part of the regulatory impact analysis for the proposed rule.

Taking these considerations into account, we believed applying a payment methodology that includes calculating the benchmark update consistently based on assignable FFS beneficiaries, instead of all FFS beneficiaries, would meet the requirements under section 1899(i)(3) of the Act that the payment model improve the quality and efficiency of items and services furnished to Medicare beneficiaries, without additional program expenditures. However, we also discussed our intention to revisit this determination periodically. If we determine the payment model no longer satisfies the requirements of section 1899(i)(3) of the Act, for example if the model results in net program costs, we would undertake additional notice and comment rulemaking to make adjustments to the model to assure continued compliance with the statutory requirements.

Accordingly, we proposed to use the authority under section 1899(i)(3) of the Act to revise the regulation at § 425.602(b)(1) to specify that the annual update to the benchmark will be based on the projected absolute amount of growth in national per capita expenditures for Parts A and B services under the original Medicare FFS program for assignable beneficiaries. We further proposed to specify in this provision of the regulations that we would identify assignable beneficiaries for the purpose of calculating the update based on national FFS expenditures using the 12-month calendar year corresponding to the year for which the update is being calculated. We sought comment on these proposed provisions.

We also proposed to make conforming changes to the regulations to specify that assignable Medicare FFS beneficiaries, identified based on the 12-

month period corresponding to the calendar year for which the calculations are being made, will be used to perform the following calculations: (1) Truncation thresholds for limiting the impact of catastrophically large claims on ACO expenditures under § 425.602(a)(4), § 425.604(a)(4), § 425.606(a)(4), § 425.610(a)(4); and (2) national growth rates used to trend forward expenditures during the benchmark period under § 425.602(a)(5). We specified that we would provide additional information through subregulatory guidance regarding the process for using assignable beneficiaries to perform these calculations, as well as the calculation of the claims completion factor applied under § 425.602(a)(1), § 425.604(a)(5), § 425.606(a)(5), § 425.610(a)(5).

Similarly, as discussed in sections II.A.2.b. and II.A.2.e.2 of this final rule, we proposed to specify in a new provision of the Shared Savings Program regulations at § 425.603 that would govern the methodology for resetting, adjusting, and updating an ACO's benchmark for a second or subsequent agreement period starting on or after January 1, 2017, that county FFS expenditures would be based on assignable Medicare FFS beneficiaries determined using the 12-month period corresponding to the calendar year for which the calculations are being made.

We proposed that regulatory changes regarding use of assignable beneficiaries in calculations based on national FFS expenditures would apply for the 2017 performance year and all subsequent performance years. Under this proposed provision, these changes would apply to ACOs that are in the middle of an agreement period, specifically ACOs that started their first agreement period in 2015 or 2016 and ACOs that started their second agreement period on January 1, 2016. We would adjust the benchmarks for these ACOs at the start of the first performance year in which these changes apply so that the benchmark for the ACO reflects the use of the same methodology that would apply in expenditure calculations for the corresponding performance year.

We sought comment on these proposals. We also sought comment on whether expenditures for all Medicare FFS beneficiaries should be used to calculate these elements for ACOs in their first agreement period or a second agreement period that started on January 1, 2016, while expenditures for assignable Medicare FFS beneficiaries are used to calculate these elements for an ACO's second and subsequent agreement period starting on or after January 1, 2017, in combination with

the use of the assignable beneficiary population to determine expenditures for the ACO's regional service area.

*Comment:* Among the comments addressing this aspect of our proposed methodology, almost all commenters were supportive of the proposal to use assignable beneficiaries, rather than all FFS beneficiaries, when calculating both national and regional expenditures. A commenter generally agreed with all proposed modifications described in the relevant section of the proposed rule (81 FR 5843 through 5845). As discussed in section II.A.2.b.2 of this final rule, some commenters disfavored including ACO assigned beneficiaries within the population of assignable beneficiaries that would be the basis for calculating these factors. As discussed in section II.A.2.e.2 of this final rule, a commenter disagreed with limiting the population to assignable beneficiaries (instead of all FFS beneficiaries) when calculating the truncation thresholds.

*Response:* We appreciate the commenters' support for our proposed approach. We are finalizing, with one modification, our proposal to calculate factors based on national and regional FFS expenditures using the population of assignable Medicare FFS beneficiaries, identified based on the 12-month period corresponding to the calendar year for which the calculations are being made. See previous discussion in this final rule of related comments and responses, specifically: Section II.A.2.b.2 for comments concerning the inclusion of ACO assigned beneficiaries within the assignable population; and section II.A.2.e.2 for discussion of the comment concerning calculation of truncation thresholds based on expenditures for assignable beneficiaries instead of the broader FFS population.

As specified in the 2016 proposed rule, we plan to monitor for observable differences in the health status (for example, as identified by CMS-HCC risk scores) and expenditures of the assignable beneficiaries identified using the 12-month calendar year assignment window, as compared to assignable beneficiaries identified using an assignment window that is the off-set 12-month period prior to the benchmark or performance year (for example, October through September preceding the calendar year). In the event that we conclude that additional adjustments (for instance, as part of risk adjusting county FFS expenditures) are necessary to account for the use of assignable beneficiaries identified using an assignment window that is different from the assignment window used to assign beneficiaries to the ACO, we

would address this issue through future rulemaking.

Although commenters did not discuss in detail their consideration of our proposal to determine completion factors based on assignable Medicare FFS beneficiaries instead of all Medicare FFS beneficiaries, we have reconsidered the need for this proposed change. The completion factors are determined based on multiple years of Medicare FFS claims submission data, and reflect claim submission patterns across the Medicare program. The concern about potential bias resulting from calculations based on beneficiaries that are not eligible for assignment, such as non-utilizers, is not prominent in the calculation of a claims completion factor. For instance, in the case of non-utilizers, there would be no relevant data to consider on the timing of receipt of claims data, because there would be no claims with dates of service for these beneficiaries in the relevant period examined for the purpose of calculating the completion factor. Further, in calculating the completion factors, the use of more comprehensive data based on the timing of submission of claims across the entire Medicare FFS population, as is reflected in our current approach, would result in the most accurate factors as compared to use of a subset of Medicare FFS beneficiaries (such as assignable beneficiaries under the Shared Savings Program) for these calculations. For these reasons, we are not finalizing our proposal to replace the current approach for calculating the claims completion factors using all Medicare FFS beneficiaries with an approach to calculating these factors based on assignable Medicare FFS beneficiaries at this time.

*Comment:* A commenter noted that beneficiaries receiving only services provided by allied providers (non-physician practitioners) are excluded from the proposed definition of assignable beneficiary. This commenter suggested that these providers be included in determining assignable beneficiaries because of the increasing role of non-physician practitioners in efforts to lower the cost of care for patients with low acuity healthcare needs.

*Response:* We continue to believe it is important to align the definition of assignable beneficiary with the statutory requirement that beneficiaries be assigned to an ACO based on their use of primary care services furnished by physicians and with the methodology for identifying assignable beneficiaries described in the 2016 proposed rule and also discussed earlier in this section of the final rule. Applying the same

definition of assignable beneficiary as is used in the assignment process will help to ensure that program calculations based on national and regional FFS expenditures reflect the expenditures and acuity of patients that could be assigned to ACOs. Therefore we decline at this time to adopt the commenter's suggestion to also use services furnished by non-physician providers as a basis for identifying assignable beneficiaries.

*Comment:* Several commenters addressed the timing of applicability of the revised methodology for determining factors based on national FFS expenditures using the assignable beneficiary population instead of all FFS beneficiaries. A commenter noted support for the proposal that this methodology would apply for the 2017 performance year and all subsequent performance years and would apply to ACOs that are in the middle of an agreement period. One comment, which seemed to reflect the commenter's misunderstanding of the proposed policy, interpreted the proposal as failing to address the applicability of the proposed changes to ACOs with 2014 agreement start dates.

*Response:* We are finalizing with modifications our proposal that regulatory changes regarding the use of assignable beneficiaries in calculations based on national FFS expenditures would apply for the 2017 performance year and all subsequent performance years. The proposed rule specified revisions to the provisions at § 425.602(b), § 425.604(a)(1) through (3), § 425.606(a)(1) through (3), and § 425.610(a)(1) through (3) in order to differentiate between the methodology that applied for performance years before 2017 and the methodology that would apply for the 2017 performance year and all subsequent performance years. We believe it is important to clarify the timing of applicability of these changes, which will be reflected in the regulations finalized with this final rule:

- In establishing or resetting an ACO's historical benchmark for agreement periods beginning in 2017 and subsequent years, we will apply the methodology for use of assignable beneficiaries in determining factors based on national FFS expenditures and regional FFS expenditures.

- In calculations made during a performance year, including updating an ACO's historical benchmark and determining an ACO's performance year expenditures, for performance year 2017 and subsequent years, we will apply the methodology for use of assignable beneficiaries in determining factors

based on national FFS expenditures and regional FFS expenditures.

- To ensure consistency in the way in which expenditure calculations are performed across the program, we will apply the revised methodology to ACOs that are in the middle of an agreement period, including: ACOs that started their first agreement period in 2015 or 2016; ACOs that entered the program in 2014 and elect the participation option established with this final rule to defer by 1 year entrance into a second agreement period under a two-sided model; and ACOs that started their second agreement period on January 1, 2016. We will adjust the benchmarks for these ACOs at the start of the 2017 performance year, the first performance year in which these changes apply, and in any subsequent years in the agreement period, so that the benchmarks established for these ACOs will reflect the use of the same methodology that will apply in expenditure calculations for the corresponding performance year, including determining the benchmark update and the ACO's expenditures for the performance year.

We wish to clarify that for any performance year prior to the applicability date for the regulatory change, we will continue to apply the current methodology under which factors based on national FFS expenditures are calculated using all FFS beneficiaries.

**FINAL ACTION:** We are finalizing our proposal to use assignable beneficiaries in all national and regional FFS calculations with one modification. We are not finalizing our proposal to determine completion factors based on assignable Medicare FFS beneficiaries, and will continue to determine these completion factors based on the timing of submission of claims across the entire Medicare FFS population. However, as proposed, we will limit the Medicare FFS population used in all other program calculations to "assignable" Medicare beneficiaries who meet the following requirements: (1) Received at least one primary care service, as defined under § 425.20, with a date of service during the 12-month assignment window; and (2) this primary care service was provided by a primary care physician, as defined under § 425.20, or by a physician with one of the primary specialty designations included in § 425.402(c). The assignable beneficiary population will be identified consistently across program tracks using the assignment window for the 12-month calendar year corresponding to the benchmark or performance year. This revised methodology will apply to

all ACOs, including those ACOs with 2015 and 2016 agreement start dates that are in the middle of an agreement period, as well as ACOs that entered the program in 2014 and elect the participation option established with this final rule to defer by 1 year entrance into a second agreement period under a two-sided model. We will adjust the benchmarks for these ACOs at the start of the 2017 performance year and in any subsequent years in the agreement period so that the benchmarks established for these ACOs will reflect the methodology used in expenditure calculations for the performance year. We will provide additional information through subregulatory guidance regarding the process for using assignable beneficiaries to perform these calculations. We will revise the regulations to reflect these changes as follows:

- Revise the regulation at § 425.602(b)(1) using the authority under section 1899(i)(3) of the Act to provide that the historical benchmark will be updated annually for each year of the agreement period based on the flat dollar equivalent of the projected absolute amount of growth in national per capita expenditures for Parts A and B services under the original Medicare FFS program for assignable beneficiaries identified for the 12-month calendar year corresponding to the year for which the update is calculated. As discussed in section II.A.2.d.3 of this final rule, section IV.E of this final rule contains an updated assessment of all policies that are being implemented under the authority of section 1899(i)(3) of the Act. We anticipate that the costs of this alternative payment model will be periodically reassessed as part of the impact analysis for subsequent rulemaking regarding the payment models used in the Shared Savings Program. However, in the event we do not undertake additional rulemaking, we intend to periodically reassess whether the payment model established under the authority of section 1899(i)(3) of the Act continues to improve the quality and efficiency of items and services furnished to Medicare beneficiaries, without resulting in additional program expenditures. If we determine the payment model no longer satisfies the requirements of section 1899(i)(3) of the Act, for example if the alternative payment model results in net program costs, we will undertake additional notice and comment rulemaking to make adjustments to our payment methodology to assure continued compliance with the statutory requirements.

- Make conforming changes to the regulations on: (1) Truncation thresholds for limiting the impact of catastrophically large claims on ACO expenditures under § 425.602(a)(4), § 425.604(a)(4), § 425.606(a)(4), § 425.610(a)(4); and (2) growth rates used to trend forward expenditures during the benchmark period under § 425.602(a)(5) to specify that assignable Medicare FFS beneficiaries identified based on the 12-month period corresponding the calendar year for which the calculation is being made will be used to perform these calculations.

- Specify in a new provision of the Shared Savings Program regulations at § 425.603 that county FFS expenditures that are used in the methodology for resetting, adjusting, and updating an ACO's benchmark will be based on assignable Medicare FFS beneficiaries determined using the 12-month period corresponding to the calendar year for which the calculations are being made.

#### f. Timing of Applicability of Revised Rebasing and Updating Methodology

In the 2016 proposed rule, we discussed an approach under which the revised rebasing methodology could be applied to new agreement periods beginning on or after January 1, 2017, in a manner that allows for a phase-in to a greater percentage in calculating the regional adjustment for all ACOs:

- All ACOs would have the benchmark for their first agreement period set and updated under the methodology under § 425.602(a) and (b).
- The 2014, 2015, and 2016 starters and subsequent cohorts entering their second agreement periods on or after January 1, 2017, would be rebased under the new methodology for adjusting an ACO's rebased historical benchmark to reflect expenditures in the ACO's regional service area, and the ACO's rebased benchmark would be updated during the agreement period by growth in regional FFS expenditures. In calculating the regional adjustment to the rebased historical benchmark for an ACO's second agreement period, the percentage applied to the difference between the ACO's regional service area expenditures and the ACO's rebased historical benchmark expenditures would be set at 35 percent. In an ACO's third or subsequent agreement period this percentage would be set at 70 percent unless the Secretary determines a lower weight should be applied, as specified through future rulemaking.

- With respect to the ACOs that started in the program in 2012 and 2013 and entered a second agreement period beginning in 2016, we applied the

current rebasing methodology, under which we equally weight the benchmark years and account for savings generated during the ACO's prior agreement period, in rebasing their historical benchmark for their second agreement period. We would apply the methodology specified under § 425.602(b) for updating the benchmark annually for each year of their second agreement period. We would apply the new rebasing policies, including the phase in of the percentage used in calculating the regional adjustment, to these ACOs for the first time in calculating their rebased historical benchmark for their third agreement period (beginning in 2019), as if the ACOs were entering their second agreement period. Accordingly, the 2012 and 2013 starters would have the same transition to the use of a higher percentage in calculating the regional adjustment as all other ACOs.

We explained that this approach to phasing in the application of the new methodology for adjusting an ACO's rebased historical benchmark to reflect regional FFS expenditures would give ACOs and other stakeholders greater opportunity to prepare for, understand the effects of, and adjust to the application of benchmarks that incorporate regional expenditures.

Therefore, we proposed to make these changes applicable to ACOs starting a second or subsequent agreement period on or after January 1, 2017. These changes would initially apply in resetting benchmarks for the second agreement period for all ACOs other than those ACOs that started in the program in 2012 and 2013 (who entered their second agreement period on January 1, 2016). Furthermore, we proposed that 2012 and 2013 starters would have the same transition to regional adjustments to their rebased historical benchmarks as all other ACOs: In calculating the regional adjustment to the ACO's rebased historical benchmark for its third agreement period (in 2019), the percentage applied to the difference between the ACO's regional service area expenditures and ACO's rebased historical benchmark expenditures would be set at 35 percent; in its fourth or subsequent agreement period this percentage would be set at 70 percent unless the Secretary determines a lower weight should be applied, as specified through future rulemaking. We requested comment on this proposed approach to phasing in the application of the revised rebasing and updating methodology.

*Comment:* A commenter expressed support for the proposed phase-in of the

new benchmark rebasing methodology based on an ACO's individual agreement renewal schedule rather than moving all ACOs to the new standard at one time. Many commenters opposed the proposal to phase-in the revised methodology to 2012 and 2013 starters beginning in their third agreement periods (starting January 1, 2019). Instead, commenters suggested options that would allow 2012 and 2013 starters the choice of the proposed approach or having the revised methodology apply during their second agreement period (for example, applying the methodology for performance year 2017 and onward, or allowing eligible ACOs to enter a new agreement period under the revised methodology that would begin in 2017). A commenter, in favor of applying the revised rebasing methodology to all ACOs in their second agreement period, suggested retroactively applying the changes to the first performance year (2016) of the 2012 and 2013 starters' second agreement period. Another commenter suggested allowing 2012 and 2013 starters that meet certain eligibility criteria (such as a quality performance threshold) to enter a new agreement period under the revised methodology beginning 2017, and permitting those ACOs participating under a performance-based risk model to have a weight greater than 35 percent applied in the calculation of the regional FFS adjustment. Alternatively, a commenter suggested applying the 70 percent weight (instead of 35 percent, as proposed) in calculating the regional adjustment for 2012 and 2013 starters beginning with their third agreement period.

Many commenters seemed to view the delay in applying the revised rebasing methodology to 2012 and 2013 starters until their third agreement period as a misfortune of timing. Commenters who perceived the proposed adjustment as beneficial explained that delaying application of the revised methodology would penalize 2012 and 2013 starters (or stated another way, unfairly advantage later entrants into the program) and perpetuate differences in benchmarks between ACOs in the same region. These commenters believed that this delay may cause attrition of these ACOs from the program. A commenter pointed out that applying the revised methodology to 2014 starters who begin a new agreement period in 2017, but delaying its application to 2012 and 2013 starters until 2019, could inadvertently lead to provider movement between ACOs depending on which benchmarking approach applies and is more financially favorable to the

ACO. A commenter suggested giving 2014 starters the option of delaying application of the revised methodology until their third agreement period, citing uncertainty about the policies to be finalized as these organizations decide whether to continue in the program.<sup>2</sup>

*Response:* In section II.A.2.c.3 of this final rule, we discuss our response to comments requesting broader flexibility to allow ACOs to choose from a menu of options on when the revised rebasing methodology would apply, and the weight with which the regional adjustment would be calculated.

ACOs that entered the Shared Savings Program in 2012 and 2013 renewed their agreements beginning January 1, 2016, with the understanding that the benchmark rebasing methodology finalized in the June 2015 final rule would be applied to their second agreement period. Under this rebasing methodology, described elsewhere in this final rule, we equally weight the ACO's historical benchmark years, and apply an adjustment for savings generated under the ACO's prior agreement period. While this methodology is substantially different from the rebasing approach we are establishing in this final rule, we are in fact applying to these ACOs a rebasing methodology that is intended to help mitigate the effects of an ACO's past successful performance on its current benchmark. The adjustment for savings generated in the ACO's prior agreement period increases the ACO's rebased historical benchmark by an amount that reflects the ACO's past financial and quality performance, and takes into account the size of the ACO's assigned beneficiary population. Equally weighting the benchmark years (corresponding to the three performance years of the prior agreement period) in resetting the ACO's historical benchmark mitigates reductions to the benchmark that would result from placing a higher weight on more recent prior benchmark years (corresponding to later years in the ACO's prior agreement period), in which ACOs are anticipated to show greater expenditure reductions. This methodology was designed to encourage continued participation in the Shared Savings Program and performance improvement by ACOs entering a second or subsequent agreement period, and therefore improve the overall sustainability of the program. These

goals are consistent with the goals for the policies adopted in this final rule that incorporate regional FFS expenditures into the rebasing methodology.

Additionally, the 2016 proposed rule did not address the possibility of applying the revised rebasing methodology to these ACOs' second agreement periods spanning January 1, 2016 through December 31, 2018. As a result, we do not believe it would be appropriate to adopt a policy in this final rule under which we would apply the revised methodology to these ACOs prior to the start of their third agreement period in 2019. Applying this revised methodology in the middle of an ACO's second agreement period could prove disruptive to ACOs that have structured their operations and legal arrangements (including the ACO's Participant Agreements with ACO participant TINs) to reflect the application of the current benchmarking methodology. We also believe that more immediate application of the revised policies to 2012 and 2013 starters during their second agreement periods could undermine the ability of these ACOs to adapt to this change, possibly causing organizations to terminate their participation prior to the end of their second agreement period.

Furthermore, we do not believe it would be possible to allow these ACOs to terminate their current agreement period in order to start a new agreement period under the revised rebasing methodology, as suggested by some commenters. Section 425.222 addresses the circumstances under which an ACO may re-apply to participate in the Shared Savings Program after the ACO's agreement has been terminated. Section 425.222(a) specifies that an ACO that has been terminated from the Shared Savings Program under §§ 425.218 or 425.220 may participate in the Shared Savings Program again only after the date on which the term of the original participation agreement would have expired if the ACO had not been terminated. We believe that this provision, without further modification, would prohibit CMS from allowing ACOs with 2012 and 2013 agreement start dates to terminate their current second agreement and re-enter the program under the revised benchmark rebasing methodology for a new second agreement period beginning January 1, 2017.

Taking these factors into consideration, we decline at this time to modify the Shared Savings Program regulations to offer the flexibility for 2012 and 2013 starters to terminate their agreements beginning January 1, 2016, and to reapply for a new second

agreement period beginning January 1, 2017, under the revised rebasing methodology that is being adopted in this final rule.

*Comment:* Some commenters suggested alternatives not discussed in the proposed rule. Some commenters urged incorporating greater regulatory flexibility to apply the revised methodology when establishing the benchmarks for ACOs transitioning to the Shared Savings Program after completing a contract period under another CMS alternative payment methodology, including the Pioneer and Next Generation ACO Models. For example, with respect to the proposed phase-in approach, some commenters specified that former Pioneer ACOs and Next Generation ACOs entering their first agreement period under the Shared Savings Program should be allowed the option to be considered as entering a second or subsequent agreement period in order to allow their benchmark to be established using the regional benchmarking approach. A commenter explained that moving back to a benchmark calculated using national FFS factors would be taking a step backwards in terms of the evolution of the ACO model and unnecessarily expose these ACOs to additional risk.

*Response:* We greatly appreciate commenters' thoughtful suggestions for the transition of ACOs from other CMS ACO initiatives into the Shared Savings Program. We did not propose or discuss related changes to the Shared Savings Program regulations in the 2016 proposed rule. We agree with commenters that many organizations participating under other CMS ACO initiatives (such as the Pioneer ACO model and the Next Generation ACO model), which use factors based on regional FFS expenditures in setting ACO benchmarks, may find it disadvantageous to enter the Shared Savings Program under the methodology used to establish an ACO's benchmark for its first agreement period, and would prefer to be treated as if they were entering the program in a second or subsequent agreement period in order to receive a benchmark established using the rebasing methodology adopted in this final rule. We believe there are complexities to this issue that would need to be explored further, including the determination of which organizations would be eligible to be treated as entering the Shared Savings Program under a later agreement period and the applicability of other program requirements that relate to the agreement period in which an ACO is participating, including the selection of risk track and the quality performance

<sup>2</sup> The application/renewal cycle for the January 1, 2017 Shared Savings Program start date began in spring 2016. See the Shared Savings Program Web site, How to Apply Web page, available at <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/Application.html>.

standard. We anticipate considering these issues further in future rulemaking.

**FINAL ACTION:** We are finalizing our proposal to make the new benchmark rebasing policies described in this final rule, including the phase in of the percentage used in calculating the regional adjustment, applicable to ACOs entering into a second or subsequent agreement period in 2017 or subsequent years. With respect to ACOs that started in the program in 2012 and 2013 that have renewed their agreements for a second agreement period beginning in 2016:

- We applied the rebasing methodology established with the June 2015 final rule, under which we equally weight the benchmark years and account for savings generated during the ACO's prior agreement period, in rebasing their historical benchmark for their second agreement period (beginning in 2016). With the conforming changes made to the regulations text in this final rule, this methodology is incorporated in new § 425.603(b). We will apply the methodology specified under § 425.602(b) to update the benchmark

annually for each year of the second agreement period for these ACOs.

- We will apply the new rebasing policies, including the revised phase in of the percentage used in calculating the regional adjustment that we are adopting in this final rule, to these ACOs for the first time in calculating their rebased historical benchmark for their third agreement period (beginning in 2019), as if the ACOs were entering their second agreement period. Accordingly, the 2012 and 2013 starters will have the same transition to the use of a higher percentage in calculating the regional adjustment as all other ACOs.

TABLE 3—CHARACTERISTICS OF BENCHMARKING APPROACHES BY AGREEMENT PERIOD

Source of methodology	Agreement period	Historical benchmark trend factors (trend BY1, BY2 to BY3)	Adjustment to the historical benchmark for regional FFS expenditures (percentage applied in calculating adjustment)	Adjustment to the historical benchmark for savings in prior agreement period?	Adjustment to the historical benchmark for ACO participant list changes	Adjustment to the historical benchmark for health status and demographic factors of performance year assigned beneficiaries	Update to the historical benchmark for growth in FFS spending
November 2011 final rule.	First .....	National .....	No .....	No .....	Calculated using benchmark year assignment based on the ACO's certified ACO Participant List for the performance year.	Newly assigned beneficiaries adjusted using CMS-HCC model; continuously assigned beneficiaries adjusted using demographic factors alone unless CMS-HCC risk scores result in a lower risk score.	National
As modified by June 2015 final rule.	Second (beginning 2016).	National .....	No .....	Yes .....	Same as methodology for first agreement period.	Same as methodology for first agreement period.	National
As modified by this final rule: Rebasing Methodology for second or subsequent agreement periods beginning 2017 and subsequent years.	Second (third for 2012/2013 starters).	Regional .....	Yes (35 percent, or 25 percent if ACO is determined to have higher spending compared to its region).	No .....	Same as methodology for first agreement period; regional adjustment redetermined based on ACO's certified ACO Participant List for the performance year.	No change .....	Regional
	Third (fourth for 2012/2013 starters).	Regional .....	Yes (70 percent unless the Secretary determines a lower weight should be applied, as specified through future rulemaking, or 50 percent if ACO is determined to have higher spending compared to its region).	No .....	Same as methodology for second agreement period beginning 2017 and subsequent years.	No change .....	Regional
	Fourth and subsequent (fifth and subsequent for 2012/2013 starters).	Regional .....	Yes (70 percent unless the Secretary determines a lower weight should be applied, as specified through future rulemaking).	No .....	Same as methodology for second agreement period beginning 2017 and subsequent years.	No change .....	Regional

#### B. Adjusting Benchmarks for Changes in ACO Participant (TIN) Composition

In the initial rulemaking establishing the Shared Savings Program, we acknowledged that the addition or

removal of ACO participants or ACO providers/suppliers (identified by TINs and NPIs, respectively) during the term of an ACO's participation agreement could affect a number of different

aspects of the ACO's participation in the Shared Savings Program. The 2016 proposed rule provided detailed background on the regulatory and subregulatory history of how CMS sets

and adjusts benchmarks to reflect ACO participant composition (see 81 FR 5848–5850).

We explained that under the current methodology, we set an ACO's historical benchmark at the start of an agreement period based on the assigned population in each of the three benchmark years by using the ACO Participant List certified by the ACO. The ACO must submit a new certified ACO Participant List at the start of each new performance year. CMS adjusts an ACO's historical benchmark at the start of a performance year if the ACO Participant List that the ACO certified at the start of the new performance year differs from the one it certified at the start of the prior performance year. We use the updated certified ACO Participant List to assign beneficiaries to the ACO in the benchmark period (the 3 years prior to the start of the ACO's agreement period) in order to determine the ACO's adjusted historical benchmark. As a result of changes to the ACO's certified ACO Participant List, we may adjust the historical benchmark upward or downward. Under this methodology, the historical benchmarks for ACOs with ACO Participant List changes from one performance year to the next continue to reflect the ACOs' historical costs in relation to the current composition of the ACO.

During the program's initial performance years, we experienced a high volume of change requests from ACOs, both adding and removing ACO participants. We adjusted the historical benchmarks for 162 of 220 ACOs (74 percent) with 2012 and 2013 start dates for the 2014 performance year to reflect changes in ACO participants. For the 2015 performance year, we adjusted benchmarks for 245 of 313 ACOs (78 percent) with 2012, 2013 or 2014 start dates to reflect changes in ACO participants.

While the current methodology ensures that a benchmark that has been adjusted based on changes in the ACO's participant composition accurately reflects benchmark year assignment using the most recent certified ACO Participant List, a primary drawback is that this methodology is operationally burdensome. To adjust benchmarks to account for ACO Participant List changes made by ACOs for each new performance year, we must repeat the assignment process for all 3 benchmark years for each starter cohort. Furthermore, with the addition of Track 3, we will need to perform two assignment runs for each benchmark year for a starter cohort, given that assignment for Track 3 ACOs is based on an offset beneficiary assignment

window of the most recent 12-month period preceding the relevant calendar year for which data are available (for example, the period spanning October–September prior to the start of the benchmark year) that differs from the calendar year beneficiary assignment window used for Track 1 and Track 2 ACOs.

In light of the operational burden of adjusting benchmarks to reflect changes in ACO participants under the current policy, and the considerations associated with our proposals to adopt a benchmark rebasing methodology that requires additional calculations, we proposed to replace the current approach for calculating adjusted historical benchmarks for ACOs that make ACO Participant List changes with a more streamlined approach on a program-wide basis. The proposed approach would start with an ACO's historical benchmark based on the ACO's certified ACO Participant List for the most recent prior performance year and make adjustments using a ratio that is based on expenditures during a reference year for: (1) The ACO's beneficiaries assigned using both the ACO Participant List for the new performance year and the ACO Participant List for the most recent prior performance year (stayers); and (2) expenditures for the ACO's beneficiaries assigned using only the ACO Participant List for the new performance year (joiners) to obtain the overall adjusted benchmark. Calculations of the adjustment would be made, and applied to the historical benchmark, for each of the following populations of beneficiaries, according to Medicare enrollment type: ESRD, disabled, aged/dual eligible, aged/non-dual eligible. In the event an ACO's new ACO Participant List resulted in zero stayers, we proposed to continue to apply the current methodology for adjusting the ACO's historical benchmark for ACO Participant List changes.

We proposed to incorporate this adjustment to the historical benchmark for ACOs in their first agreement period and those ACOs that started a second agreement period on January 1, 2016, by adding a paragraph to § 425.602. In addition, we proposed to specify that the adjustment would apply to an ACO's rebased historical benchmark under the revised rebasing methodology

in a new provision of the Shared Savings Program regulations at § 425.603. We also proposed to add definitions for “stayers,” “joiners,” and “leavers” to § 425.20.

We stated in the proposed rule that we believe that this approach would offer the right balance between approximating the accuracy of the current methodology for adjusting historical benchmarks (which requires performing beneficiary assignment for all 3 of an ACO's historical benchmark years with the new ACO Participant List) and operational ease. Initial modeling suggested that benchmarks calculated using this alternative methodology are highly correlated with those calculated using the current methodology.

We also examined and sought comment on a second alternative under which we would calculate the average per capita expenditures for leavers in the reference year and use this value, along with the relative person years for leavers and stayers, to impute average per capita reference year expenditures for stayers from the historical benchmark. The imputed expenditures for stayers would then be combined with average per capita reference year expenditures for joiners to obtain the overall adjusted benchmark.

*Comment:* While a few commenters expressed support for the proposed methodology to streamline adjustments for ACO Participant List changes, many commenters felt that CMS did not provide adequate information for stakeholders to properly evaluate the proposal, noting that the agency did not provide detailed results of its own modeling or sufficient data to allow others to perform their own analyses. A number of commenters urged the agency to make additional information available and to postpone finalization of the proposal at this time.

*Response:* In light of commenters' suggestions that we allow additional time to analyze the proposal, we are not finalizing the proposed new streamlined methodology at this time. We continue to believe the proposed approach has the potential to reduce operational burden without sacrificing accuracy. Therefore, we anticipate revisiting this issue in future notice and comment rulemaking. We believe that delaying adoption of a new approach to adjust historical benchmarks for ACO Participant List changes will allow CMS to gain more experience in the program and will allow more opportunity for the agency and stakeholders to evaluate the merits and tradeoffs associated with the proposed methodology or other alternatives. To that end, we anticipate

making more information available to aid stakeholder evaluation of this approach through future notice and comment rulemaking.

*Comment:* Some commenters expressed concerns about the accuracy of a “proxy” measure for adjusting benchmarks, or the potential for some ACOs to see large differences between the proposed and current methodologies for adjusting an ACO’s benchmark for ACO Participant List changes, even if the two approaches produce similar results on average. Several commenters noted that differences of even one or two percentage points between the proposed and existing methodology could be quite substantial for an individual ACO. Some commenters also warned that using an expenditure ratio based on a single year of data could be less accurate or equitable than the current methodology that redetermines beneficiary assignment for each of an ACO’s three benchmark years. A commenter stated CMS should not use a proxy method for adjusting the benchmark and that the agency should not let expediency threaten the accuracy of the program.

*Response:* We appreciate the concerns raised by commenters regarding the accuracy of the proposed streamlined approach for adjusting historical benchmarks for ACO Participant List changes and the potential for the proposed approach to have varied effects across ACOs. We believe that delaying finalization of this proposal will allow stakeholders further opportunity to study the implications of this or other alternatives, which may assuage some of the concerns initially raised about this proposal.

We want to take this occasion to clarify a statement in the proposed rule that referred to a magnitude of change for most ACOs of between  $-2$  percent and  $+2$  percent. Some commenters seemed to interpret this statement as referring to differences between the current methodology for computing adjusted benchmarks and the proposed streamlined methodology. In fact, the statement referred to differences between benchmarks calculated using the current methodology but based on different ACO Participant Lists (previous performance year and updated). In our modeling, comparing adjusted benchmarks computed under the proposed and current methodologies for 88 ACOs that began the program in 2014 and made ACO Participant List Changes for performance year 2015, we found that for close to two-thirds of these ACOs, the difference between the two methods was within half of a percentage point in either direction. For

over 80 percent of these ACOs, the difference was within 1 percentage point. Only one ACO among the 88 saw a difference greater than two percentage points, with the proposed approach producing a benchmark that was 2.3 percent lower than the benchmark calculated under the current methodology. The mean difference between the two methods (proposed minus current) was  $-0.2$  percent and the median was  $-0.1$  percent.

*Comment:* Some commenters suggested other alternatives for CMS’ consideration in conjunction with the proposed approach. A few commenters indicated that if CMS did decide to finalize the proposal to streamline the calculation of adjusted benchmarks, the agency should broaden the set of circumstances under which the current methodology would apply. Some commenters suggested that, rather than reverting to the current methodology only in the unlikely instance of zero “stayers,” the agency should adopt a low-volume threshold for stayers, below which the current methodology would be used to adjust for ACO Participant List changes. Another commenter called for adjusting benchmarks for ACO Participant List changes more frequently, such as within 30 days of an ACO notifying CMS of an ACO participant’s resignation or removal from the list. Another commenter wanted to see the proposed methodology coupled with efforts by CMS to promote better data collection and information sharing.

Several commenters acknowledged that they understood CMS’ desire to reduce operational complexity, but they expressed concern that CMS proposed a proxy method for adjusting benchmarks for ACO Participant List changes without first addressing other aspects of the existing methodology that commenters perceived to be flawed. Some commenters detailed alternative approaches. For example, some commenters suggested that adjustments to the ACO’s benchmark for composition changes should be made for changes in ACO providers/suppliers, identified by National Provider Identifiers (NPIs), rather than for changes in ACO participants identified by TINs, or should account for changes in both NPIs and TINs. Their rationale was that only ACOs themselves can determine which physicians and non-physician practitioners are functioning as primary care providers and should be used in determining beneficiary assignment. Another commenter suggested that using NPIs instead of TINs could better account for changes in ACO composition over time. Some

commenters also felt that CMS should address instability and inaccuracies introduced into benchmarks by ACO Participant List changes when such changes result in a difference in the acuity of patients assigned to the ACO in the benchmark period versus those assigned to the ACO for the performance year. A few commenters noted that some ACOs have had artificially low benchmarks due to innocuous changes in TINs, such as restructurings, where CMS did not make a correction or accommodation. These commenters further explained, for example, that when an ACO introduces a new service line for complex patients within an existing TIN during an agreement period, there would be no history of treating such patients in the baseline period and the benchmark would be understated. Another commenter opined that CMS should perform additional analysis and policy development on the fundamentals of benchmarking before developing a proxy process for making adjustments to benchmarks.

*Response:* We appreciate the suggestions raised by commenters and will take them into consideration when revisiting this issue in future rulemaking. However, we note that some of the suggestions offered, for example adjusting benchmarks for ACO Participant List changes more frequently, would likely offset, if not negate, the expected reduction in operational burden associated with the streamlined approach, which was the primary rationale behind its development. Thus it will be important to weigh the tradeoffs posed by any suggested modifications.

Further, in the 2016 proposed rule, CMS did not contemplate changes to the underlying methodology used to assign beneficiaries to ACOs, including how ACO participants are defined for purposes of assignment, or to policies surrounding when or under what circumstances CMS will make adjustments or corrections to an ACO’s benchmark. We appreciate the concerns raised by commenters and will continue to review existing policies as we gain additional experience in the program. That being said, we do not believe that we should necessarily forgo opportunities to reduce administrative complexity in the near term if alternative methodologies have the potential to lower operational burden without sacrificing accuracy when calculating the adjustment for changes in the ACO’s certified ACO Participant List.

*FINAL ACTION:* After consideration of the public comments received and

the concerns raised by many commenters, at this time, we are not finalizing our proposal to replace the current approach for calculating adjusted historical benchmarks for ACOs that make ACO Participant List changes with a new program-wide approach that would adjust an ACO's historical benchmark using an expenditure ratio based on single reference year. Relatedly, we are not finalizing the proposed definitions of "stayers," "leavers," and "joiners" in § 425.20 at this time. Although we are not finalizing the proposal to adopt a more streamlined approach for adjusting historical benchmarks for ACO Participant List changes in this rule, we continue to believe this alternative approach has merit as a means for reducing operational burden without sacrificing accuracy in ACO benchmarks. As such, we anticipate revisiting this proposal in future notice and comment rulemaking, and making more information available at that time to aid stakeholder evaluation. However, we are finalizing as proposed clarifying revisions to the description of the current approach to calculating adjusted historical benchmarks for ACOs that make ACO Participant List changes at § 425.602(a)(8), to specify that the benchmark is adjusted to take into account the expenditures for beneficiaries who would have been assigned to the ACO in any of the 3 most recent years prior to the agreement period using the most recent certified ACO Participant List for the relevant performance year. In addition, we will include a similar provision in new § 425.603 to provide that the same adjustment for ACO Participant List changes will be made to an ACO's rebased historical benchmark.

### *C. Facilitating Transition to Performance-Based Risk*

#### *1. Overview*

As discussed in detail in the proposed rule (81 FR 5851 through 5853), we continue to believe that in order for the Shared Savings Program to be effective and sustainable over the long term, we need to further strengthen our efforts to transition the Shared Savings Program to a two-sided performance-based risk program in which ACOs share in both savings and losses. Currently, for its initial agreement period, an ACO applies to participate in a particular financial model or track of the program as specified under § 425.600(a). If the ACO's application is accepted, the ACO must remain under that financial model for the duration of its 3-year agreement. ACOs entering the program under the

one-sided shared savings model (Track 1) that meet eligibility criteria may continue their participation under this model for a second 3-year agreement period as specified under § 425.600(b). In response to suggestions from ACOs and other stakeholders, and based on our experience with the first group of ACOs eligible for renewal for a second agreement period starting in 2016 in which nearly all such ACOs applied to remain in Track 1 for an additional agreement period, we further considered whether it would be appropriate to offer an additional participation option to encourage ACOs to move more quickly from the one-sided shared savings model to a performance-based risk model when renewing their agreements.

#### *2. Additional Option for ACOs Participating Under Track 1 to Apply to Renew for a Second Agreement Period Under a Two-Sided Track*

To respond to stakeholder concerns and to provide additional flexibility for ACOs that are willing to accept performance-based risk arrangements, we proposed to add a participation option that would allow eligible Track 1 ACOs to defer by 1 year their entrance into a performance-based risk model (Track 2 or 3) by extending their first agreement period under Track 1 for a fourth performance year. ACOs that would be eligible to elect this proposed new participation option would be those ACOs eligible to renew for a second agreement period under Track 1 but instead are willing to move to a performance-based risk track 2 years earlier, after continuing under Track 1 for 1 additional year. This option would assist ACOs in transitioning to a two-sided risk track when they need only one additional year in Track 1 rather than a full 3-year agreement period in order to prepare to accept performance-based risk. The additional year could allow such ACOs to further develop necessary infrastructure to meet the program's goals, such as further developing their care management services, adopting additional mechanisms for measuring and improving quality performance, finalizing implementation and testing of electronic medical records, and performing data analytics. We proposed to make this option available to Track 1 ACOs whose first agreement period is scheduled to end on or after December 31, 2016. Under this proposal, ACOs that elect this new participation option would continue under their first agreement period for a fourth year, deferring benchmark rebasing as well as deferring entrance to a two-sided risk track if they are approved for renewal.

More specifically, we proposed to provide an additional option for ACOs participating under Track 1 to apply to renew for a second agreement period under a two-sided track (Track 2 or Track 3) under the renewal process specified at § 425.224. If the ACO's renewal request is approved, the ACO would be able to defer entering the new agreement period under a performance-based risk track for 1 year. Further, as a result of this deferral, we would also defer rebasing the ACO's benchmark for 1 year. At the end of this fourth performance year under Track 1, the ACO would transition to the selected performance-based risk track for a 3-year agreement period. Accordingly, we proposed to amend the participation agreement requirements at § 425.200 to provide that an ACO that defers entering its new agreement period will be able to continue participating under its first agreement for an additional year (for an agreement period that would total 4 years).

An ACO electing this option would still be required to undergo the renewal process specified at § 425.224 prior to the end of its initial agreement (PY 3) and meet all other renewal requirements including the requirement that the ACO demonstrate that it is capable of repaying shared losses as required to enter a performance-based risk track. Because the ACO would be committing under the renewal application to transition to a performance-based risk track following completion of PY 4 under Track 1, the ACO would be required to demonstrate as part of its renewal application that it has established an adequate repayment mechanism as specified at § 425.204(f) to assure CMS of its ability to repay losses for which it may be liable during the new agreement period. We proposed to make this option available to Track 1 ACOs whose first agreement period is scheduled to end on or after December 31, 2016. Therefore, this proposed option would be available to ACOs with 2014 start dates seeking to renew their participation agreements in order to enter their second agreement period beginning in 2017. Under this proposal, we would update the ACO's benchmark as specified at § 425.602(b) for performance year 4 of the initial participation agreement. However, we would defer resetting the benchmark as specified at proposed § 425.603 until the beginning of the ACO's second agreement period (that is, the ACO's first agreement period under the selected performance-based risk track). The benchmark would be reset under the policies in place for that time

period, including the regional adjustment we are finalizing in this rule. Also, we proposed that the quality performance standard that would apply for performance year 4 of the initial participation agreement would be the same as for the ACO's performance year 3, consistent with § 425.502(a)(2). Specifically, we proposed that during the fourth performance year of the ACO's first agreement period, the ACO must continue to report all measures and the ACO will be assessed on performance based on the quality performance standard in place for the third performance year of the ACO's first agreement period.

In addition, we proposed that if a Track 1 ACO finishing its initial agreement period chooses to elect this option during the renewal of its participation in the Shared Savings Program, the ACO would be required to transition to the selected performance-based risk track at the end of the fourth performance year under Track 1. The term of the second agreement period would be 3 performance years.

If such an ACO subsequently decides during the fourth performance year that it no longer wants to transition to the performance-based risk track it selected in its application for a second agreement period, then the currently established close-out procedures and payment consequences of early termination under § 425.221 would apply. For example, if the ACO voluntarily terminates its agreement under § 425.221(a), effective December 31 of its fourth performance year, and completes all required close-out procedures, then as specified by § 425.221(b), the ACO would be eligible to share in any shared savings for its fourth performance year.

In addition, to provide some incentive for ACOs to honor their commitment to participate early in a performance-based risk track, we proposed that if an ACO that has been approved for an extension of its initial agreement period terminates its participation agreement prior to the start of the first performance year of the second agreement period, then the ACO would be considered to have terminated its participation agreement for the second agreement period under § 425.220. Such an ACO would not be eligible to participate in the Shared Savings Program again until after the date on which the term of that second agreement period would have expired if the ACO had not terminated its participation, consistent with § 425.222.

In the proposed rule, we also noted that if an ACO that goes on to participate under a two-sided track

under this proposed option voluntarily terminates its agreement during its second agreement period, then the currently established close-out procedures and payment consequences of early termination under § 425.221 would apply. If an ACO terminates its agreement under its selected performance-based risk track and subsequently decides to reapply to participate in the Shared Savings Program, then the requirements under § 425.222 for re-application after termination would apply. For example, consistent with our current policy, such an organization would be required to apply to participate under a two-sided model and would have to wait the remaining duration of the agreement period before reapplying.

In developing this proposal to support our policy goal of providing additional flexibility to ACOs that are considering transitioning to two-sided risk, we also considered an alternative option that would permit the ACO to transition to a two-sided risk track during a subsequent 3-year agreement period under Track 1, instead of extending the first agreement period for an additional year. Under this alternative approach, we indicated that we would allow the ACO to remain in Track 1 for the first performance year of the second 3-year agreement period. The ACO would then be required to transition to Track 2 or 3 for the final 2 performance years of the agreement period. An ACO choosing this option would be required to satisfy all the requirements for a performance-based risk track at the time of renewal, including the requirement that the ACO demonstrate that it is capable of repaying shared losses as required to enter a performance-based risk track. Under this approach, we would rebase the ACO's benchmark as provided under proposed § 425.603, effective for the first year of the second 3-year agreement period. Further, we would calculate shared savings for the first year of the second 3-year agreement period under the one-sided model as specified at § 425.604. During the second and third performance years of the second agreement period, we would calculate shared savings and shared losses, as applicable, under either Track 2 (as determined at § 425.606) or Track 3 (as determined at § 425.610). We did not elect to propose this alternative option because we believed there could be a stronger incentive for some ACOs to transition to two-sided performance-based risk if we were to defer resetting the ACO's benchmark until the beginning of the ACO's second agreement period. Additionally, we

noted that the alternative approach could raise concerns about risk selection since an ACO could participate for the first performance year of the second agreement period under this alternative, learn midway through the second performance year that its expenditures for the first performance year were below the negative MSR, and withdraw from the program before being subjected to reconciliation under performance-based risk.

We welcomed comments on our proposal and the alternative approach, as well as on other possible alternatives to provide flexibility and encourage ACOs to enter into and honor their participation agreements under performance-based risk tracks, and any related issues.

*Comment:* Commenters generally supported the proposed new participation option, believing that this additional participation option could assist some ACOs with transitioning to a two-sided risk track more quickly by giving eligible ACOs an additional year to further develop the infrastructure needed to achieve success under a performance-based risk track. Some commenters thought the alternative approach, in which we would allow the ACO to remain in Track 1 for the first performance year of its second 3 year agreement period before transitioning to a performance-based risk track in year 2, should also be offered, and might even be advantageous for ACOs in some situations. For example, some commenters suggested that this alternative participation option could be advantageous if it were integrated with the APM requirements under MACRA; that is, if the first year of a new two-sided risk contract under the alternative option could qualify as being "more than nominal financial risk" and therefore enable the ACO's physicians and other eligible clinicians to receive bonus payments equal to 5 percent of their covered Medicare professional services. A number of commenters also indicated that it was difficult for them to fully evaluate the proposed option and the alternative approach without first having policies in place for implementing MACRA, so that it would be clearer whether these new participation options might qualify as an APM under MACRA.

To provide yet even more flexibility for ACOs prepared to accept performance-based risk, some commenters recommended that CMS allow ACOs to "move up" the risk tracks (that is, to move from Track 1 to Track 2 or 3, or move from Track 2 to Track 3) between performance years without being required to wait for the

start of a new agreement period. These commenters suggested that allowing an ACO to accept varying degrees of risk within an agreement period would position the ACO to best balance its exposure to and tolerance for financial risk and would create a true glide path for providers.

However, many commenters indicated that while they supported adding one or more additional participation options, they also cautioned that adding such participation options might not have much impact on ACOs' willingness to participate under a performance-based risk track. These commenters suggested that if a Track 1 ACO is uncertain about its ability to successfully manage financial risk, the ACO would more likely simply choose to continue under Track 1 for a second agreement period. Another commenter stated that the anticipated impact of the proposed regional benchmark rebasing methodology is not as significant as hoped for and therefore the proposal to facilitate transition to performance-based risk by extending an ACO's agreement period into a fourth year without rebasing is not a meaningful incentive. This commenter recommended that CMS consider lowering the minimum savings rate of two percent under § 425.604(b) as a way to support ACOs by improving the probability that they will be eligible to share in any savings they achieve as they transition to performance-based risk, particularly for ACOs that demonstrate a commitment to the Shared Savings Program through their years of participation and meet sufficient size requirements for statistical reliability.

A commenter expressed concern that adding the proposed additional participation option could slow the move away from FFS payment arrangements. This commenter believes that the ultimate goal is for providers to take on full financial responsibility for caring for a population of patients for a fixed payment. On balance, however, the commenter preferred the proposed alternative for transition to participation under Track 2 or Track 3, over the option to renew for an additional 3-year agreement period under Track 1, as previously finalized in the June 2015 rule.

*Response:* We appreciate the general support received from commenters on our proposal to provide an additional option for ACOs participating under Track 1 to apply to renew for a second agreement period under a two sided track (Track 2 or Track 3), under which the ACO, if approved by CMS, may

defer entering the new agreement period under a performance-based risk track, and extend participation under the initial participation agreement, for 1 year (that is, the initial agreement period would total 4 years). We acknowledge the concerns raised by commenters that this new participation option might not significantly affect ACOs' willingness to assume performance-based risk, but agree with commenters that such an option may influence some ACOs to transition to a performance-based risk track sooner than they otherwise might have.

As we gain experience with this new participation option in the Shared Savings Program, we will continue to evaluate the appropriateness and effectiveness of our incentives to encourage ACOs to transition to a performance-based risk track and, as necessary, may propose refinements through future notice and comment rulemaking. Although we are not adopting the alternative approach that we discussed in the proposed rule (that would permit the ACO to transition to a two-sided risk track during a subsequent 3-year agreement period under Track 1, instead of deferring entry into a new agreement period under a two-sided risk track and extending the first agreement period for an additional year), we may revisit it along with possible other approaches, including those suggested by commenters, in the future. As we gain additional experience under the Shared Savings Program, we may propose, if warranted, one or more additional participation options through future rulemaking to increase ACOs' willingness to assume performance-based risk. We would also note that the Department of Health and Human Services recently issued a Notice of Proposed Rulemaking that includes its proposals for implementation of the bonus payment for participants in eligible APMs under MACRA, 81 FR 28162 (May 9, 2016).

*Comment:* A commenter disagreed with our proposal that if an ACO that has been approved for an extension of its initial agreement period terminates its participation agreement prior to the start of the first performance year of the second agreement period, the ACO would be considered to have terminated its participation agreement for the second agreement period under § 425.220. We included this proposal because we believe it will provide an incentive for ACOs to honor their commitment to participate early in a performance-based risk track. The commenter believes that the proposed approach overlooks the fact that unanticipated changes can have a

material impact on an ACO's readiness to assume risk. To illustrate, this commenter suggested that a significant change in the ACO's Participant List could have a material impact on the ACO's readiness and ability to follow through on its prior commitment to transition to a performance-based risk track. To address such situations, this commenter recommended that CMS create a "hold harmless" provision for ACOs that choose to renew their participation under the new participation option but then subsequently decide they are unable to assume performance-based risk due to a material change in their structure. Under this suggested hold harmless provision, an ACO that is unable to honor its commitment to participate in a performance-based risk track should have its benchmark rebased, so that it can be treated as being in PY1 of its second agreement period under Track 1. This commenter encouraged CMS to work with stakeholders to define a comprehensive list of material events that would enable an ACO to qualify for the hold harmless provision.

*Response:* We are not persuaded that it is necessary to revise the proposal to include a "hold harmless" provision. We continue to believe it would be appropriate under this new participation option to provide an incentive for ACOs to honor their commitment to participate early in a performance-based risk track. We would expect that ACOs considering this new participation option would share their process and systems knowledge with potential new ACO participants to increase the likelihood that new ACO participants could be successfully integrated in to the ACO, but ultimately ACOs should make their own determination as to whether a TIN is ready to join it in assuming performance-based risk. Alternatively, if the change in the ACO's composition is due the loss of one or more key ACO participant TINs, we believe it would be appropriate for the ACO to make its own determination as to whether to honor its commitment to assume performance-based risk or terminate its participation agreement. Also, we already have an adjustment to the historical benchmark in place that accounts for changes in an ACO's certified ACO Participant List, as discussed in section II.B of this final rule. This policy allows for more accurate benchmarks that reflect the historical spending patterns of the ACO and its assigned beneficiaries. Therefore, we are finalizing as proposed the policy that, if an ACO that has been approved for an extension of its initial

agreement period terminates its participation agreement prior to the start of the first performance year of the second agreement period, the ACO will be considered to have terminated its participation agreement for the second agreement period under § 425.220. Such an ACO will not be eligible to participate in the Shared Savings Program again until after the date on which the term of that second agreement period would have expired if the ACO had not terminated its participation, consistent with § 425.222.

*Comment:* Commenters provided a variety of other suggestions that they believe might also encourage ACOs to transition to a performance-based risk track earlier. For example, a commenter preferring retrospective beneficiary assignment under Track 2 rather than prospective assignment under Track 3, suggested that Track 2 could be made more attractive to participants if CMS were to make enhancements that are currently available only under Track 3, such as the waiver of the SNF 3-Day Rule, available under Track 2. Similar to comments we received in prior rulemaking, a number of commenters requested that CMS allow ACOs to include partial or “split TINs” among their ACO participants to allow large organizations, such as academic medical centers and their faculty practice plans, to participate in the program under a performance-based risk track with a subset of their providers.

Another commenter urged CMS to create stronger incentives for ACOs to assume downside risk in Track 2 and Track 3, such as by reducing the final sharing rate for eligible ACOs under Track 1 to perhaps 20 percent for the second agreement period, to minimize the number of ACOs renewing under Track 1. Otherwise, the commenter suggests many Track 1 ACOs may decide that Track 1 benefits, including having no risk of shared losses, exceed the marginal reduction of their shared savings payments during the second renewal term. This commenter also believes that CMS should provide a clearer and more certain path for ACOs willing to share in risk by, for example, also offering prospective beneficiary assignment for ACOs moving to Track 2 and providing more timely Part D expenditure data for assigned beneficiaries. The commenter believes that these changes would help ACOs predict the expected baseline Medicare spending and savings and reduce uncertainty.

*Response:* Although we are not addressing these additional suggestions as part of this rulemaking, we will further consider these and other

suggestions from ACOs and other stakeholders that might encourage ACOs to enter performance-based risk arrangements earlier. As we discussed in the June 2015 final rule (80 FR 32810 and 32811), we appreciate the flexibilities that could be afforded to ACOs if a methodology could be developed that would permit ACOs to split ACO participants or ACO providers/suppliers into two different risk tracks. Under such a model, ACOs could progressively move providers participating in their organizations into risk in a step-wise fashion. Therefore, we continue to be interested in exploring operational processes that could permit such a design while also ensuring appropriate beneficiary protections. We intend to continue considering this issue and may revisit it in future rulemaking as infrastructure evolves to support this new alternative.

*FINAL ACTION:* We are finalizing our proposal to provide an additional option for ACOs participating under Track 1 to apply to renew for a second agreement period under a two-sided track (Track 2 or Track 3) under the renewal process specified at § 425.224. If the ACO's renewal request is approved, the ACO may defer entering the new agreement period under the performance-based risk track for 1 year and extend its first agreement period under Track 1 for a fourth performance year. Further, as a result of this deferral and extension, we will also defer rebasing the ACO's benchmark for 1 year. At the end of the fourth performance year under Track 1, the ACO will transition to the selected performance-based risk track for a 3-year agreement period. Accordingly, we are amending the participation agreement requirements at § 425.200 to provide that an ACO in its first agreement period under Track 1 that has applied and been approved for a second agreement period under a performance-based risk track that defers entering its new agreement period under the performance-based risk track will be able to continue participating under its first agreement for an additional year (for an agreement period that would total 4 years).

In addition, we are finalizing our proposal that if an ACO that has been approved for an extension of its initial agreement period terminates its participation agreement prior to the start of the first performance year of the second agreement period, then the ACO will be considered to have terminated its participation agreement for the second agreement period under § 425.220. Such an ACO will not be eligible to participate in the Shared Savings Program again until after the

date on which the term of that second agreement period would have expired if the ACO had not terminated its participation, consistent with § 425.222.

*D. Administrative Finality: Reopening Determinations of ACO Savings or Losses to Correct Financial Reconciliation Calculations, and a Conforming Change*

1. Overview

ACOs enter into agreements with CMS to participate in the Shared Savings Program, under which ACOs that meet quality performance requirements and reduce the Medicare Parts A and B expenditures for their assigned beneficiaries below their benchmark by a specified margin are eligible to share a percentage of savings with the Medicare program. Further, ACOs participating under a two-sided risk track, whose Medicare Parts A and B expenditures for their assigned beneficiaries exceed their benchmarks by a specified margin, are liable for sharing losses with CMS. After each performance year, CMS calculates whether an ACO has generated shared savings by comparing its actual expenditures for its assigned beneficiaries in the PY with its updated benchmark. Savings are generated if actual Medicare Parts A and B expenditures for assigned beneficiaries are less than the updated benchmark expenditures and shared with the ACO if they exceed the ACO's minimum savings rate, and the ACO meets the minimum quality performance standards and otherwise maintains its eligibility to participate in the Shared Savings Program. For an ACO under a two-sided risk track, losses are generated if actual Medicare Parts A and B expenditures for assigned beneficiaries are greater than the updated benchmark expenditures and the ACO is liable for shared losses if the losses exceed the ACO's minimum loss rate.

To date, we have announced 2 years of financial performance results for ACOs participating in the Shared Savings Program, in Fall 2014 for 220 ACOs with 2012 and 2013 start dates for PY 1 (concluding December 31, 2013), and in August 2015 for 333 ACOs with 2012, 2013 and 2014 start dates for PY 2014. As discussed in detail in the proposed rule (81 FR 5853 through 5854), several months after the release of PY 1 financial reconciliation results and shared savings payments to eligible ACOs, we discovered that there was an issue with one of the source input data fields used in the final financial reconciliation calculations. As a result,

the PY 1 shared savings payments were overstated for some ACOs and shared losses were understated for some other ACOs. We ultimately determined this issue resulted in an estimated 5 percent overstatement of PY 1 shared savings payments to ACOs and an understatement of shared losses (81 FR 5853 and 5854). The impact on individual ACOs varied depending on the extent to which services provided to the ACO's assigned beneficiaries were furnished by providers that receive DSH payments. The issue did not result in understated PY 1 shared savings payments or overstated PY 1 shared loss recoupments for any ACO.

The financial reconciliation calculation/methodology and the amount of shared savings an ACO might earn, including all underlying financial calculations, are not appealable. That is, the determination of whether an ACO is eligible for shared savings under section 1899(d) of the Act, and the amount of such shared savings, as well as the underlying financial calculations are precluded from administrative and judicial review under section 1899(g)(4) of the Act and § 425.800(a)(4). However, under § 425.314(a)(4), if as a result of any inspection, evaluation, or audit, it is determined that the amount of shared savings due to the ACO or the amount of shared losses owed by the ACO has been calculated in error, CMS reserves the right to reopen the initial determination and issue a revised initial determination. (See also the CMS Web site at <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/Downloads/Reconsideration-Review-Process-Guidance.pdf>).

As noted in the proposed rule, we have not previously specified the actions that we would take under circumstances when we identify an error in a prior payment determination, such as the error that occurred in the calculation of PY 1 shared savings and shared losses. We are concerned that the current uncertainty regarding the timeframes and other circumstances in which we would reopen a payment determination to correct financial calculations under the Shared Savings Program could introduce financial uncertainty which could seriously limit an ACO's ability to invest in additional improvements (such as IT solutions and process development, staffing, population management, care coordination, and patient education) to increase quality and efficiency of care. This uncertainty could also limit an ACO's ability to get a clean opinion from its financial auditors, which could, for example, harm the ACO's ability to

obtain necessary capital for additional program improvements. This could be especially challenging for ACOs seeking to enter or continue under a two-sided performance-based risk track since under the requirements at § 425.204(f)(2), such an ACO must, as part of its application for a two-sided performance-based risk track, demonstrate its ability to repay shared losses to the Medicare program, which it may do by placing funds in escrow, obtaining a surety bond, establishing a line of credit (as evidenced by a letter of credit that the Medicare program can draw upon), or establishing a combination of such repayment mechanisms, that will ensure its ability to repay the Medicare program. These arrangements can often require that an ACO or its financial supporters or both make an assessment of the ACO's level of financial risk for possible repayments. We are particularly concerned that uncertainty regarding past financial results could discourage ACOs from moving more quickly from the one-sided shared savings track to a performance-based risk track when renewing their agreements.

We considered an approach under which we would always reopen a determination of ACO shared savings or shared losses to correct any issue that might arise with respect to a financial calculation, identified within 4 years after the release of final financial reconciliation results. We did not propose this option because we were concerned that this approach of correcting even very minor errors might result in significant operational burdens for ACOs and CMS, including multiple financial reconciliation re-runs and off-cycle payment/recoupment activities that could have the potential for significant and unintended operational consequences, and could jeopardize the certainty of performance results for both ACOs and CMS. We also considered whether to adopt a policy under which we would never correct for errors after performing the financial calculations and making initial determinations of ACO shared savings and shared losses. However, we did not propose this option because we believed it would be appropriate to reopen financial calculations in certain circumstances, such as in the case of fraud or similar fault as defined at § 405.902, or for errors with a significant impact on the computation of ACOs' shared savings/shared losses. Therefore, we proposed a finality policy for financial calculations and shared savings payments or shared loss recoupments in which we would allow for corrections, under certain

circumstances and within a defined timeframe, after financial calculations have been performed and the determination of ACO shared savings and shared losses has been made.

## 2. Circumstances for Reopening Initial Determinations and Final Agency Determinations of ACO Shared Savings or Shared Losses to Correct Financial Reconciliation Calculations

In developing the proposals in this section, we considered the following issues: (1) The type of issue/error that we would correct; (2) the timeframes for reopening a payment determination; and (3) whether we should establish a materiality threshold as an indicator of a material effect on shared savings and shared losses that would warrant a correction, and if so, at what level.

First, we proposed that CMS would have discretion to reopen a payment determination at any time in the case of fraud or "similar fault," as defined in § 405.902. It is longstanding policy in the Medicare program that a determination may be reopened at any time if it was procured by fraud or "similar fault," (see, for example, § 405.980(b)(3); 74 FR 65296, 65313 (December 9, 2009)). Second, we proposed that in certain circumstances we would reopen a payment determination for good cause. For consistency and to decrease program complexity, we proposed to follow the same approach to reopening for good cause as applies to the reopening of Parts A and B claims determinations under § 405.986. Specifically, we proposed that CMS would have the discretion to reopen a payment determination, within 4 years after the date of notification to the ACO of the initial determination of shared savings or shared losses for the relevant performance year, if there is good cause. We proposed that good cause may be established if there is new and material evidence that was not available or known at the time of the payment determination, and which may result in a different conclusion, or if the evidence that was considered in making the payment determination clearly shows on its face that an obvious error was made at the time of the payment determination.

We indicated that new and material evidence or an obvious error could come to CMS' attention through a variety of means, such as identification by CMS through CMS program integrity reviews or audits, or identification through audits conducted by independent federal oversight entities such as the Office of Inspector General (OIG) or the Government Accountability

Office (GAO). CMS program integrity reviews and audits include reviews and audits conducted by CMS' contractors. We proposed to establish a 4-year time period (that is, 4 years from initial notification of the payment determination) for reopening Shared Savings Program payment determinations for good cause to provide sufficient time to initiate and complete CMS program integrity reviews or audits by oversight entities like OIG or GAO and to evaluate errors identified through those processes. We proposed that good cause would not be established by changes in substantive law or interpretative policy. A change of legal interpretation or policy by CMS in a regulation, CMS ruling, or CMS general instruction, whether made in response to judicial precedent or otherwise, would not be a basis for reopening a payment determination under the proposal. Further, we proposed CMS would have sole discretion to determine whether good cause exists for reopening a payment determination under this section. Under the proposal, the determination of whether an error was made, whether a correction would be appropriate based on these proposed criteria, and the timing and manner of any correction would be within the sole discretion of CMS. We also indicated in the proposal that we did not intend to propose an exhaustive list of potential issues that would or would not constitute good cause, but instead intended to provide additional subregulatory guidance on this issue. We also noted that good cause would not be established by a reconsideration, appeal, or other administrative or judicial review of any determinations precluded under § 425.800.

In addition, we indicated we would not reopen a payment determination to consider, or otherwise consider as part of a reopening, additional claims information submitted following the end of the 3-month claims run out and the use of the completion factor. We would continue to use claims submitted prior to the end of the 3-month claims run out with a completion factor to calculate an ACO's per capita expenditures for each performance year, consistent with §§ 425.604(a)(5), 425.606(a)(5) and 425.610(a)(5). Also, consistent with established policy, under this proposed policy, we would not reopen a determination if an ACO's ACO participants submitted additional claims or submitted corrected claims after the 3-month claims run out period following the end of the performance year.

In order to provide an opportunity for CMS to consider updated information and make other adjustments to payment determinations across all ACOs, and to minimize program disruptions for ACOs resulting from multiple reopenings, we indicated that we would, to the extent feasible, make corrections for a given performance year in a unified reopening (as opposed to multiple reopenings). In addition, we indicated we would consider other ways to reduce operational burdens for both ACOs and CMS that could result from making payment adjustments.

In addition, in discussing the proposal regarding reopenings for good cause, we proposed that we would also consider whether the error is material and thus warrants a correction by reviewing the nature and particular circumstances of the error. We did not propose specific criteria for determining materiality but we indicated our intent to provide additional information for ACOs through subregulatory guidance, as appropriate. For example, in the case of technical errors by CMS such as CMS data source file errors and CMS computational errors, we stated we would consider limiting reopenings of payment determinations under the Shared Savings Program to issues/errors that have a material effect on the net amount of ACO shared savings and shared losses computed for the applicable performance year for all ACOs, and thus warrant a correction due to the magnitude of the error.

We also initially considered applying a materiality threshold for each ACO, rather than evaluating materiality based on the effect on total net shared savings and shared losses for all ACOs, in determining whether to exercise our reopening discretion to correct a CMS technical error. However, we indicated in the proposed rule that we believed it would be appropriate to limit reopenings to correct CMS technical errors that more widely affect the program rather than reopening determinations for specific issues for each of the hundreds of ACOs participating in the Shared Savings Program absent evidence of fraud or similar fault, or good cause established by evidence of other errors. Otherwise, a relatively broad scope and extended timeframe for reopening could seriously limit an ACO's ability to invest in additional improvements to increase quality and efficiency of care. This uncertainty could also limit an ACO's ability to get a clean opinion from its financial auditors, which could, for example, harm the ACO's ability to obtain necessary capital for additional program improvements. This could be

especially challenging for ACOs seeking to enter or continue under a two-sided performance-based risk track since under the requirements at § 425.204(f), such an ACO must, as part of its application for a two-sided performance-based risk track, demonstrate its ability to repay shared losses to the Medicare program, which it may do by placing funds in escrow, obtaining a surety bond, establishing a line of credit (as evidenced by a letter of credit that the Medicare program can draw upon), or establishing a combination of such repayment mechanisms, that will ensure its ability to repay the Medicare program. These arrangements can often require that an ACO and/or its financial supporters make an assessment of the ACO's level of financial risk for possible repayments. Uncertainty over past financial results could significantly affect an ACO's ability to obtain and maintain these arrangements with financial institutions, and thus discourage ACOs from moving more quickly from the one-sided shared savings track to a performance-based risk track when renewing their agreements. (81FR 5854).

Therefore, after considering these issues, we proposed to revise § 425.314 to remove paragraph (a)(4) and add a new paragraph (e) to specify the circumstances under which we would reopen a payment determination under §§ 425.604(f), 425.606(h), 425.610(h), 425.804, or 425.806. Specifically, we proposed that, if CMS determines that the amount of shared savings due to the ACO or the amount of shared losses owed by the ACO has been calculated in error, CMS may reopen the earlier payment determination and issue a revised initial determination. We proposed that a payment determination may be reopened: (1) At any time in the case of fraud or similar fault, as defined in § 405.902; or (2) not later than 4 years after the date of notification to the ACO of the initial determination of shared savings or shared losses for the relevant performance year under § 425.604(f), § 425.606(h) or § 425.610(h), for good cause. We proposed that good cause may be established when there is new and material evidence of an error or errors, that was not available or known at the time of the payment determination and may result in a different conclusion, or the evidence that was considered in making the payment determination clearly shows on its face that an obvious error was made at the time of the payment determination. Good cause would not be established by a change of legal

interpretation or policy by CMS in a regulation, CMS ruling or CMS general instruction, whether made in response to judicial precedent or otherwise. We would have sole discretion to determine whether good cause exists for reopening a payment determination under this section. Also, good cause would not be established by a reconsideration, appeal, or other administrative or judicial review of any determinations precluded under § 425.800.

Under the proposal, the determination of whether an error was made, whether a correction would be appropriate based on the proposed criteria, and the timing and manner of any correction would be within the sole discretion of CMS. We proposed that if CMS determines that the specified criteria were met and exercises its discretion to reopen, CMS would recompute the financial results for all ACOs affected by the error or errors. In light of this policy proposal, we indicated we would not reopen and revise the PY 1 payment determinations solely affected by the data source error described previously because we had not previously specified, either through regulations or program guidance, the criteria CMS would apply in determining whether to reopen a payment determination. However, we indicated we would reopen and revise these PY 1 payment determinations for other errors satisfying the proposed criteria for reopening for good cause or for fraud or similar fault (81 FR 5857). Finally, we proposed to amend § 425.800(a)(4), expressly to include a revised initial determination in the list of determinations that are precluded from administrative and judicial review.

We invited comments on this proposal, including the proposed criteria for reopening, on alternative approaches for defining the time period for reopenings of payment determinations, on the criteria for establishing good cause, whether the time period for reopenings for good cause should be longer or shorter than 4 years, and on any other criteria that we should consider for the final rule to address issues related to financial reconciliation calculations and the determination of ACO shared savings and shared losses.

*Comment:* Commenters generally appreciated efforts to further define parameters around reopening payment determinations within the Shared Savings Program. A few commenters concurred with the provisions as proposed; however, most commenters expressed concerns about one or more aspects of the proposal. In particular, many commenters suggested limiting the timeframe for good cause

redeterminations to a shorter period such as 2 years, instead of 4, to provide ACOs with more financial certainty. These commenters stated that requiring ACOs to repay CMS for errors made potentially several years earlier would pose an excessive administrative burden on both ACOs and the Medicare program, create financial uncertainty and could discourage ACOs from participating in the program.

*Response:* We believe a 4 year time frame for reopenings for good cause, which is based on the timeframe for reopening of Parts A and B claims determinations under § 405.986, would also be appropriate under the Shared Savings Program. We acknowledge that a shorter timeframe for good cause determinations might provide more financial certainty for ACOs. However, based on a review of comments, we continue to believe the proposed approach carefully balances a desire to provide more financial certainty for ACOs while also addressing program integrity and other concerns. We are especially concerned that a shorter time period could make it difficult for CMS to make corrections based on program integrity reviews or audits by OIG or GAO. Similarly, a longer time period might make it feasible for CMS to make additional corrections based on program integrity reviews or audits by OIG or GAO, but could provide less financial certainty for ACOs.

*Comment:* Many commenters are concerned that CMS reserves for itself sole discretion to determine whether good cause exists for reopening. These commenters requested that CMS include a specific “appeal process” or other process in which individual ACOs could submit information and data to CMS regarding errors and other anomalies.

*Response:* As discussed earlier in this section, the financial reconciliation calculation/methodology and the amount of shared savings an ACO might earn, including all underlying financial calculations, are not appealable. That is, the determination of whether an ACO is eligible for shared savings under section 1899(d) of the Act, and the amount of such shared savings, as well as the underlying financial calculations are precluded from administrative and judicial review under section 1899(g)(4) of the Act and § 425.800(a)(4). Accordingly, we are not establishing an appeal process for ACOs to submit information to us regarding errors they believe were made in the financial reconciliation calculation or in determining the amount of shared savings earned by the ACO. We believe it is appropriate that the determination

of whether an error was made, whether a correction would be appropriate based on these proposed criteria, and the timing and manner of any correction that would be made would be within the sole discretion of CMS. However, we also did not intend to imply that there would be no opportunity for ACOs to bring concerns about data errors or other anomalies to our attention. As noted in the June 2015 final rule (80 FR 32699), there are numerous existing processes through which ACOs can submit information and data to CMS regarding alleged data errors and other anomalies. For example, each ACO is assigned a CMS point of contact, we provide ACOs with a dedicated email box for ACOs to submit questions for subject matter experts to address, and we hold numerous webinars that include opportunities for ACOs to raise questions and concerns. CMS will consider information about potential errors or anomalies provided by ACOs in conducting its own reviews of prior payment determinations.

*Comment:* Some commenters requested that CMS propose the specific good cause criteria including a materiality threshold through rulemaking instead of through sub-regulatory guidance so that the criteria are transparent and available for public comment. Many commenters requested that CMS establish a policy for a materiality threshold at an individual ACO level instead of across all ACOs to recognize that although determinations may have an insignificant effect on the program as a whole, a negative impact could be financially devastating to an individual ACO. Many of these commenters suggested a lower materiality threshold for individual ACOs, such as one percent or two percent, although there were a few commenters that indicated five percent might be acceptable if the materiality threshold was applied at the individual ACO level. Some commenters requested that CMS consider adopting a tiered materiality threshold for ACOs of varying size, practice-mix, patient population, and overall level of sophistication. For example, according to this commenter, an error affecting a smaller or newer ACO or an ACO serving a high-need population should be subject to a lower materiality threshold. Some commenters believe it is important to maintain flexibility and that CMS should consider individual materiality thresholds for differing ACOs to help ACOs that are facing financial strain and duress.

*Response:* We appreciate the suggestions that commenters provided regarding issues related to the

materiality of a payment error and when CMS should reopen a payment determination for good cause. Based on a review of the comments, we believe that it would be appropriate to address issues related to the materiality of an error through subregulatory guidance rather than through regulations. We believe that both CMS and ACOs would benefit from gaining additional experience with issues related to reopenings of payment determinations in the Shared Savings Program before further considering whether additional regulations would be appropriate. However, we are concerned that it could be very complex and burdensome for CMS to tailor materiality considerations to the particular characteristics or circumstances of a given ACO, as suggested by some commenters. In considering when to reopen an error for good cause, we intend to strike a careful balance between important Medicare program integrity concerns that payments be made timely and accurately under the Shared Savings Program with our desire to minimize unnecessary operational burdens for ACOs and CMS, and to support the ACOs' ability to invest in additional improvements to increase quality and efficiency of care. To achieve this careful balance in objectives for reopenings to address CMS technical errors, we may consider whether the error satisfies a materiality threshold, such as 3 percent of the total amount of net shared savings and shared losses for all ACOs for the applicable performance year. As described in the 2016 proposed rule, we plan to provide additional information about how we may consider the materiality of an error in subregulatory guidance (see 81 FR 5856 through 5857). To illustrate, under such an approach, we could exercise our discretion to reopen the financial reconciliation for a performance year if we determined that a correction to address a CMS technical error would affect total net shared savings and shared losses (that is, the amount of shared savings after the amount of shared losses has been subtracted) for all ACOs for the affected performance year by 3 or more percent. We may consider a higher threshold, such as 5 percent, or a lower threshold, such as 1 or 2 percent. However, based on a review of guidance from the GAO for financial audits of federal entities, we believe that 3 percent could generally be a reasonable threshold for "material effect." The GAO guidance was developed to assist auditors in assessing material effect for planning the audit scope for federal entities to ensure that

financial statement audits achieve their intended outcomes of providing enhanced accountability over taxpayer-provided resources. This guidance has been used for a number of years by GAO financial auditors for performing financial statement audits of federal entities. (See the GAO Web site at [http://www.gao.gov/special.pubs/01765G/vol1\\_complete.pdf](http://www.gao.gov/special.pubs/01765G/vol1_complete.pdf).) Although ACOs are not federal entities, we believe it would be reasonable to consider the GAO guidance in determining when a technical error has a material effect across all ACOs, such that we should use our discretion to reopen for good cause. The Shared Savings Program is a relatively large federal program administered within HHS, including over 400 ACOs (as of January 1, 2016). Accordingly, we believe that the GAO guidance on federal entity audits, while not directly applicable, provides a relevant and appropriate resource in considering when errors in certain payment determinations under the Shared Savings Program are material and whether we should exercise our discretion to reopen for good cause.

*Comment:* Commenters did not directly address the PY1 payment determinations affected by the data source error described in the proposed rule. However, some commenters more broadly urged that CMS hold ACOs harmless for payment determination errors made by CMS. These commenters believe that ACOs "should not be penalized for CMS errors" because ACOs may have already used the affected funds to improve beneficiary care.

*Response:* Except as discussed in the proposed rule for the PY 1 data source error, we do not believe it would be appropriate to establish a finality policy to hold ACOs harmless for payment determination errors made by CMS. We acknowledge that from year to year, corrections could sometimes advantage individual ACOs and sometimes disadvantage individual ACOs. We anticipate that, over time, this approach would not likely have a biased effect on ACOs or Medicare expenditures since the impact of reopenings over time would be equally likely to increase/decrease net shared savings and losses. We also believe there would be program integrity concerns if we were to hold ACOs harmless for payment determination errors made by CMS.

*Comment:* A few commenters recommended that payment and recoupment activities associated with reopenings and revised initial payment determinations be administered as stand-alone activities rather than being combined with subsequent years'

savings or losses. Their rationale is that ACOs are still evolving and their compositions are changing, sometimes dramatically, from year to year; therefore, recalculation of the financial reconciliation should impact the ACO participants from the corresponding performance year, and not the ACO participants in a subsequent performance year.

*Response:* We indicated in the proposal that we would consider ways to minimize program disruptions for ACOs that could result from one or more reopenings. Our intent is to reduce operational burdens, when feasible, that might result if an ACO were subject to one or more reopenings. The net effect on payments as a result of a reopening will not be different whether we perform the reopening independently or in conjunction with payment reconciliation for another performance year. In either case, we would provide ACOs with details regarding any necessary adjustments in their shared savings or shared losses resulting from reopened financial calculations for each performance year affected. We expect that ACOs would have sufficient information to be able to internally attribute any changes in shared savings/shared losses for a prior performance year as the ACO believes appropriate and consistent with the ACO's agreements with its ACO participants. Therefore, to the extent feasible, we will make corrections in a unified reopening (as opposed to multiple reopenings) to correct errors for a given performance year. In addition, we will consider other ways to reduce operational burdens for both ACOs and CMS that could result from making payment adjustments. For example, if we determine that a correction needs to be made to a prior performance year's results for good cause, we would seek to potentially adjust shared savings payments to the ACO or shared loss recoupments from the ACO for a subsequent performance year. To illustrate, if an ACO that generated shared savings for the second performance year of its agreement period owed CMS money based on a correction made to the payment determination for the prior performance year, we might be able to deduct the amount owed prior to making the current year shared savings payments (subject to the general requirement, discussed in the proposed rule, for ACOs to repay monies owed to CMS within 90 days of notification of the obligation). In either case, we expect to be able to provide ACOs with sufficient details regarding these corrections that they will be able to attribute the

additional payment or recoupment arising from the reopening internally and, as applicable, distribute additional funds to or collect amounts from the appropriate ACO participants from the prior PY.

**FINAL ACTION:** We are finalizing the administrative finality policy as proposed. Specifically, we are finalizing that if CMS determines that the amount of shared savings due to an ACO or the amount of shared losses owed by an ACO has been calculated in error, CMS may reopen the earlier payment determination and issue a revised initial determination: (1) At any time in the case of fraud or similar fault, as defined in § 405.902; or (2) not later than 4 years after the date of notification to the ACO of the initial determination of shared savings or shared losses for the relevant performance year under § 425.604(f), § 425.606(h) or § 425.610(h), for good cause. Good cause may be established when there is new and material evidence of an error or errors, that was not available or known at the time of the payment determination and may result in a different conclusion, or the evidence that was considered in making the payment determination clearly shows on its face that an obvious error was made at the time of the payment determination. Good cause will not be established by a change of legal interpretation or policy by CMS in a regulation, CMS ruling or CMS general instruction, whether made in response to judicial precedent or otherwise. We will have sole discretion to determine whether good cause exists for reopening a payment determination. Also, good cause will not be established by a reconsideration, appeal, or other administrative or judicial review of any determinations precluded under § 425.800.

If we determine that the reopening criteria are met, we will recompute the financial results for all ACOs affected by the error or errors. We will not reopen and revise PY 1 payment determinations to address the data source error described previously. We will address issues regarding when an error is material such that it would be appropriate to exercise our discretion to reopen for good cause through subregulatory guidance.

We note that the current requirements for ACO repayment of shared losses after notification of the initial determination of shared losses will not be affected by any of the policies that we are adopting in this section of this final rule. As described under § 425.606(h)(3) (Track 2) and § 425.610(h)(3) (Track 3), if an ACO has shared losses, the ACO must make

payment in full to CMS within 90 days of receipt of notification. These current requirements will continue to apply for repayment by ACOs for shared losses. For example, an ACO will not be able to delay recoupment of any payments required under § 425.606(h)(3) or § 425.610(h)(3) by notifying CMS of a possible error that could merit reopening. Instead, if we later determine that a correction should be made, we would subsequently combine, if feasible, the revised calculation of shared savings or shared losses for the affected performance year with the financial reconciliation for the most recent performance year. For example, we would add any amount owed to the ACO as a result of the reopening, to any shared savings payments for which the ACO is eligible for the most recent performance year. Finally, we had proposed to include these administrative finality provisions as a revision to § 425.314 (Audits and record retention) by removing (a)(4) and adding a new paragraph (e) to specify the circumstances under which we would reopen a payment determination under §§ 425.604(f), 425.606(h), 425.610(h), 425.804, or 425.806. However, we now believe these administrative finality provisions are a sufficiently distinct topic from “audits and record retention” that it would be clearer to instead incorporate these administrative finality provisions in a new, separate section at § 425.315 (Reopening Determinations of ACO Savings or Losses to Correct Financial Reconciliation Calculations). Accordingly, we are revising § 425.314 by removing (a)(4) and are adding a new § 425.315 to specify the circumstances under which we would reopen a payment determination under §§ 425.604(f), 425.606(h), 425.610(h), 425.804, or 425.806.

### 3. Conforming Change

As discussed earlier in the overview for this section, the determination of whether an ACO is eligible for shared savings, and the amount of such shared savings, and the limit on the total amount of shared savings as well as the underlying financial calculations are excluded from administrative and judicial review under section 1899(g) of the Act. Accordingly, in the November 2011 final rule establishing the Shared Savings Program, we adopted the regulation at § 425.800 to preclude administrative and judicial review of the determination of whether an ACO is eligible for shared savings and the amount of shared savings under Track 1 and Track 2 (§ 425.800(a)(4)), and the limit on total amount of shared savings that may be earned under Track 1 and

Track 2 (§ 425.800(a)(5)). In the June 2015 final rule, we amended the Shared Savings Program regulations by adding a new provision at § 425.610 to establish a new performance-based risk option (Track 3) that includes prospective beneficiary assignment and a higher sharing rate. However, in the June 2015 final rule we inadvertently did not also update § 425.800 to include references to determinations under § 425.610 (Track 3) in the list of determinations under this part for which there is no reconsideration, appeal, or other administrative or judicial review. Therefore, we proposed a conforming change to amend § 425.800 to add determinations under § 425.610 (Track 3) to the list of determinations under § 425.800(a)(4) and (a)(5) for which there is no reconsideration, appeal, or other administrative or judicial review.

**Comment:** We did not receive comments on this proposed conforming change.

**Response:** We will finalize this conforming change to the regulations to include determinations for Track 3 ACOs to the list of determinations for which there is no reconsideration, appeal, or other administrative or judicial review.

**FINAL ACTION:** We are amending § 425.800 to add determinations under § 425.610 (Track 3) to the list of determinations under § 425.800(a)(4) and (a)(5) for which there is no reconsideration, appeal, or other administrative or judicial review.

## III. Collection of Information Requirements

As stated in section 3022 of the Affordable Care Act, Chapter 35 of title 44, United States Code, shall not apply to the Shared Savings Program. Consequently, the information collection requirements contained in this final rule need not be reviewed by the Office of Management and Budget.

## IV. Regulatory Impact Analysis

### A. Statement of Need

This final rule is necessary in order to make certain payment and policy changes to the Medicare Shared Savings Program established under section 1899 of the Act. The Shared Savings Program promotes accountability for a patient population, fosters the coordination of items and services under Medicare Parts A and B, and encourages investment in infrastructure and redesigned care processes for high quality and efficient service delivery. These changes are focused on calculations for resetting the financial benchmark for an ACO's second or subsequent agreement period,

thereby fulfilling a goal communicated in the Shared Savings Program June 2015 final rule (80 FR 32692), and further discussed in the 2016 proposed rule, to take into account regional expenditures when resetting an ACO's financial benchmark for a second or subsequent agreement period.

### *B. Overall Impact*

We examined the impacts of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999) and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action that is likely to result in a rule: (1) Having an annual effect on the economy of \$100 million or more in any 1 year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as “economically significant”); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects (\$100 million or more in any 1 year). We estimate that this rulemaking is “economically significant” as measured by the \$100 million threshold, and hence also a major rule under the Congressional Review Act. Accordingly, we have prepared a RIA, which to the

best of our ability presents the costs and benefits of the rulemaking.

In keeping with our standard practice, the main analysis presented in this RIA compares the expected outcomes of the modifications finalized with this rulemaking to the expected outcomes under current regulations. We provide our analysis of the expected costs of the payment model under section 1899(i)(3) of the Act compared to the costs that would be incurred under the statutory payment model under section 1899(d) of the Act in section IV.E of this final rule.

### *C. Anticipated Effects*

#### *1. Effects on the Medicare Program*

The Shared Savings Program is a voluntary program involving an innovative mix of financial incentives for demonstrating quality of care and efficiency gains within FFS Medicare. As a result, the changes to the Shared Savings Program adopted in this final rule could result in a range of possible outcomes. While evaluation of the program's overall impact to date is ongoing, the quality and financial results of the first 2 performance years are within the range originally projected for the program in the November 2011 final rule (see Table 8, 76 FR 67963). Also, at this point, we have seen no evidence of selective ACO participation that would systematically bias overall program performance as measured by ACO benchmarks.

In the June 2015 final rule, we established a policy for rebasing an ACO's financial benchmark for a second or subsequent agreement period by weighting each benchmark year equally and taking into account savings generated by the ACO in the previous agreement period. We also discussed potential future modifications to the rebasing methodology that would account for regional FFS expenditures and remove the policy of adding savings generated by the ACO in the previous agreement period. In the 2016 proposed rule, we proposed modifications to the program's regulations, focused on incorporating regional expenditures into ACOs' rebased historical benchmarks. In this final rule, we are adopting an alternative benchmarking approach for ACOs starting a second agreement period in 2017 and subsequent years. The rebasing methodology promulgated in the June 2015 rule will apply to ACOs that entered a second agreement period in 2016. The revised rebasing methodology promulgated in this final rule will apply to these ACOs starting in their third agreement period. Under the revised benchmarking methodology adopted in this final rule, an ACO's

reset benchmark will be adjusted by a percentage of the difference between the average per capita expenditure amount for the ACO's regional service area and the ACO's rebased historical benchmark amount (described in section II.A.2.c of this final rule). Under the phased approach to using a higher percentage in calculating the adjustment for regional expenditures (described in section II.A.2.c.3 of this final rule): in the ACO's first agreement period in which the regional FFS adjustment is applied the percentage used in calculating the regional adjustment will be set as high as 35 percent; in the ACO's second agreement period in which the regional FFS adjustment is applied and subsequent agreement periods, the percentage will be set as high as 70 percent unless the Secretary determines a lower weight should be applied, as specified through future rulemaking. This approach will further limit the link between an ACO's performance in prior agreement periods and its benchmark in subsequent agreement periods by making the benchmark more reflective of costs in the ACO's regional service area. These changes are intended to strengthen the incentives for ACOs to invest in infrastructure and care redesign necessary to improve quality and efficiency and meet the goals of the Shared Savings Program. In response to comments, we are finalizing a modification that will moderate the phase-in of the regional FFS adjustment for ACOs that have higher costs than their region and for which the regional adjustment will reduce the ACO's benchmark. In such cases, the weight placed on the regional FFS adjustment will be reduced to 25 percent (down from 35 percent) in the first agreement period in which the regional FFS adjustment is applied, and 50 percent (down from 70 percent) in the second. By the third agreement period under the revised rebasing methodology, the weight placed on the regional FFS adjustment will be 70 percent for all ACOs, unless the Secretary determines a lower weight should be applied, as specified through future rulemaking.

Another key modification to the benchmark rebasing methodology involves refining certain calculations that currently rely on national FFS expenditures and corresponding trends so that they are instead determined according to county FFS trends observed in each ACO's unique assignment-weighted regional service area. Annual average per capita costs will be tabulated for assignable FFS beneficiaries in each county. For each ACO, a regional weighted average

expenditure will be found by applying ACO assigned-beneficiary weights to the average expenditures tabulated for each county. Changes in an ACO's regional service area average per capita expenditures (and relative risk reflected in associated HCC risk scores) will define a regional trend specific to each ACO's region. This regional trend will be utilized in two specific areas of the existing benchmark methodology to replace the: (1) National expenditure trend in calculations establishing the ACO's rebased historical benchmark; and (2) existing national "flat dollar" growth amount for updating the rebased historical benchmark for each performance year.

By replacing the national average FFS expenditure trend and "flat dollar" update with trends observed for county level FFS assignable beneficiaries in each ACO's unique assignment-weighted regional service area, benchmark calculations will be better structured to account for exogenous trend factors particular to each ACO's region and the pool of potentially-assignable beneficiaries therein (for example, higher trend due to a particularly acute flu season or an unusually large area wage index adjustment or change).

Although the policy will have mixed effects—increasing or decreasing benchmarks for ACOs in various circumstances—an overall increase in program savings will likely result from taking into account service-area trends in benchmark calculations. In some cases lower benchmarks will be produced, preventing shared savings payments to certain ACOs for whom national average trends and updates would have provided higher updated benchmarks. For other ACOs, such a policy will be more sensitive to regional circumstances outside of the ACO's control causing higher trends for the ACO's service area. In such cases, a higher benchmark could improve program cost savings in the long run by reducing the likelihood the ACO would choose to drop out of the program because a shared loss would otherwise have been assessed due to exogenous factors unrelated to the ACO's changes in care delivery.

In addition, applying the regional trend as a percentage (rather than "flat dollar") when updating the benchmark to a performance year basis is anticipated to further reduce program costs by improving the accuracy of updated benchmarks, particularly for ACOs that have historical benchmarks significantly below or above average. The November 2011 final rule discussed the risk that large nominal "flat dollar"

growth updates could compound over an agreement period to excessively inflate benchmarks for ACOs with relatively low historical benchmark cost and could lead to predictable bias and resulting cost for selective participation in the program (76 FR 67964). Such risk has not materialized in program experience to date, largely due to the historically low national program trend used to update ACO benchmarks through the first 3 years of the program. However, the per capita trend for the Medicare FFS program is anticipated to be higher in future years associated with the period governed by this final rule in contrast to the relatively moderate growth in cost experienced over the first 3 years of the program's implementation.<sup>3</sup> The changes to the methodology for updating the benchmark included in this final rule will apply regional trends to update ACO benchmarks and therefore prevent the increased program cost the current update methodology risks by employing an average "flat dollar" update that compounds over the 3 years of an ACO's agreement period.

Program participation and ACO beneficiary assignment are not homogeneously distributed geographically. ACOs tend to have service areas overlapping those of other ACOs in the same urban or suburban market(s). Therefore, to the extent that ACOs in these areas produce significant reductions in expenditures, a greater proportion of such savings will affect ACO-service-area trends than the average effect felt at the national program level, effectively reducing the average ACO's updated benchmark compared to what the use of a national trend alone would have produced. While such effect has the potential to reduce program costs by reducing net shared savings payments it could be seen as a disadvantage to participating organizations in "ACO-heavy regions" that manage to broadly increase efficiency at the overall regional market level.<sup>4</sup> However, on the whole, we anticipate this effect to be a reasonable

trade-off that will not prevent an overall improvement in the incentive for ACOs to improve efficiency in care delivery in the context of periodic benchmark rebasing as a result of the policies adopted in this final rule. As described previously in this rule, we acknowledge the potential advantages of alternative approaches to determining benchmark updates, for example utilizing the national growth rate adjusted for regional price variation, and we anticipate exploring such approaches in future rulemaking.

Additionally, we anticipate significant program savings will result from ending the policy from the June 2015 rule under which savings generated in the previous agreement period are taken into account when resetting the benchmark in an ACO's second or subsequent agreement period. However, savings from this modification are not wholly retained by the program but are largely redistributed to ACOs that are measured to have demonstrated efficiency in a more standardized way, using a regional FFS adjustment to their benchmarks. As commenters on the 2016 proposed rule noted, roughly two-thirds of ACOs in the 2014 public use data released in conjunction with the 2016 proposed rule showed lower expenditures than their county-weighted FFS averages and would therefore likely benefit from the regional FFS adjustment.

Changes to the existing benchmark calculations described previously are expected to benefit program cost savings by producing rebased benchmarks with improved accuracy (for example, reflecting regional trends rather than national average trends and 'flat dollar' updates) and of somewhat lower per capita cost on average (due to removing the effect of the savings adjustment to the rebased benchmark and because regional trend calculations typically reflect a higher proportion of ACO assigned beneficiary experience than national average trend calculations). However, such savings are expected to be partly offset by increasing shared savings payments to ACOs benefiting from the adjustment to the rebased historical benchmark to reflect a portion of the difference between the average per capita expenditure amount for the ACO's regional service area and the ACO's rebased historical benchmark amount. This trade-off reflects our intent to strengthen the reward for attainment of efficiency in an absolute sense, complementing the existing program's focus on rewarding improvement relative to an ACO's recent baseline.

<sup>3</sup> Traditional fee-for-service Medicare Part A and B annual per capita cost trend is expected to reach approximately 5 percent in 2019, as detailed in the 2017 Medicare Advantage Early Preview accessible at: <https://www.cms.gov/Medicare/Health-Plans/MedicareAdvtgSpecRateStats/Downloads/EarlyPreview2017GrowthRates.pdf>.

<sup>4</sup> Similarly, certain regions may be targeted for other care delivery reforms, for example certain Center for Medicare and Medicaid Innovation models. A downward bias on an ACO's benchmark could be felt to the extent that such activity reduces expenditures for beneficiaries in the ACO's region but not in a proportional way within the ACO's assigned population. Such scenarios are more likely when competing models are specifically targeted at beneficiaries not assigned to an ACO.

Making a regional adjustment to the ACO's rebased historical benchmark will strengthen an ACO's incentives to generate and maintain efficient care delivery over the long run by weakening the link between an ACO's prior performance and its future benchmark. This adjustment is expected to marginally increase program participation in agreement periods where risk (Track 2 or 3) is mandatory for an ACO since a significant portion of ACOs will have knowledge that a favorable baseline expenditure comparison to their FFS region will mitigate their risk of being assessed a shared loss in a subsequent agreement period. It is also expected to reduce the frequency with which ACOs in Track 2 or 3 drop out of the program during an agreement period because such ACOs will have somewhat greater certainty regarding the extent to which savings achieved in the prior agreement period will continue to be reflected in a rebased benchmark that incorporates a regional adjustment.

However, more predictable relationships, that is, an ACO's knowledge of its costs relative to FFS expenditures in its region, also create the risk of added cost to the Shared Savings Program by way of—(1) Increasing shared savings payments to ACOs exhibiting expenditures significantly below their region at baseline especially in cases where such differences are related to factors exogenous to efficiency in the delivery of care (where shared savings payments could be further inflated by increased selection of Track 3 over Track 2); (2) potentially losing participation from ACOs with expenditures high above their region at baseline—reducing the opportunity to impact beneficiary populations with the greatest potential for improvements in the cost and quality of care;<sup>5</sup> and (3) from structural shifts by ACOs in ways that would reduce assignment of relatively high cost beneficiaries and increase assignment of relatively healthy populations or shift the geography of their service area to similarly effect a more favorable benchmark adjustment. A primary uncertainty and significant potential concern is whether complex patients will continue to have their care successfully coordinated by ACO

providers/suppliers under the revised benchmark methodology. If the regional adjustment results in unattainable benchmarks for ACOs serving at-risk and medically complex populations then the program would likely exhibit decreasing participation from providers serving populations where the greatest potential for savings through better care coordination and quality improvement would otherwise be present and therefore we would expect significantly lower savings for the program than currently anticipated.

In addition to the uncertainty with respect to the relationship of the potential offsetting effects noted previously, there remains broader uncertainty as to the number of ACOs that will participate in the program (especially under performance-based risk in Track 2 or Track 3), provider and supplier response to financial incentives offered by the program, interactions with other value based models and programs from CMS and other payers, and the ultimate effectiveness of the changes in care delivery that may result as ACOs work to improve the quality and efficiency of patient care. Certain ACOs that have achieved shared savings in their first agreement period may find that they receive significantly lower benchmarks under these revisions (especially in cases where regional expenditures are much lower than expenditures for the ACO's assigned beneficiary population). Other ACOs may seek to maximize sharing in savings by selecting Track 3 if they have assigned beneficiaries with significantly lower expenditures at baseline relative to their region. These uncertainties continue to complicate efforts to assess the financial impacts of the Shared Savings Program and result in a wide range of potential outcomes regarding the net impact of the changes included in this final rule on Medicare expenditures.

To best reflect these uncertainties, we continue to utilize a stochastic model that incorporates assumed probability distributions for each of the key variables that will affect the overall financial impact of the Shared Savings Program. A summary of assumptions and assumption ranges utilized in the model includes the following:

- Approximately 100, 100, and 200 ACOs will consider renewing in 2017, 2018, and 2019, respectively.
- ACOs will choose not to renew if—
  - ++ Under the current policy: The ACO's gross loss in the prior performance year was 5 percent or greater; or
  - ++ Under the policies included in this final rule: The ACO's gross loss is

3 percent or greater in the prior performance year after accounting for the expected effect of the revised rebasing methodology (for example, considering differences between the ACO's spending and that of its region) and adjusting for ACO participant changes that result in baseline cost reduction of 2 percent on average (see discussion elsewhere in this final rule).

In either scenario, the thresholds are calibrated to approximate the level of baseline loss an ACO would correlate to an expected shared loss from its rebased benchmark. The magnitude of the loss is roughly equal to the revenue ACO participating physicians may have gained from the 5 percent incentive payment under MACRA<sup>6</sup> that is potentially available to physicians and certain other practitioners in certain ACOs for participation in the Shared Savings Program. The policies included in this final rule are assumed to result in a lower tolerance for renewal after a prior agreement period loss because the regional adjustment to the rebased benchmark is expected to be more consistent from year to year whereas the current rebasing methodology would be expected to generate a higher benchmark reflecting to a greater degree the actual spending from the prior agreement period that led to the prior loss. However, ACOs that do renew under the policies included in this final rule are expected to be more likely to remain in the program for the entire agreement period because the benchmark adjustment improves the likelihood that favorable changes to the methodology for rebasing the benchmark that led the ACO to renew its agreement will continue to be evidenced in future performance years.

- Renewing ACO will choose higher risk in Track 3 if—
  - ++ Under the current policies: The ACO's gross savings in prior performance year are 4 percent or greater; or
  - ++ Under the policies included in this final rule: The ACO's prior performance year gross savings adjusted by regional expenditures are 2 percent or greater.

In either scenario, similar to the renewal assumption, policies included in the final rule offer greater certainty that adjusted prior performance will correlate to future performance and therefore the threshold for selecting

<sup>5</sup> Early program results indicate that ACOs with expenditures significantly above their risk-adjusted FFS regional average have produced greater than average reductions in expenditures than ACOs with low baseline expenditures relative to their region; however it is not yet evident that such early savings achieved for such relatively high cost populations are likely to grow to an extent that their expenditures would reach parity with their region.

<sup>6</sup> The Medicare Access and CHIP Reauthorization Act of 2015 (MACRA) established new incentives to encourage physicians and certain other practitioners to participate in alternative payment models; pending final rulemaking, such incentive payments may equate to approximately 5 percent of physician fee schedule revenue to eligible clinicians participating in certain qualifying ACOs.

Track 3 is lower than what is assumed for the baseline scenario.

- Marginal gross savings will increase by between 0.0 percent to 1.0 percent for ACOs selecting higher performance-based risk in Track 3 and between 0.0 percent to 0.2 percent for all ACOs due to the adjusted rebasing methodology. These ranges were chosen to encompass a range of relative savings rates observed for performance-based risk accepted by ACOs participating in the Pioneer ACO Model relative to Shared Savings Program ACOs, the vast majority of which have elected to participate under the one-sided shared savings model (Track 1).

- ACOs experiencing a loss during the rebased agreement period are assumed to drop out prior to the second or third performance year if a shared loss from the prior performance year exceeds 2 percent. While Pioneer ACO Model experience would predict a lower tolerance for remaining in the program after a loss, 2 percent was chosen to approximate the incentive payment under MACRA that may be made available (pending final rulemaking) to physicians and certain other practitioners participating in ACOs in Track 2 and Track 3, which was not available to participants in Pioneer ACOs.

- ACOs will make adjustments to their ACO Participant Lists that reduce their cost relative to region by approximately 2 percent on average. This assumption is based on empirical analysis of 2015 ACO Participant List change requests and resulting impact on ACO baseline expenditures due to changes in assignment; the magnitude of bias is assumed to be greater for ACOs starting higher than their corresponding regional average expenditures and/or with a relatively small assigned beneficiary population and lower for ACOs starting below regional average expenditures and/or with a relatively large assigned beneficiary population.

- ACOs will achieve a mean quality score of 80 percent (based on analysis of Shared Savings Program ACO quality scores in 2013 and 2014).

- ACO savings will have an impact on regional expenditures and trends proportional to ACO assignment saturation of the FFS beneficiary population in the market.

Assumptions for ACO baseline costs, including variations in trends for ACOs and their relationship to their respective regions were determined by analyzing existing ACO expenditures and corresponding regional expenditures back to 2009, the first benchmark year used for the first wave of ACOs that entered the program in 2012. (Note, associated data for the 2012 through 2014 time period were released in conjunction with the 2016 proposed rule to assist commenters in modeling implications of the proposed policy changes.) The empirical time series data were randomly extrapolated to form baseline time series data through the end of the rebased agreement period by applying growth rates to ACOs and their regions by randomly sampling empirical growth rates for ACOs (and their respective regions) with similar characteristics in terms of size and relative cost to region.

Using a Monte Carlo simulation approach, the model randomly draws a set of extrapolated ACO baseline trends and specific values for each variable, reflecting the expected covariance among variables, and calculates the program's financial impact based on the specific set of assumptions. We repeated the process for a total of 1,000 random trials, tabulating the resulting individual cost or savings estimates to produce a distribution of potential outcomes that reflects the assumed probability distributions of the incorporated variables.

Table 4 details our estimate of the 3-year net impact of the policy changes included in this final rule on net FFS benefit claims costs, net shared savings payments to ACOs, and the resulting impact on net Federal cost. Projected impacts are detailed for the first 3 cohorts of ACOs that would be renewing agreements under these changes, renewing respectively for agreement periods starting in 2017, 2018, and 2019. During these agreement periods, a 35 percent weight would be placed on the benchmark expenditure adjustment for regional FFS expenditures (or a lower 25 percent weight in cases where the ACO's rebased costs are higher than its regional FFS average). In such agreement periods, total savings from these changes to the methodology for calculating and trending expenditures during the benchmark period in order to

establish and update the benchmark, as well as anticipated savings from marginally increased program participation and improved incentives for creating efficiency, are expected to be greater than the increase in cost of net shared savings payments due to selective participation in response to adjustments that are predictably significant (either favorable or unfavorable) upon examination of how expenditures for the ACO's historically assigned beneficiary population compare to the expenditure level for the ACO's regional service area at baseline. For this reason the net Federal impact is projected to be a savings (that is, a negative change in net Federal cost) for the first 3 years for each renewing cohort, and correspondingly a \$110 million net Federal savings for the first 3 calendar years of the projection window, 2017 through 2019. Such median impact on net Federal cost results from a projected increase in savings on net benefit claims costs of \$410 million partially offset by a \$300 million increase in net shared savings payments to ACOs. The last two rows of Table 4 enumerate the range of potential net Federal cost impacts our modeling projected, specifically the 10th percentile of simulation outcomes (a \$240 million net Federal increase in cost) and the 90th percentile (\$480 million net Federal savings). Overall, approximately two-thirds of trials resulted in combined net Federal savings over 2017 to 2019.

The estimate for this final rule reflects \$10 million higher net Federal cost than the impact estimated for the 2016 proposed rule. As a result of finalizing a phase-in approach that reduces the weight for the regional FFS adjustment during an ACO's first and second agreement periods under the revised rebasing methodology in cases where it decreases the ACO's rebased benchmark, we estimate: (1) An increase in shared savings payments net of shared losses of \$50 million over 2017 through 2019 compared to the corresponding estimate in the proposed rule, mainly because of increases to certain ACOs' rebased benchmarks; (2) a decrease in gross claims costs due to increased participation of \$40 million relative to the corresponding estimate in the 2016 proposed rule.

TABLE 4—ESTIMATED 3-YEAR IMPACT OF CHANGES (INCLUDING A MAXIMUM 35 PERCENT WEIGHT USED IN DETERMINING REGIONAL ADJUSTMENT AMOUNT) ON NET BENEFIT COSTS, NET PAYMENTS TO ACOs, AND OVERALL NET FEDERAL COSTS CYs 2017 THROUGH 2019

[Impacts are Median Results Unless Otherwise Noted]

Calendar year	2017	2018	2019	3-Year total
Impact on Net Claims Costs (\$Million):				
ACOs Renew 2017 .....	– 70	– 70	– 80	– 220
ACOs Renew 2018 .....	.....	– 60	– 70	– 130
ACOs Renew 2019 .....	.....	.....	– 60	– 60
All ACO Total .....	– 70	– 130	– 210	– 410
Impact on Net Shared Savings Pay (\$Million):				
ACOs Renew 2017 .....	50	40	40	130
ACOs Renew 2018 .....	.....	40	40	80
ACOs Renew 2019 .....	.....	.....	90	90
All ACO Total .....	50	80	170	300
Overall Impact on Net Federal Costs (\$Million):				
ACOs Renew 2017 .....	– 20	– 30	– 40	– 90
ACOs Renew 2018 .....	.....	– 20	– 30	– 50
ACOs Renew 2019 .....	.....	.....	30	30
All ACO Total .....	– 20	– 50	– 40	– 110
Low (10th %-ile) .....	20	50	170	240
High (90th %-ile) .....	– 70	– 160	– 250	– 480

The stochastic model and resulting financial estimates were prepared by the CMS Office of the Actuary (OACT). The median result of \$110 million increase in savings in net Federal cost is a reasonable “point estimate” of the impact of the changes included in this final rule on the Shared Savings Program during the period between 2017 through 2019. However, we emphasize the possibility of outcomes differing substantially from the median estimate, as illustrated by the estimate distribution. Accordingly, this RIA presents the costs and benefits of this final rule to the best of our ability. As further data emerge and are analyzed, we may improve the precision of future financial impact estimates.

To the extent that the Shared Savings Program will result in net savings or costs to Part B of Medicare, revenues from Part B beneficiary premiums will also be correspondingly lower or higher. In addition, because MA payment rates depend on the level of spending within traditional FFS Medicare, savings or costs arising from the Shared Savings Program will result in corresponding adjustments to MA payment rates. Neither of these secondary impacts has been included in the analysis shown.

#### a. Effects of the Final Rule in Subsequent Agreement Periods

For an ACO’s third agreement period (that is, the second rebased agreement period under the revised benchmarking

methodology, for example the 3-year period covering 2020 through 2022 for ACOs renewing for a second agreement period in 2017) the weight on the adjustment to the benchmark for regional FFS expenditures will increase to 70 percent (except in cases where the ACO’s rebased costs are higher than costs for its region in which case the weight will increase to 50 percent for the second rebased agreement period). Increasing the weight of the adjustment reduces the strength of the link between an ACO’s effect on the cost of care for its assigned beneficiaries and the benchmark calculated for an ensuing agreement period. Weakening this link may increase the incentive for ACOs to make investments in care delivery reforms because resulting potential savings will be more likely to be rewarded over multiple agreement periods rather than being ‘baked’ back into the benchmark at the next rebasing. On the other hand, efficiency gains will need to be significantly greater than those currently achieved by the ACOs participating in the program to result in budget neutrality by sufficiently offsetting increased shared savings payments to ACOs favored by a regional adjustment with a 70 percent weight. As discussed previously, we are setting the maximum weight of the regional adjustment at 70 percent for ACOs with lower costs than their region in their second agreement period under the revised benchmarking methodology,

and for all ACOs in their third and all subsequent agreement periods under this methodology, unless the Secretary determines a lower weight should be applied, as specified through future rulemaking. This determination, which could be made in advance of the agreement period beginning January 1, 2020, may be based on an assessment of the effects of the regional adjustment (and other modifications to the program made under this rule) on the Shared Savings Program such as: The effects on net program costs; the extent of participation in the Shared Savings Program; and the efficiency and quality of care received by beneficiaries.

ACOs demonstrate a wide range of differences in expenditures relative to risk adjusted expenditure levels for their region (for the sample of roughly 200 ACOs that started in the program in 2012 or 2013 the percentage by which ACO per capita expenditures exceed or are exceeded by their respective risk-adjusted regional per capita expenditures varies with a standard deviation of approximately 10 percent). Transitioning to a 70 percent weight to calculate the regional adjustment effectively down-weights the savings generated by the changes we are making to the existing benchmark calculation, since an ACO’s benchmark would have increased dependence on the regional FFS expenditures and correspondingly a decreasing dependence on the historical expenditures for the ACO. At the same

time, increasing the weight used to calculate the regional adjustment could result in selective participation and increases in shared savings payments to ACOs that have low beneficiary expenditures at baseline. If that were to happen, the overall anticipated cost of net shared savings payments would rise and outweigh the anticipated potential gains from additional care management and associated improvements in net benefit costs spurred by the improved incentives for efficiency generated by partially delinking ACO benchmarks from their own historical costs.

An element of the regional adjustment which becomes apparent when reviewing the accompanying data files and the performance of ACOs in 2013 and 2014 (for those roughly 200 ACOs that started in 2012 and 2013) is that ACOs that are above or below the regional service area expenditure amount used to adjust their rebased benchmark in 1 year tend to have a similar bias in the following year. Placing a 100 percent weight on the regional service area expenditure amount illustrates this. Of the 50 ACOs that were the furthest below their estimated regional service area expenditure level in 2013, all were at least 10 percent below and their average expenditures were roughly 15 percent below the expenditures for the region. In the subsequent year, 2014, none of these ACOs exceeded its regional service area expenditure level, and the average expenditure difference only moved by about 2 percentage points. Similar yet less glaring results occur in those ACOs above their regional service area expenditure level, with the 50 ACOs the furthest above their regional service area expenditure level having costs an average of approximately 10 percent above the regional service area expenditure level in 2013—an average difference for the group that only moved by about 2 percentage points the following year.

Of the approximately 150 ACOs that were more than 0.5 percent below their regional service area expenditure level, only about 10 percent were above their regional service area expenditure level in the following year. Again, ACOs above their regional service area expenditure level follow a similar pattern, though less drastic. Of the ACOs above their regional service area expenditure level by more than 0.5 percent, approximately 25 percent performed below their regional service area expenditure level in the following year. Notwithstanding the potential for behavioral changes, this illustrates that for a significant portion of existing ACOs, there is evidence of a bias when

compared to their regional service area expenditure level and that bias is likely to be predictable over time. We have accounted for cost associated with program selection for ACOs favored by such bias and considered attrition in participation by ACOs disfavored by such bias. However, for some ACOs of the latter condition, it may take multiple years to sufficiently redesign their care delivery processes in order to generate savings substantial enough to offset high expenditures relative to their region at baseline. We note that this analysis is based on data from the first 2 years of program operations, and longer term effects may emerge to mitigate bias for certain ACOs with high expenditures at baseline.

Additionally, the passage of MACRA established new incentives to encourage providers to participate in alternative payment models. Paying for value and incentivizing better care coordination and integration is a top priority for us, and we have been implementing policies that encourage a shift towards paying for value instead of volume. MACRA provides additional tools to encourage care integration and value-based payment. Although implementation of MACRA is ongoing and many details are still to be finalized through rulemaking, the incentives created by MACRA could result in increased market pressure on providers to participate in ACOs. This may lower the risk of selective participation and potentially lead to higher expected net Federal savings.

Emerging data will be monitored in order to provide additional information for updating projections as part of the use of a higher percentage (70 percent) in calculating the regional adjustment amount for ACOs entering a third or subsequent agreement period. For example, if ACOs respond by generating new efficiencies in care beyond those that are anticipated, and/or potential selective participation responses are lower than expected, then a 70 percent weight could potentially be associated with revised expectations regarding net costs or net savings. However, it is also possible that gains in efficiency will fail to materialize and/or selective participation and other behavioral responses will increase cost beyond the level that is currently anticipated; in such scenario, we would consider further rulemaking as necessary to protect the Medicare Trust Funds (for example, in order to apply a lower percent weight in calculating the regional adjustment amount).

#### b. Further Considerations

This final rule introduces regional expenditure trends and a regional adjustment to the rebased historical benchmark that includes prospective HCC risk adjustment to ensure trending and the regional adjustment appropriately account for differences in risk between an ACO's assigned beneficiary population and its regional service area assignable beneficiary population. Current program experience supports the hypothesis that the current approach of applying conditional reliance on demographic risk ratios for a continuously-assigned subset of beneficiaries for purposes of adjusting the historical benchmark to a performance year basis provides a reasonable balance between accounting for changes in risk of the population and limiting the risk that coding intensity shifts would artificially inflate ACO benchmarks. This final rule retains this policy for adjusting the historical benchmark to a performance year basis.

However, for the changes involving the use of regional expenditure trends (to trend forward the benchmark years and to update the ACO's rebased historical benchmark) and the adjustment to the rebased benchmark for expenditures in the ACO's regional service area, we are not implementing any additional explicit policy for limiting coding intensity sensitivity at this time (beyond what is described in section II.A of this final rule), but rely on the difference between the average prospective HCC scores for the ACO's assigned beneficiary population and its regional service area assignable beneficiary population. Regional trend calculations for the rebased historical base years are expected to mitigate the risk of sensitivity to potential coding intensity efforts by ACO providers/suppliers for several reasons. The benchmark years for the new agreement period correspond to performance years from a prior agreement period where incentives for coding intensity changes were already actively limited by the continuously assigned demographic alternative calculation. In addition, coding intensity shifts that are uniform over a prior agreement period would not affect the trending of historical expenditures from the first 2 years to the third year of such period because such historical adjustments are only sensitive to risk score changes between the first 2 years and the third year of such baseline period. The CMS-HCC model has been updated for 2016 in ways that reduce its sensitivity to subjective coding levels for chronic conditions that are known to have historically

accounted for differences in coding levels for MA beneficiaries relative to FFS Medicare. Lastly, ACOs tend to neighbor each other in markets where any ACO coding intensity shifts would then likely drive similar market-wide effects (including effects from market spillover affecting diagnosis codes submitted for patients receiving care from ACO providers/suppliers but who are not ultimately assigned to an ACO) that would tend to net out any coding shifts in the calculation of risk scores relative to the ACO's region. This final consideration also offers a degree of reassurance that the calculation of the adjustment reflecting the difference between an ACO's expenditures relative to its region would be less likely to be materially biased by ACO coding intensity shifts.

We intend to carefully monitor emerging program data to assess whether the overall benchmark methodology as revised remains appropriately balanced between sensitivity to real changes in assigned population risk and protection from making shared savings payments due to potential coding intensity shifts. Of particular concern for close monitoring (and potential future rulemaking changes, if necessary) are the unique circumstances related to the use of a prospective beneficiary assignment methodology in Track 3 and the associated benchmark calculations for Track 3 ACOs. Prospective assignment creates an overlap between the claims considered for purposes of determining beneficiary assignment to the ACO and the period in which diagnosis submissions from claims are utilized for calculating a beneficiary's prospective HCC score for the year during which the beneficiary will be assigned to the ACO. A related area for monitoring is whether regional FFS expenditures tabulated at a county level for assignable beneficiaries determined using the assignment methodology used in Track 1 and Track 2 would provide an unbiased comparison to a beneficiary population assigned under the prospective assignment methodology for Track 3. For these reasons, as part of our monitoring we will consider the potential necessity to undertake rulemaking in order to make adjustments to regional calculations for Track 3 ACOs to avoid biasing the results.

## 2. Effects on Beneficiaries

As explained in more detail previously, we believe the changes included in this final rule will provide additional incentive for ACOs to improve care management efforts and

maintain program participation. In addition, ACOs with low baseline expenditures relative to their region are more likely to transition to and sustain participation in a risk track (Tracks 2 or 3) in future agreement periods. Consequently, the changes in this final rule will also benefit beneficiaries through broader improvements in accountability and care coordination (such as through the use of the waiver of the 3-day stay SNF rule by Track 3 ACOs) than would occur under current regulations. Also, in this final rule we are finalizing a modified version of our proposal in order to provide a more gradual phase-in of the regional adjustment for ACOs with higher costs than their region. It is anticipated this modification will improve the ability of ACOs serving at-risk and medially complex populations to continue to participate and succeed in the program over the medium to long run.

Additionally, we intend to continue to analyze emerging program data to monitor for any potential unintended effect that the introduction of a regional adjustment to the ACO's rebased historical benchmark could potentially have on the incentive for ACOs to serve vulnerable populations (and for ACOs to maintain existing partnerships with providers and suppliers serving such populations). Further refinements that could be addressed in future rulemaking if monitoring ultimately revealed such problems could include reducing the percentage applied to the adjustment to the benchmark for regional expenditures, introducing additional adjustments (for example, enhancements or complements to the prospective CMS-HCC risk model) to control for exogenous factors impacting an ACO's costs relative to its region, or otherwise modifying the benchmark calculation to improve the balance between rewarding attainment and improvement in the efficiency and quality of care delivery for the full spectrum of beneficiaries enrolled in FFS Medicare.

## 3. Effects on Providers and Suppliers

We anticipate that including an adjustment to an ACO's historical benchmark reflecting a percentage of the difference between the ACO's regional service area average per capita expenditure amount and the ACO's rebased historical benchmark amount will provide an additional incentive for ACOs to make investments to improve care coordination. At the same time, this change in methodology also shifts the benchmark policy focus from rewarding improvement in trend relative to an ACO's original baseline to an incentive

that places more weight on attainment of efficiency—how an ACO compares in absolute expenditures to its region. Certain ACOs that joined the program from a high expenditure baseline relative to their region and that showed savings under the first agreement period benchmark methodology will likely expect lower benchmarks and greater likelihood of shared losses under a methodology that includes at least a 25 percent weight on the regional expenditure adjustment. Additionally, certain ACOs that joined the program with relatively low expenditures relative to their region may now expect significant shared savings payments even if they failed to generate shared savings in their first agreement period under the existing benchmark methodology.

## 4. Effect on Small Entities

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most physician practices, hospitals, and other providers are small entities either by virtue of their nonprofit status or by qualifying as a small business under the Small Business Administration's size standards (revenues of less than \$7.5 to \$38.5 million in any 1 year; NAIC Sector-62 series). States and individuals are not included in the definition of a small entity. For details, see the Small Business Administration's Web site at <http://www.sba.gov/content/small-business-size-standards>. For purposes of the RFA, approximately 95 percent of physicians are considered to be small entities. There are over 1 million physicians, other practitioners, and medical suppliers that receive Medicare payment under the Physician Fee Schedule.

Although the Shared Savings Program is a voluntary program and payments for individual items and services will continue to be made on a FFS basis, we acknowledge that the program can affect many small entities and have developed our rules and regulations accordingly in order to minimize costs and administrative burden on such entities as well as to maximize their opportunity to participate. For example, networks of individual practices of ACO professionals are eligible to form an ACO. Also, the use of a MSR under Track 1, and, if elected by the ACO under Tracks 2 and 3, that varies by the size of the ACO's population that is calculated using a lower confidence

interval allows the MSRs (and, if applicable, MLRs) for smaller ACOs to be significantly lower than they would have been had CMS applied the higher confidence intervals used to derive MSRs (and MLRs) applicable to medium and large size ACOs. Further, eligible ACOs may remain under the one-sided model for a second agreement period to give them additional time to gain experience with the accountable care model before undertaking performance-based risk.

Small entities are both allowed and encouraged to participate in the Shared Savings Program, provided the ACO has a minimum of 5,000 assigned beneficiaries, thereby potentially realizing the economic benefits of receiving shared savings resulting from the utilization of enhanced and efficient systems of care and care coordination. Therefore, a solo, small physician practice or other small entity may realize economic benefits as a function of participating in this program and the utilization of enhanced clinical systems integration, which otherwise may not have been possible. We believe the policies included in this final rule, including facilitating the transition to performance-based risk (see section II.C of this final rule), may further encourage participation by small entities. For example, smaller entities (among others) that are risk averse but ready to transition to a performance-based risk track may elect the option that would defer by one year their entrance into a two-sided model. Once under a two-sided model, ACOs will have the opportunity for greater reward compared to participation under the one-sided model although they will be at risk for shared losses.

As detailed in this RIA, total median shared savings payments net of shared losses are expected to increase by \$300 million over the 2017 to 2019 period as a result of changes that will increase benchmarks for certain ACOs participating in the Shared Savings Program and therefore increase the average small entity's shared savings revenue. However, the impact on any single small entity may depend on its relationship to costs calculated for the counties comprising its regional service area.

#### 5. Effect on Small Rural Hospitals

Section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define

a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. Although the Shared Savings Program is a voluntary program, this final rule will have a significant impact on the operations of a substantial number of small rural hospitals. We are changing our regulations such that benchmark trend calculations and adjustments for ACOs that include rural hospitals as ACO participants will reflect FFS costs and trends in the ACO's regional service area. Overall, we expect the average ACO to receive greater shared savings revenue under these changes (\$300 million greater net sharing anticipated over 2017 through 2019). However, the impact on individual ACOs and their participating small rural hospitals may differ from the program average.

*Comment:* A commenter acknowledged that the impact on small entities and rural hospitals remains to be seen and suggested that CMS monitor the effects of the benchmarking changes to ensure that small entities and hospitals, particularly in rural and underserved areas, are not placed at a disadvantage.

*Response:* We appreciate the commenter's suggestion. This final rule describes a number of issues for monitoring and future consideration with respect to the changes being finalized to the methodology for resetting the ACO's benchmark, including: The approach to calculating regional FFS expenditures (in particular in relation to the methodology for defining the ACO's regional service area and use of assignable beneficiaries for determining county FFS expenditures), factors for consideration in relation to the weight applied in calculating the regional adjustment to the ACO's rebased historical benchmark, and the impact of coding initiatives on ACO benchmarks. This monitoring will include considerations relevant across the ACOs participating in the Shared Savings Program, which represent diverse interests by virtue of their ACO participant composition, patient populations, locations, and organizational structures, among other factors.

*Comment:* Although not discussing the specifics of data modeling, comments from stakeholders representing rural ACOs supported moving to the use of regional comparison data when resetting ACO benchmarks, indicating their belief that this approach creates a more meaningful comparison group and better reflects the health care environment in which the ACO operates.

*Response:* We appreciate commenters' feedback and also share commenters' beliefs that the revised rebasing methodology may benefit ACOs, including ACOs located in rural areas, by the increasing the weight on regional FFS expenditures in calculating the benchmark, and moving away from benchmarks based on the ACO's historical spending.

#### 6. Unfunded Mandates

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2016, that is approximately \$146 million. This final rule does not include any mandate that would result in spending by state, local or tribal governments, in the aggregate, or by the private sector in the amount of \$146 million in any 1 year. Furthermore, participation in this program is voluntary and is not mandated.

#### D. Alternatives Considered

As indicated in the June 2015 final rule (see 80 FR 32795 through 32796), and as discussed in the 2016 proposed rule (see 81 FR 5833 through 5834), we also considered an alternative method for establishing benchmarks for subsequent agreement periods that would incorporate regional trends. Under such method we would apply the regional trend to inflate an ACO's historical benchmark from the prior (that is, first) agreement period to represent expenditures expected for the most recent base year preceding the ACO's subsequent agreement period. This approach would therefore be delinked from an ACO's performance over the prior agreement period (except to the extent an ACO's assigned population impacts its wider regional trend)—improving the incentive for ACOs to invest in efforts to improve efficiency. In contrast to the methodology for calculating a regional adjustment established with this rule, it would also retain sensitivity to baseline costs demonstrated by beneficiaries assigned to the ACO in the prior agreement period, potentially mitigating concerns regarding certain types of program selection and possibly providing a more incremental transition for ACOs familiar with the existing benchmark methodology.

Specifically it was estimated that blending an ACO's rebased benchmark with its prior (first) historical benchmark inflated by a regional trend

would produce an overall budget neutral change in net program cost for the subsequent agreement period if the blending were accomplished via a 70 percent weight on an ACO's trended prior benchmark and a 30 percent weight on its rebased benchmark. While such blend would reasonably be expected to result in an improvement in program incentives for ACOs to generate new efficiencies in care delivery despite rebasing concerns, other considerations impacted the decision to ultimately set forth the different approach detailed in this final rule.

Primarily, program experience to date indicates that many ACOs make significant changes to their provider composition over the course of an agreement period. Attempting to lock-in a first historical benchmark that would be trended to form 70 percent of the historical benchmark for future agreement periods would invariably be complicated and in many cases biased by changes in provider composition made years after the ACO's first entry into the program. Such operational complications and potential biases would invariably grow in magnitude for subsequent agreement periods, necessitating modifications to future rebasing, for example by reducing the weight on the regionally-trended component of the benchmark or requiring the regionally trended component always to be sourced from the rebased benchmark from the prior agreement period—changes that would likely dampen the incentive for ACOs to make significant investments in redesigning care in efficient ways. Furthermore, the rebasing methodology adopted in this final rule has the comparative advantage of linking the regional adjustment to an ACO's historical expenditures to its region's contemporary standardized cost as opposed to the level of cost (and associated efficiency) that happened to be exhibited in an ACO's prior historical benchmark period. Therefore, it was determined that the approach we are adopting in this final rule generally offers a less complicated and more consistent and equitable mechanism for adjusting ACO rebased benchmarks to reflect regional expenditures over the long term.

#### *E. Compliance With Requirements of Section 1899(i)(3)(B) of the Act*

As previously discussed in this final rule, certain policies, including both existing policies and new policies adopted in this final rule, rely upon the authority granted in section 1899(i)(3) of the Act to use other payment models that the Secretary determines will

improve the quality and efficiency of items and services furnished to Medicare FFS beneficiaries. Section 1899(i)(3)(B) requires that such other payment model must not result in additional program expenditures. Policies falling under the authority of section 1899(i)(3) of the Act include: Performance-based risk, refining the calculation of national expenditures used to update the historical benchmark to use the assignable subpopulation of total FFS enrollment, updating benchmarks with regional trends as opposed to national average absolute growth in per capita spending, and adjusting performance year expenditures to remove IME, DSH, and uncompensated care payments.

A comparison was constructed between the projected impact of the payment methodology that incorporates all changes and a hypothetical baseline payment methodology that excludes the elements described previously that require section 1899(i)(3) of the Act authority—most importantly performance based risk in Tracks 2 and 3 and updating benchmarks using regional trends. The hypothetical baseline was assumed to include adjustments allowable under section 1899(d)(1)(B)(ii) of the Act including the provision from the June 2015 final rule whereby an ACO's rebased benchmark might include an adjustment reflecting a portion of savings measured during the ACO's prior agreement period and the 35 percent weight used in calculating the regional adjustment to the ACO's rebased historical benchmark in this rule (or 25 percent weight should such regional adjustment be negative, as specified in this rule). The stochastic model and associated assumptions described previously in this section were adapted to reflect the agreement period spanning 2017 through 2019 for roughly 100 ACOs expected to renew in 2017. Such analysis estimated approximately \$130 million greater average net program savings under the alternative payment model that includes all policies that require the authority of section 1899(i)(3) than would be expected under the hypothetical baseline in total over the 2017 to 2019 agreement period cycle.

Furthermore, approximately 79 percent of stochastic trials resulted in greater or equal net program savings. The alternative payment model, as adopted in this final rule, is projected to result in both greater savings on benefit costs and net payments to ACOs. Participation in performance-based risk under Track 2 and Track 3 is assumed to improve the incentive for ACOs to increase the efficiency of care for

beneficiaries (similar to as assumed in the modeling of the impacts, described previously). Such added savings are partly offset by lower participation associated with the requirement to transition to performance-based risk. Correspondingly, net shared savings payments are also expected to be greater under the alternative payment model under section 1899(i)(3) of the Act than under the hypothetical baseline, mainly driven by the higher sharing rates and potentially lower minimum savings requirements in Track 2 and Track 3, but partly offset mainly by lower benchmarks resulting from ending the policy adopted in the June 2015 final rule of adding a portion of savings to the rebased benchmark, the use of more accurate regional benchmark updates, and new shared loss revenue.

Additionally, we projected a lower net federal savings of approximately \$10 million would result from using the hypothetical baseline described previously, but without the adjustment to account for a portion of savings generated during the ACO's prior agreement period, which we eliminated from the hypothetical baseline's rebased benchmarks. We believe ending the adjustment for savings generated in the ACO's prior agreement period will enable us to place a greater weight on the amount of the regional adjustment in the future, while not over crediting or penalizing an ACO for its prior performance (discussed in section II.A.2.c of this final rule). This alternative hypothetical baseline more closely resembles the future hypothetical baseline that would be used in our analysis of the application of a higher weight in calculating the regional adjustment in subsequent agreement periods (for example, if we undertake future rulemaking further amending the methodology for rebasing and updating the benchmark, as discussed previously in this final rule).

Relative savings projected for the ACOs starting a second agreement period in 2017 participation cycle are reasonably assumed to be proportional for ACOs starting a second agreement period in 2018 and 2019 because the assumptions and parameters would be the same or similar. Accordingly, the requirement under section 1899(i)(3)(B) of the Act that an alternative payment model not result in additional program expenditures is therefore satisfied for the period 2017 through 2019. As discussed elsewhere in this final rule, we will reexamine this projection in the future to ensure that the requirement under section 1899(i)(3)(B) of the Act that an alternative payment model not result in additional program

expenditures continues to be satisfied, taking into account, for example, increasing the weight placed on the regional adjustment to an ACO's rebased historical benchmark, which will increase to 70 percent for an ACO's second (or third for ACOs with higher costs than their region) and subsequent agreement periods under the revised rebasing methodology (unless the Secretary determines a lower weight

should be applied, as specified through future rulemaking). In the event that we conclude that the payment model established under section 1899(i)(3) of the Act no longer meets this requirement, we would undertake additional notice and comment rulemaking to make adjustments to the payment model to assure continued compliance with the statutory requirements.

#### F. Accounting Statement and Table

As required by OMB Circular A-4 under Executive Order 12866, in Table 5, we have prepared an accounting statement showing the change in net federal monetary transfers resulting from provisions of this final rule as compared to baseline.

TABLE 5—ACCOUNTING STATEMENT ESTIMATED IMPACTS  
[CYs 2017–2019]

Category	Primary estimate	Minimum estimate	Maximum estimate	Source citation (RIA, preamble, etc.)
Impact on Net Federal Cost From Finalized Changes to Medicare Shared Savings Program				
Annualized monetized: Discount rate: 7% .....	– 36.2 million .....	76.6 million .....	– 155.9 million .....	Table 4.
Annualized monetized: Discount rate: 3% .....	– 36.5 million .....	78.5 million .....	– 158.2 million.	
Notes: Amounts are expressed in 2016 dollars.	Negative values reflect reduction in federal net cost resulting from care management by ACOs. Estimates may be a combination of benefits and transfers. To the extent that the incentives created by Medicare payments change the amount of resources society uses in providing medical care, the more accurate categorization of effects would be as costs (positive values) or benefits/cost savings (negative values), rather than as transfers.			

#### G. Publicly Available Data

In response to requests from ACOs and other stakeholders for data to allow for modeling of proposed changes to the benchmark rebasing methodology, CMS made new data files available through the Shared Savings Program's Web site, to coincide with the issuance of the 2016 proposed rule (<https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/Statutes-Regulations-Guidance.html>). These files included: Average per capita county-level FFS spending and risk scores for 3 historical years; and ACO-specific data, on the total number of assigned beneficiaries residing in each county where at least 1 percent of the ACO's assigned beneficiaries reside, for 3 historical years. A listing of all publicly available Shared Savings Program ACO data and ACO performance data sources maintained by CMS is available through the Shared Savings Program Web site (see the guide titled "Medicare Shared Savings Program Publicly available ACO data and ACO performance data sources maintained by CMS" available online at <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/index.html>).

*Comment:* Some commenters modeled the proposed benchmarking changes using the publicly available data files released with the 2016 proposed rule, and other sources of Shared Savings Program performance data, and included remarks about their

findings within their comment letters. For example, several comments reflect estimates that approximately two-fifths to two-thirds of ACOs will have their benchmarks upwardly adjusted as a result of the revised rebasing methodology. A commenter described its analysis as indicating some ACOs will experience significant and unexpected swings in their reset historical benchmarks (when comparing the benchmark values resulting from the current methodology versus the revised methodology). Another commenter explained its analysis showed relatively high-cost ACOs face increasing headwinds as their benchmarks converge with their region, whereas relatively low-cost ACOs would have more favorable benchmarks. Another commenter specified that the 35 percent weight used to calculate the regional adjustment for an ACO's first agreement period under the revised rebasing methodology would result in a benchmark reduction of about 2 percent for ACOs with spending one standard deviation above the regional mean, and noted this would be substantial relative to estimated savings.

*Response:* We appreciate commenters' careful attention to the details of the 2016 proposed rule, modeling of the proposed policies, and informative comments including their analyses. We note that the analyses provided by commenters pertaining to the key change to the methodology—institution of a regional FFS adjustment to the

rebased benchmark—are generally in harmony with CMS' calculations in developing the rule and this impact analysis, providing reassurance that the data provided were a sufficient tool to allow the public to analyze the general impact of the new method for rebasing. We took into account commenters' observations regarding ACOs with high baseline costs for which a positive savings adjustment under the prior methodology will be replaced by a negative regional FFS adjustment. By reducing the weight applied to the regional FFS adjustment during the first two agreement periods under the revised rebasing methodology in cases where it lowers ACOs' benchmarks, this final rule will encourage continued participation by certain ACOs with significant potential to generate additional savings despite high baseline costs. We believe this change in policy from the proposed rule addresses concerns raised by commenters and illustrated in their analyses that the regional adjustment could disadvantage certain ACOs that have shown cost savings but may require longer than one agreement period to bring costs down toward the regional average in order to avoid a significant negative adjustment to their rebased benchmarks.

#### H. Conclusion

The analysis in this section, together with the remainder of this preamble, provides a regulatory impact analysis. As a result of this final rule, the median estimate of the financial impact of the

Shared Savings Program for CYs 2017 through 2019 is net federal savings of \$110 million greater than what would have been saved if no changes were made. Although this is the best estimate of the financial impact of the Shared Savings Program during CYs 2017 through 2019, a relatively wide range of possible outcomes exists. While approximately two-thirds of the stochastic trials resulted in an increase in net program savings, the 10th and 90th percentiles of the estimated distribution show a net increase in costs of \$240 million to net savings of \$480 million, respectively.

Overall, our analysis projects that improvements in the accuracy of benchmark calculations, including through the introduction of a regional adjustment to the ACO's rebased historical benchmark, are expected to result in increased overall participation in the program. These changes are also expected to improve the incentive for ACOs to invest in effective care management efforts, increase the attractiveness of participation under performance-based risk in Track 2 or 3 for certain ACOs with lower beneficiary expenditures, and result in overall greater gains in savings on FFS benefit claims costs than the associated increase in expected shared savings payments to ACOs. We intend to monitor emerging results for effects on claims costs, changing participation (including risk for cost due to selective changes in participation), and unforeseen bias in benchmark adjustments due to diagnosis coding intensity shifts. Such monitoring will be used to inform future rulemaking, such as if the Secretary determines that a lower weight should be used in calculating the regional adjustment amount.

In accordance with the provisions of Executive Order 12866, this rule was reviewed by the Office of Management and Budget.

#### List of Subjects in 42 CFR Part 425

Administrative practice and procedure, Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR part 425 as set forth below:

#### PART 425—MEDICARE SHARED SAVINGS PROGRAM

- 1. The authority citation for part 425 is revised to read as follows:

**Authority:** Secs. 1102, 1106, 1871, and 1899 of the Social Security Act (42 U.S.C. 1302, 1306, 1395hh, and 1395jj).

- 2. Amend § 425.20 by adding in alphabetical order definitions for “ACO's regional service area”, “Assignable beneficiary”, and “BY” to read as follows:

#### § 425.20 Definitions.

*ACO's regional service area* means all counties where one or more beneficiaries assigned to the ACO reside.

*Assignable beneficiary* means a Medicare fee-for-service beneficiary who receives at least one primary care service with a date of service during a specified 12-month assignment window from a Medicare-enrolled physician who is a primary care physician or who has one of the specialty designations included in § 425.402(c).

*BY* stands for benchmark year.

- 3. Amend § 425.200 as follows:

■ A. In paragraph (b)(2) introductory text by removing the phrase “all subsequent years” and adding in its place the phrase “through 2016”.

■ B. By adding paragraph (b)(3).

■ C. By adding paragraph (e).

The additions read as follows:

#### § 425.200 Participation agreement with CMS.

\* \* \* \* \*

(b) \* \* \*

(3) For 2017 and all subsequent years—

(i) The start date is January 1 of that year; and

(ii) The term of the participation agreement is 3 years, except the term of an ACO's initial agreement period under Track 1 (as described under § 425.604) may be extended, at the ACO's option, for an additional year for a total of 4 performance years if the conditions specified in paragraph (e) of this section are met.

\* \* \* \* \*

(e) *Optional fourth year.* (1) To qualify for a fourth performance year as described in paragraph (b)(3)(ii) of this section, the ACO must meet all of the following conditions:

(i) Is currently participating in its first agreement period under Track 1.

(ii) Has requested renewal of its participation agreement in accordance with § 425.224.

(iii) Has selected a two-sided model (as described under § 425.606 or § 425.610 of this part) in its renewal request.

(iv) Has requested an extension of its current agreement period and a 1-year

deferral of the start of its second agreement period in a form and manner specified by CMS.

(v) CMS approves the ACO's renewal, extension, and deferral requests.

(2) An ACO that is approved for renewal, extension, and deferral that terminates its participation agreement before the start of the first performance year of the second agreement period is—

(i) Considered to have terminated its participation agreement for the second agreement period under § 425.220; and

(ii) Not eligible to participate in the Shared Savings Program again until after the date on which the term of that second agreement period would have expired if the ACO had not terminated its participation, consistent with § 425.222.

#### § 425.314 [Amended]

- 4. Amend § 425.314 by removing paragraph (a)(4).

- 5. Add § 425.315 to read as follows:

#### § 425.315 Reopening Determinations of ACO Shared Savings or Shared Losses to Correct Financial Reconciliation Calculations.

(a) *Reopenings.* (1) If CMS determines that the amount of shared savings due to the ACO or the amount of shared losses owed by the ACO has been calculated in error, CMS may reopen the initial determination or a final agency determination under subpart I of this part and issue a revised initial determination:

(i) At any time in the case of fraud or similar fault as defined in § 405.902; or

(ii) Not later than 4 years after the date of the notification to the ACO of the initial determination of savings or losses for the relevant performance year under § 425.604(f), § 425.606(h) or § 425.610(h), for good cause.

(2) Good cause may be established when—

(i) There is new and material evidence that was not available or known at the time of the payment determination and may result in a different conclusion; or

(ii) The evidence that was considered in making the payment determination clearly shows on its face that an obvious error was made at the time of the payment determination.

(3) A change of legal interpretation or policy by CMS in a regulation, CMS ruling or CMS general instruction, whether made in response to judicial precedent or otherwise, is not a basis for reopening a payment determination under this section.

(4) CMS has sole discretion to determine whether good cause exists for reopening a payment determination under this section.

(b) [Reserved]

■ 6. Amend § 425.602 by:

- A. Revising the section heading.
- B. Revising paragraphs (a)(4), (5), and (8).
- C. Adding paragraph (a)(9).
- D. Revising paragraphs (b)(1) and (2).
- E. Removing paragraph (c).

The revisions and additions read as follows:

**§ 425.602 Establishing, adjusting, and updating the benchmark for an ACO's first agreement period.**

(a) \* \* \*

(4) Truncation of expenditures:

(i) For agreement periods beginning before 2017—

(A) Truncates an assigned beneficiary's total annual Parts A and B fee-for-service per capita expenditures at the 99th percentile of national Medicare fee-for-service expenditures as determined for each benchmark year in order to minimize variation from catastrophically large claims; and

(B) For the 2017 performance year and any subsequent performance years in agreement periods beginning in 2014, 2015 and 2016, the benchmark is adjusted to reflect the use of assignable beneficiaries in determining the 99th percentile of Medicare fee-for-service expenditures for purposes of truncating expenditures for assigned beneficiaries during each benchmark year as specified in paragraph (a)(4)(ii) of this section.

(ii) For agreement periods beginning in 2017 and subsequent years, truncates an assigned beneficiary's total annual Parts A and B fee-for-service per capita expenditures at the 99th percentile of national Medicare fee-for-service expenditures for assignable beneficiaries identified for the 12-month calendar year corresponding to each benchmark year in order to minimize variation from catastrophically large claims.

(5) Trending expenditures:

(i) For agreement periods beginning before 2017—

(A) Using CMS Office of the Actuary national Medicare expenditure data for each of the years making up the historical benchmark, determines national growth rates and trends expenditures for each benchmark year (BY1 and BY2) to the third benchmark year (BY3) dollars.

(B) To trend forward the benchmark, CMS makes separate calculations for expenditure categories for each of the following populations of beneficiaries:

- (1) ESRD.
- (2) Disabled.
- (3) Aged/dual eligible Medicare and Medicaid beneficiaries.
- (4) Aged/non-dual eligible Medicare and Medicaid beneficiaries.

(C) For the 2017 performance year and any subsequent performance years in agreement periods beginning in 2014, 2015 and 2016, the benchmark is adjusted to reflect the use of assignable beneficiaries to perform each of these calculations as specified in paragraph (a)(5)(ii) of this section.

(ii) For agreement periods beginning in 2017 and subsequent years—

(A) Using CMS Office of the Actuary national Medicare expenditure data for each of the years making up the historical benchmark, determines national growth rates for assignable beneficiaries identified for the 12-month calendar year corresponding to each benchmark year, and trends expenditures for each benchmark year (BY1 and BY2) to the third benchmark year (BY3) dollars.

(B) To trend forward the benchmark, CMS makes separate calculations for expenditure categories for each of the following populations of beneficiaries:

- (1) ESRD.
- (2) Disabled.
- (3) Aged/dual eligible Medicare and Medicaid beneficiaries.
- (4) Aged/non-dual eligible Medicare and Medicaid beneficiaries.

\* \* \* \* \*

(8) The benchmark is adjusted to take into account the expenditures for beneficiaries who would have been assigned to the ACO in any of the 3 most recent years prior to the agreement period using the most recent certified ACO participant list for the relevant performance year.

(9) The historical benchmark is further adjusted at the time of reconciliation for a performance year to account for changes in severity and case mix for newly and continuously assigned beneficiaries using prospective HCC risk scores and demographic factors as described under §§ 425.604(a)(1) through (3), 425.606(a)(1) through (3), and 425.610(a)(1) through (3).

(b) \* \* \*

(1) For performance years before 2017, CMS updates the historical benchmark annually for each year of the agreement period based on the flat dollar equivalent of the projected absolute amount of growth in national per capita expenditures for Parts A and B services under the original Medicare fee-for-service program.

(i) CMS updates the fixed benchmark by the projected absolute amount of growth in national per capita expenditures for Parts A and B services under the original Medicare fee-for-service program using data from CMS' Office of the Actuary.

(ii) To update the benchmark, CMS makes expenditure calculations for separate categories for each of the following populations of beneficiaries:

- (A) ESRD.
- (B) Disabled.
- (C) Aged/dual eligible Medicare and Medicaid beneficiaries.
- (D) Aged/non-dual eligible Medicare and Medicaid beneficiaries.

(2) For the 2017 performance year and subsequent performance years, CMS updates the historical benchmark annually for each year of the agreement period based on the flat dollar equivalent of the projected absolute amount of growth in national per capita expenditures for Parts A and B services under the original Medicare fee-for-service program for assignable beneficiaries identified for the 12-month calendar year corresponding to the year for which the update is calculated.

(i) CMS updates the fixed benchmark by the projected absolute amount of growth in national per capita expenditures for Parts A and B services under the original Medicare fee-for-service program for assignable beneficiaries identified for the 12-month calendar year corresponding to the year for which the update is being calculated using data from CMS' Office of the Actuary.

(ii) To update the benchmark, CMS makes expenditure calculations for separate categories for each of the following populations of beneficiaries:

- (A) ESRD.
- (B) Disabled.
- (C) Aged/dual eligible Medicare and Medicaid beneficiaries.
- (D) Aged/non-dual eligible Medicare and Medicaid beneficiaries.

■ 7. Add § 425.603 to read as follows:

**§ 425.603 Resetting, adjusting, and updating the benchmark for a subsequent agreement period.**

(a) An ACO's benchmark is reset at the start of each subsequent agreement period.

(b) For second agreement periods beginning in 2016, CMS establishes, adjusts, and updates the rebased historical benchmark in accordance with § 425.602(a) and (b) with the following modifications:

(1) Rather than weighting each year of the benchmark using the percentages provided at § 425.602(a)(7), each benchmark year is weighted equally.

(2) An additional adjustment is made to account for the average per capita amount of savings generated during the ACO's previous agreement period. The adjustment is limited to the average number of assigned beneficiaries (expressed as person years) under the ACO's first agreement period.

(c) For second or subsequent agreement periods beginning in 2017 and subsequent years, CMS establishes the rebased historical benchmark by determining the per capita Parts A and B fee-for-service expenditures for beneficiaries who would have been assigned to the ACO in any of the 3 most recent years before the agreement period using the certified ACO participant list submitted before the start of the agreement period as required under § 425.118. CMS does all of the following:

(1) Calculates the payment amounts included in Parts A and B fee-for-service claims using a 3-month claims run out with a completion factor. The calculation—

(i) Excludes IME and DSH payments; and

(ii) Considers individually beneficiary identifiable payments made under a demonstration, pilot or time limited program.

(2) Makes separate expenditure calculations for each of the following populations of beneficiaries:

(i) ESRD.

(ii) Disabled.

(iii) Aged/dual eligible Medicare and Medicaid beneficiaries.

(iv) Aged/non-dual eligible Medicare and Medicaid beneficiaries.

(3) Adjusts expenditures for changes in severity and case mix using prospective HCC risk scores.

(4) Truncates an assigned beneficiary's total annual Parts A and B fee-for-service per capita expenditures at the 99th percentile of national Medicare fee-for-service expenditures for assignable beneficiaries identified for the 12-month calendar year corresponding to each benchmark year in order to minimize variation from catastrophically large claims.

(5) Trends forward expenditures for each benchmark year (BY1 and BY2) to the third benchmark year (BY3) dollars using regional growth rates based on expenditures for the ACO's regional service area as determined under paragraphs (e) and (f) of this section, making separate expenditure calculations for each of the following populations of beneficiaries:

(i) ESRD.

(ii) Disabled.

(iii) Aged/dual eligible Medicare and Medicaid beneficiaries.

(iv) Aged/non-dual eligible Medicare and Medicaid beneficiaries.

(6) Restates BY1 and BY2 trended and risk-adjusted expenditures in BY3 proportions of the following populations of beneficiaries:

(i) ESRD.

(ii) Disabled.

(iii) Aged/dual eligible Medicare and Medicaid beneficiaries.

(iv) Aged/non-dual eligible Medicare and Medicaid beneficiaries.

(7) Weights each benchmark year equally.

(8) The ACO's benchmark will be adjusted in accordance with § 425.118(b) for the addition and removal of ACO participants or ACO providers/suppliers during the term of the agreement period. To adjust the benchmark, CMS does the following:

(i) Takes into account the expenditures for beneficiaries who would have been assigned to the ACO in any of the 3 most recent years prior to the agreement period using the most recent certified ACO participant list for the relevant performance year.

(ii) Redetermines the regional adjustment amount under paragraph (c)(9) of this section, according to the ACO's assigned beneficiaries for BY3 resulting from the most recent certified ACO participant list for the relevant performance year.

(9) Adjusts the historical benchmark based on the ACO's regional service area expenditures, making separate calculations for the following populations of beneficiaries: ESRD, disabled, aged/dual eligible Medicare and Medicaid beneficiaries, and aged/non-dual eligible Medicare and Medicaid beneficiaries. CMS does all of the following:

(i) Calculates an average per capita amount of expenditures for the ACO's regional service area as follows:

(A) Determines the counties included in the ACO's regional service area based on the ACO's BY3 assigned beneficiary population.

(B) Determines the ACO's regional expenditures as specified under paragraphs (e) and (f) of this section for BY3.

(C) Adjusts for differences in severity and case mix between the ACO's assigned beneficiary population and the assignable beneficiary population for the ACO's regional service area identified for the 12-month calendar year that corresponds to BY3.

(ii) Calculates the adjustment as follows:

(A) Determines the difference between the average per capita amount of expenditures for the ACO's regional service area as specified under paragraph (c)(9)(i) of this section and the average per capita amount of the ACO's rebased historical benchmark determined under paragraphs (c)(1) through (8) of this section, for each of the following populations of beneficiaries:

(1) ESRD.

(2) Disabled.

(3) Aged/dual eligible Medicare and Medicaid beneficiaries.

(4) Aged/non-dual eligible Medicare and Medicaid beneficiaries.

(B) Applies a percentage, determined as follows:

(1) The first time an ACO's benchmark is rebased using the methodology described under paragraph (c) of this section, CMS calculates the regional adjustment as follows:

(i) Using 35 percent of the difference between the average per capita amount of expenditures for the ACO's regional service area and the average per capita amount of the ACO's rebased historical benchmark, if the ACO is determined to have lower spending than the ACO's regional service area;

(ii) Using 25 percent of the difference between the average per capita amount of expenditures for the ACO's regional service area and the average per capita amount of the ACO's rebased historical benchmark, if the ACO is determined to have higher spending than the ACO's regional service area.

(2) The second time that an ACO's benchmark is rebased using the methodology described under paragraph (c) of this section, CMS calculates the regional adjustment to the historical benchmark as follows:

(i) Using 70 percent of the difference between the average per capita amount of expenditures for the ACO's regional service area and the average per capita amount of the ACO's rebased historical benchmark, unless the Secretary determines a lower weight should be applied, if the ACO is determined to have lower spending than the ACO's regional service area;

(ii) Using 50 percent of the difference between the average per capita amount of expenditures for the ACO's regional service area and the average per capita amount of the ACO's rebased historical benchmark, if the ACO is determined to have higher spending than the ACO's regional service area.

(3) The third or subsequent time that an ACO's benchmark is rebased using the methodology described under paragraph (c) of this section, CMS calculates the regional adjustment to the historical benchmark using 70 percent of the difference between the average per capita amount of expenditures for the ACO's regional service area and the average per capita amount of the ACO's rebased historical benchmark, unless the Secretary determines a lower weight should be applied.

(4) To determine if an ACO has lower or higher spending compared to the ACO's regional service area, CMS does the following:

(i) Multiplies the difference between the average per capita amount of expenditures for the ACO's regional service area and the average per capita amount of the ACO's rebased historical benchmark for each population of beneficiaries (ESRD, Disabled, Aged/dual eligible Medicare and Medicaid beneficiaries, Aged/non-dual eligible Medicare and Medicaid beneficiaries) as calculated under paragraph (c)(9)(ii)(A) of this section by the applicable proportion of the ACO's assigned beneficiary population (ESRD, Disabled, Aged/dual eligible Medicare and Medicaid beneficiaries, Aged/non-dual eligible Medicare and Medicaid beneficiaries) for benchmark year 3 of the rebased historical benchmark.

(ii) Sums the amounts determined in paragraph (c)(9)(ii)(B)(4)(i) of this section across the populations of beneficiaries (ESRD, Disabled, Aged/dual eligible Medicare and Medicaid beneficiaries, Aged/non-dual eligible Medicare and Medicaid beneficiaries).

(iii) If the resulting sum is a net positive value, the ACO is considered to have lower spending compared to the ACO's regional service area. If the resulting sum is a net negative value, the ACO is considered to have higher spending compared to the ACO's regional service area.

(iv) If CMS adjusts the ACO's benchmark for the addition or removal of ACO participants or ACO providers/suppliers during the term of the agreement period as specified in paragraph (c)(8) of this section, CMS redetermines whether the ACO is considered to have lower spending or higher spending compared to the ACO's regional service area for purposes of determining the percentage used in calculating the adjustment in paragraphs (c)(9)(ii)(B)(1) and (2) of this section.

(10) The historical benchmark is further adjusted at the time of reconciliation for a performance year to account for changes in severity and case mix for newly and continuously assigned beneficiaries using prospective HCC risk scores and demographic factors as described under §§ 425.604(a)(1) through (3), 425.606(a)(1) through (3), and 425.610(a)(1) through (3).

(d) For second or subsequent agreement periods beginning in 2017 and subsequent years, CMS updates the rebased historical benchmark under paragraph (c) of this section, annually for each year of the agreement period by the growth in risk adjusted regional per beneficiary FFS spending for the ACO's regional service area by doing all of the following:

(1) Determining the counties included in the ACO's regional service area based on the ACO's assigned beneficiary population used to determine financial reconciliation for the relevant performance year.

(2) Determining growth rates based on expenditures for counties in the ACO's regional service area calculated under paragraphs (e) and (f) of this section, for the performance year compared to BY3 for each of the following populations of beneficiaries:

- (i) ESRD.
- (ii) Disabled.
- (iii) Aged/dual eligible Medicare and Medicaid beneficiaries.
- (iv) Aged/non-dual eligible Medicare and Medicaid beneficiaries.

(3) Updating the benchmark by making separate calculations for each of the following populations of beneficiaries:

- (i) ESRD.
- (ii) Disabled.
- (iii) Aged/dual eligible Medicare and Medicaid beneficiaries.
- (iv) Aged/non-dual eligible Medicare and Medicaid beneficiaries.

(e) For second or subsequent agreement periods beginning in 2017 and subsequent years, CMS does all of the following to determine risk adjusted county fee-for-service expenditures for use in calculating the ACO's regional fee-for-service expenditures:

(1)(i) Determines average county fee-for-service expenditures based on expenditures for the assignable population of beneficiaries in each county, where assignable beneficiaries are identified for the 12-month calendar year corresponding to the relevant benchmark or performance year.

(ii) Makes separate expenditure calculations for each of the following populations of beneficiaries:

- (A) ESRD.
- (B) Disabled.
- (C) Aged/dual eligible Medicare and Medicaid beneficiaries.
- (D) Aged/non-dual eligible Medicare and Medicaid beneficiaries.

(2) Calculates assignable beneficiary expenditures using the payment amounts included in Parts A and B fee-for-service claims with dates of service in the 12-month calendar year for the relevant benchmark or performance year, using a 3-month claims run out with a completion factor. The calculation—

- (i) Excludes IME and DSH payments; and
- (ii) Considers individually beneficiary identifiable payments made under a demonstration, pilot or time limited program.

(3) Truncates a beneficiary's total annual Parts A and B fee-for-service per

capita expenditures at the 99th percentile of national Medicare fee-for-service expenditures for assignable beneficiaries identified for the 12-month calendar year that corresponds to the relevant benchmark or performance year, in order to minimize variation from catastrophically large claims.

(4) Adjusts fee-for-service expenditures for severity and case mix of assignable beneficiaries in the county using prospective CMS-HCC risk scores. The calculation is made according to the following populations of beneficiaries:

- (i) ESRD.
- (ii) Disabled.
- (iii) Aged/dual eligible Medicare and Medicaid beneficiaries.
- (iv) Aged/non-dual eligible Medicare and Medicaid beneficiaries.

(f) For second or subsequent agreement periods beginning in 2017 and subsequent years, CMS calculates an ACO's risk adjusted regional expenditures by—

(1) Weighting the risk-adjusted county-level fee-for-service expenditures determined under paragraph (e) of this section according to the ACO's proportion of assigned beneficiaries in the county, determined by the number of the ACO's assigned beneficiaries in the applicable population (according to Medicare enrollment type) residing in the county in relation to the ACO's total number of assigned beneficiaries in the applicable population (according to Medicare enrollment type) for the relevant benchmark or performance year for each of the following populations of beneficiaries:

- (i) ESRD.
- (ii) Disabled.
- (iii) Aged/dual eligible Medicare and Medicaid beneficiaries.
- (iv) Aged/non-dual eligible Medicare and Medicaid beneficiaries.

(2) Aggregating the values determined under paragraph (f)(1) of this section for each population of beneficiaries (according to Medicare enrollment type) across all counties within the ACO's regional service area; and

(3) Weighting the aggregate expenditure values determined for each population of beneficiaries (according to Medicare enrollment type) under paragraph (f)(2) of this section by a weight reflecting the proportion of the ACO's overall beneficiary population in the applicable Medicare enrollment type for the relevant benchmark or performance year.

■ 8. Amend § 425.604 as follows:

■ A. In paragraphs (a)(1) and (a)(2)(i) and (ii) by removing the phrase “adjust for changes” and adding in its place the

phrase “adjust the benchmark for changes”.

■ B. In paragraph (a)(3) introductory text by removing the phrase “In adjusting for health status” and adding in its place the phrase “In adjusting the benchmark for health status”.

■ C. Redesignating paragraph (a)(4) as paragraph (a)(4)(i).

■ D. In newly redesignated paragraph (a)(4)(i) by removing the phrase “To minimize variation” and adding in its place the phrase “For performance years before 2017 to minimize variation”.

■ E. Adding paragraph (a)(4)(ii).

The addition reads as follows:

**§ 425.604 Calculation of savings under the one-sided model.**

(a) \* \* \*

(4) \* \* \*

(ii) For the 2017 performance year and subsequent performance years, to minimize variation from catastrophically large claims, CMS truncates an assigned beneficiary’s total annual Parts A and B fee-for-service per capita expenditures at the 99th percentile of national Medicare fee-for-service expenditures as determined for the applicable performance year for assignable beneficiaries identified for the 12-month calendar year corresponding to the performance year.

\* \* \* \* \*

■ 9. Amend § 425.606 as follows:

■ A. In paragraphs (a)(1) and (a)(2)(i) and (ii) by removing the phrase “adjust for changes” and adding in its place the phrase “adjust the benchmark for changes”.

■ B. In paragraph (a)(3) introductory text by removing the phrase “In adjusting for health status” and adding in its place the phrase “In adjusting the benchmark for health status”.

■ C. Redesignating paragraph (a)(4) as paragraph (a)(4)(i).

■ D. In newly redesignated paragraph (a)(4)(i) by removing the phrase “To

minimize variation” and adding in its place the phrase “For performance years before 2017 to minimize variation”.

■ E. Adding paragraph (a)(4)(ii).

The addition reads as follows:

**§ 425.606 Calculation of shared savings and losses under Track 2.**

(a) \* \* \*

(4) \* \* \*

(ii) For the 2017 performance year and subsequent performance years, to minimize variation from catastrophically large claims, CMS truncates an assigned beneficiary’s total annual Parts A and B fee-for-service per capita expenditures at the 99th percentile of national Medicare fee-for-service expenditures as determined for the applicable performance year for assignable beneficiaries identified for the 12-month calendar year corresponding to the performance year.

\* \* \* \* \*

■ 10. Amend § 425.610 as follows:

■ A. In paragraphs (a)(1) and (a)(2)(i) and (ii) by removing the phrase “adjust for changes” and adding in its place the phrase “adjust the benchmark for changes”.

■ B. In paragraph (a)(3) introductory text by removing the phrase “In adjusting for health status” and adding in its place the phrase “In adjusting the benchmark for health status”.

■ C. Redesignating paragraph (a)(4) as paragraph (a)(4)(i).

■ D. In newly redesignated paragraph (a)(4)(i) by removing the phrase “To minimize variation” and adding in its place the phrase “For performance years before 2017 to minimize variation”.

■ E. Adding paragraph (a)(4)(ii).

The addition reads as follows:

**§ 425.610 Calculation of shared savings and losses under Track 3.**

(a) \* \* \*

(4) \* \* \*

(ii) For the 2017 performance year and subsequent performance years, to minimize variation from catastrophically large claims, CMS truncates an assigned beneficiary’s total annual Parts A and B fee-for-service per capita expenditures at the 99th percentile of national Medicare fee-for-service expenditures as determined for the applicable performance year for assignable beneficiaries identified for the 12-month calendar year corresponding to the performance year.

\* \* \* \* \*

**§ 425.800 [Amended]**

■ 11. Amend § 425.800 as follows:

■ A. In paragraph (a)(4) by—

■ i. Removing the phrase “The determination of whether” and adding in its place the phrase “The initial determination or revised initial determination of whether”.

■ ii. Removing the phrase “including the determination” and adding in its place the phrase “including the initial determination or revised initial determination”.

■ iii. Removing the cross-reference “§ 425.602, § 425.604, and § 425.606” and adding in its place the cross-reference “§§ 425.602, 425.604, 425.606, and 425.610”.

■ B. In paragraph (a)(5) by removing the cross-reference “§ 425.604 and 425.606” and adding in its place “§§ 425.604, 425.606, and 425.610”.

Dated: May 27, 2016.

**Andrew M. Slavitt,**

*Acting Administrator, Centers for Medicare & Medicaid Services.*

Dated: June 3, 2016.

**Sylvia M. Burwell,**

*Secretary, Department of Health and Human Services.*

[FR Doc. 2016–13651 Filed 6–6–16; 4:15 pm]

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## Part VI

### Department of the Treasury

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Internal Revenue Service  
26 CFR Parts 1, 46, et al.

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### Department of Labor

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Employee Benefits Security Administration  
29 CFR Part 2590

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### Department of Health and Human Services

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45 CFR Parts 144, 146, et al.  
Expatriate Health Plans, Expatriate Health Plan Issuers, and Qualified Expatriates; Excepted Benefits; Lifetime and Annual Limits; and Short-Term, Limited-Duration Insurance; Proposed Rule

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**DEPARTMENT OF THE TREASURY****Internal Revenue Service****26 CFR Parts 1, 46, 54, 57, and 301**

[REG–135702–15]

RIN 1545–BN44

**DEPARTMENT OF LABOR****Employee Benefits Security Administration****29 CFR Part 2590**

RIN 1210–AB75

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****45 CFR Parts 144, 146, 147, 148, and 158**

[CMS–9932–P]

RIN 0938–AS93

**Expatriate Health Plans, Expatriate Health Plan Issuers, and Qualified Expatriates; Excepted Benefits; Lifetime and Annual Limits; and Short-Term, Limited-Duration Insurance**

**AGENCY:** Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Centers for Medicare & Medicaid Services, Department of Health and Human Services.

**ACTION:** Proposed rule.

**SUMMARY:** This document contains proposed regulations on the rules for expatriate health plans, expatriate health plan issuers, and qualified expatriates under the Expatriate Health Coverage Clarification Act of 2014 (EHCCA). This document also includes proposed conforming amendments to certain regulations to implement the provisions of the EHCCA. Further, this document proposes standards for travel insurance and supplemental health insurance coverage to be considered excepted benefits and revisions to the definition of short-term, limited-duration insurance for purposes of the exclusion from the definition of individual health insurance coverage. These proposed regulations affect expatriates with health coverage under expatriate health plans and sponsors, issuers and administrators of expatriate health plans, individuals with and plan sponsors of travel insurance and supplemental health insurance coverage, and individuals with short-term, limited-duration insurance. In addition, this document proposes to

amend a reference in the final regulations relating to prohibitions on lifetime and annual dollar limits and proposes to require that a notice be provided in connection with hospital indemnity and other fixed indemnity insurance in the group health insurance market for it to be considered excepted benefits.

**DATES:** Comments are due on or before August 9, 2016.

**ADDRESSES:** Comments, identified by “Expatriate Health Plans and other issues,” may be submitted by one of the following methods:

*Hand delivery or mail:* Written comment submissions may be submitted to CC:PA:LPD:PR (REG–135702–15), Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Comment submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–135702–15).

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

Comments received will be posted without change to [www.regulations.gov](http://www.regulations.gov) and available for public inspection. Any comment that is submitted will be shared with the Department of Labor (DOL) and Department of Health and Human Services (HHS). Warning: Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines. No deletions, modifications, or redactions will be made to the comments received, as they are public records.

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations, with respect to the treatment of expatriate health plan coverage as minimum essential coverage under section 5000A of the Internal Revenue Code, John Lovelace, at 202–317–7006; with respect to the provisions relating to the health insurance providers fee imposed by section 9010 of the Affordable Care Act, Rachel Smith, at 202–317–6855; with respect to the definition of expatriate health plans, expatriate health insurance issuers, and qualified expatriates, and the provisions relating to the market reforms (such as excepted benefits, and short-term, limited-duration coverage), R. Lisa Mojiri-Azad of the IRS Office of Chief Counsel, at 202–317–5500, Elizabeth Schumacher or Matthew Litton of the Department of Labor, at 202–693–8335,

Jacob Ackerman of the Centers for Medicare & Medicaid Services, Department of Health and Human Services, at 301–492–4179. Concerning the submission of comments or to request a public hearing, Regina Johnson. (202) 317–6901 (not toll-free numbers).

**Customer Service Information:**

Individuals interested in obtaining information from the Department of Labor concerning employment-based health coverage laws may call the EBSA Toll-Free Hotline, at 1–866–444–EBSA (3272) or visit the Department of Labor’s Web site (<http://www.dol.gov/ebsa>). In addition, information from HHS on private health insurance for consumers can be found on the Centers for Medicare & Medicaid Services (CMS) Web site ([www.cms.gov/ccioo](http://www.cms.gov/ccioo)) and information on health reform can be found at [www.HealthCare.gov](http://www.HealthCare.gov).

**SUPPLEMENTARY INFORMATION:****I. Background**

This document contains proposed amendments to Department of the Treasury (Treasury Department) regulations at 26 CFR part 1 (Income taxes), 26 CFR part 46 (Excise taxes, Health care, Health insurance, Pensions, Reporting and recordkeeping requirements), 26 CFR part 54 (Pension and excise taxes), 26 CFR part 57 (Health insurance providers fee), and 26 CFR part 301 (relating to procedure and administration) to implement the rules for expatriate health plans, expatriate health plan issuers, and qualified expatriates under the Expatriate Health Coverage Clarification Act of 2014 (EHCCA), which was enacted as Division M of the Consolidated and Further Continuing Appropriations Act, 2015, Public Law 113–235 (128 Stat. 2130). This document also contains proposed amendments to DOL regulations at 29 CFR part 2590 and HHS regulations at 45 CFR part 147, which are substantively identical to the amendments to 26 CFR part 54.

The EHCCA generally provides that the requirements of the Affordable Care Act<sup>1</sup> (ACA) do not apply with respect to expatriate health plans, expatriate health insurance issuers for coverage under expatriate health plans, and employers in their capacity as plan sponsors of expatriate health plans, except that: (1) An expatriate health plan shall be treated as minimum essential coverage under section

<sup>1</sup> The Patient Protection and Affordable Care Act, Public Law 111–148, was enacted on March 23, 2010, and the Health Care and Education Reconciliation Act, Public Law 111–152, was enacted on March 30, 2010. They are collectively known as the “Affordable Care Act.”

5000A(f) of the Internal Revenue Code of 1986, as amended (the Code) and any other section of the Code that incorporates the definition of minimum essential coverage; (2) the employer shared responsibility provisions of section 4980H of the Code continue to apply; (3) the health care reporting provisions of sections 6055 and 6056 of the Code continue to apply but with certain modifications relating to the use of electronic media for required statements to enrollees; (4) the excise tax provisions of section 4980I of the Code continue to apply with respect to coverage of certain qualified expatriates who are assigned (rather than transferred) to work in the United States; and (5) the annual health insurance providers fee imposed by section 9010 of the ACA takes into account expatriate health insurance issuers for certain purposes for calendar years 2014 and 2015 only.

This document also contains proposed amendments to 26 CFR part 54, 29 CFR part 2590, and 45 CFR parts 146 and 148, which would specify conditions for travel insurance, supplemental health insurance coverage, and hospital indemnity and other fixed indemnity insurance to be considered excepted benefits. Excepted benefits are exempt from the requirements that generally apply under title XXVII of the Public Health Service Act (PHS Act), part 7 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and Chapter 100 of the Code. In addition, this document contains proposed amendments to (1) the definition of “short-term, limited-duration insurance,” for purposes of the exclusion from the definition of “individual health insurance coverage” and (2) the definition of “essential health benefits,” for purposes of the prohibition on annual and lifetime dollar limits in 26 CFR part 54, 29 CFR 2590, and 45 CFR parts 144 and 147.

This document clarifies an exemption set forth in 45 CFR 153.400(a)(1)(iii) related to the transitional reinsurance program. Section 1341 of the Affordable Care Act provides for the establishment of a transitional reinsurance program in each State to help pay the cost of treating high-cost enrollees in the individual market in the 2014 through 2016 benefit years. Section 1341(b)(3)(B) of the ACA and 45 CFR 153.400(a)(1) require contributing entities to make reinsurance contributions for major medical coverage that is considered to be part of a commercial book of business.

This document also contains proposed conforming amendments to 45 CFR part 158 that address the separate

medical loss ratio (MLR) reporting requirements for expatriate policies that are not expatriate health plans under the EHCCA.

### **General Statutory Background and Enactment of ACA**

The Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104–191 (110 Stat. 1936), added title XXVII of the PHS Act, part 7 of ERISA, and Chapter 100 of the Code, which impose portability and nondiscrimination rules with respect to health coverage. These provisions of the PHS Act, ERISA, and the Code were later augmented by other consumer protection laws, including the Mental Health Parity Act of 1996, the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008, the Newborns’ and Mothers’ Health Protection Act, the Women’s Health and Cancer Rights Act, the Genetic Information Nondiscrimination Act of 2008, the Children’s Health Insurance Program Reauthorization Act of 2009, Michelle’s Law, and the ACA.

The ACA reorganizes, amends, and adds to the provisions of part A of title XXVII of the PHS Act relating to group health plans and health insurance issuers in the group and individual markets. For this purpose, the term “group health plan” includes both insured and self-insured group health plans.<sup>2</sup> The ACA added section 715(a)(1) of ERISA and section 9815(a)(1) of the Code to incorporate the provisions of part A of title XXVII of the PHS Act (generally, sections 2701 through 2728 of the PHS Act) into ERISA and the Code to make them applicable to group health plans and health insurance issuers providing health insurance coverage in connection with group health plans.

### **Expatriate Health Plans, Expatriate Health Plan Issuers and Qualified Expatriates**

Prior to the enactment of the EHCCA, employers, issuers and covered individuals had expressed concerns about the application of the ACA market reform rules to expatriate health plans and whether coverage under expatriate health plans was minimum essential coverage for purposes of section 5000A of the Code. To address these concerns on an interim basis, on March 8, 2013, the Departments of Labor, HHS, and the Treasury (collectively, the

Departments<sup>3</sup>) issued Affordable Care Act Implementation Frequently Asked Questions (FAQs) Part XIII, Q&A–1, providing relief from the ACA market reform requirements for certain expatriate group health insurance coverage.<sup>4</sup> For plan years ending on or before December 31, 2015, the FAQ provides that, with respect to expatriate health plans, the Departments will consider the requirements of subtitles A and C of title I of the ACA to be satisfied if the plan and issuer comply with the pre-ACA version of title XXVII of the PHS Act. For purposes of the relief, an expatriate health plan is an insured group health plan with respect to which enrollment is limited to primary insureds who reside outside of their home country for at least six months of the plan year and any covered dependents, and its associated group health insurance coverage. The FAQ also states that coverage provided under an expatriate group health plan is a form of minimum essential coverage under section 5000A of the Code. On January 9, 2014, the Departments issued Affordable Care Act Implementation FAQs Part XVIII, Q&A–6 and Q&A–7, which extended the relief of Affordable Care Act Implementation FAQs Part XIII, Q&A–1 for insured expatriate health plans to subtitle D of title I of the ACA and also provided that the relief from the requirements of subtitles A, C, and D of title I of the ACA would apply for plan years ending on or before December 31, 2016.<sup>5</sup>

Subsequently, the EHCCA was enacted on December 16, 2014. Section 3(a) of the EHCCA provides that the ACA generally does not apply to expatriate health plans, employers with respect to expatriate health plans but solely in their capacity as plan sponsors of these plans, and expatriate health insurance issuers with respect to coverage offered by such issuers under expatriate health plans. Under section 3(b) of the EHCCA, however, the ACA continues to apply to expatriate health plans with respect to the employer shared responsibility provisions of section 4980H of the Code, the reporting requirements of sections 6055 and 6056

<sup>3</sup> Note, however, that in sections under headings listing only two of the three Departments, the term “Departments” generally refers only to the two Departments listed in the heading.

<sup>4</sup> Frequently Asked Questions about Affordable Care Act Implementation (Part XIII), available at <http://www.dol.gov/ebsa/pdf/faq-aca13.pdf> and [http://www.cms.gov/CCIIO/Resources/Fact-Sheets-andFAQs/ACA\\_implementation\\_faq13.html](http://www.cms.gov/CCIIO/Resources/Fact-Sheets-andFAQs/ACA_implementation_faq13.html).

<sup>5</sup> Frequently Asked Questions about Affordable Care Act Implementation (Part XVIII), available at <https://www.dol.gov/ebsa/faqs/faq-aca18.html> and [https://www.cms.gov/CCIIO/Resources/Fact-Sheets-andFAQs/aca\\_implementation\\_faqs18.html](https://www.cms.gov/CCIIO/Resources/Fact-Sheets-andFAQs/aca_implementation_faqs18.html).

<sup>2</sup> The term “group health plan” is used in title XXVII of the PHS Act, part 7 of ERISA, and Chapter 100 of the Code, and is distinct from the term “health plan,” as used in other provisions of title I of the ACA. The term “health plan” does not include self-insured group health plans.

of the Code, and the excise tax provisions of section 4980I of the Code. Section 3(b) of the EHCCA further provides that an expatriate health plan offered to primary enrollees described in sections 3(d)(3)(A) and (B) of the EHCCA shall be treated as an eligible employer sponsored plan under section 5000A(f)(2) of the Code, and that an expatriate health plan offered to primary enrollees described in section 3(d)(3)(C) of the EHCCA shall be treated as a plan in the individual market under section 5000A(f)(1)(C) of the Code. Section 3(c) of the EHCCA sets forth rules for expatriate health plans with respect to the annual health insurance providers fee imposed by section 9010 of the ACA.

Sections 4375 and 4376 of the Code impose the Patient-Centered Outcomes Research Trust Fund (PCORTF) fee only with respect to individuals residing in the United States. Final regulations regarding the PCORTF fee exempt any specified health insurance policy or applicable self-insured group health plan designed and issued specifically to cover employees who are working and residing outside the United States from the fee. The exclusion from the ACA for expatriate health plans, employers with respect to expatriate health plans but solely in their capacity as plan sponsors of these plans, and expatriate health insurance issuers with respect to coverage offered by such issuers under expatriate health plans would apply to the PCORTF fee to the extent an expatriate health plan was not already excluded from the fee.

Section 1341 of the ACA establishes a transitional reinsurance program to help stabilize premiums for non-grandfathered health insurance coverage in the individual health insurance market from 2014 through 2016. Section 1341(b)(3)(B) of the ACA and the implementing regulations at 45 CFR 153.400(a)(1) require health insurance issuers and certain self-insured group health plans (“contributing entities”) to make reinsurance contributions for major medical coverage that is considered to be part of a commercial book of business. This language has been interpreted to exclude “expatriate health coverage.”<sup>6</sup> As such, HHS regulation at 45 CFR 153.400(a)(1)(iii) provides that a contributing entity must make reinsurance contributions for lives covered by its self-insured group health plans and health insurance coverage, except to the extent that such plan or coverage is expatriate health coverage,

as defined by the Secretary of HHS, or for the 2015 and 2016 benefit years only, is a self-insured group health plan with respect to which enrollment is limited to participants who reside outside of their home country for at least six months of the plan year and any covered dependents of such participants. As noted in the March 8, 2013 Affordable Care Act Implementation FAQs Part XIII, Q&A–1, the FAQ definition of “expatriate health plan” was extended to the definition of “expatriate health coverage” under 45 CFR 153.400(a)(1)(iii).

Section 3(a) of the EHCCA provides that the ACA generally does not apply to expatriate health plans, employers with respect to expatriate health plans but solely in their capacity as plan sponsors of expatriate health plans, and expatriate health insurance issuers with respect to coverage offered by such issuers under expatriate health plans. Accordingly, under the EHCCA, the transitional reinsurance program contribution obligation under section 1341 of the ACA does not apply to expatriate health plans.

Section 5000A of the Code, as added by section 1501 of the ACA, provides that, for each month, taxpayers must have minimum essential coverage, qualify for a health coverage exemption, or make an individual shared responsibility payment when filing a federal income tax return. Section 5000A(f)(1)(B) of the Code provides that minimum essential coverage includes coverage under an eligible employer-sponsored plan. Section 5000A(f)(2) of the Code and 26 CFR 1.5000A–2(c) provide that an eligible employer-sponsored plan means, with respect to an employee, group health insurance coverage that is a governmental plan or any other plan or coverage offered in the small or large group market within a State, or a self-insured group health plan. Under section 5000A(f)(1)(C) of the Code, minimum essential coverage includes coverage under a health plan offered in the individual market within a State.

Section 3(b)(1)(A) of the EHCCA provides that an expatriate health plan that is offered to primary enrollees who are qualified expatriates described in sections 3(d)(3)(A) and 3(d)(3)(B) of the EHCCA is treated as an eligible employer-sponsored plan within the meaning of section 5000A(f)(2) of the Code. Section 3(b)(1)(B) of the EHCCA provides that, in the case of an expatriate health plan that is offered to primary enrollees who are qualified expatriates described in section 3(d)(3)(C) of the EHCCA, the coverage is treated as a plan in the individual

market within the meaning of section 5000A(f)(1)(C) of the Code, for purposes of sections 36B, 5000A and 6055 of the Code.

Under section 6055 of the Code, as added by section 1502 of the ACA, providers of minimum essential coverage must file an information return with the Internal Revenue Service (IRS) and furnish a written statement to covered individuals reporting the months that an individual had minimum essential coverage. Under section 6056 of the Code, as added by section 1514 of the ACA, an applicable large employer (as defined in section 4980H(c)(2) of the Code and 26 CFR 54.4980H–1(a)(4) and 54.4980H–2) must file an information return with the IRS and furnish a written statement to its full-time employees reporting details regarding the minimum essential coverage, if any, offered by the employer. Under both sections 6055 and 6056 of the Code, reporting entities may satisfy the requirement to furnish statements to covered individuals and employees, respectively, by electronic means only if the individual or employee affirmatively consents to receiving the statements electronically.<sup>7</sup>

Under section 4980H of the Code, as added by section 1513 of the ACA, an applicable large employer that does not offer minimum essential coverage to its full-time employees (and their dependents) or offers minimum essential coverage that does not meet the standards for affordability and minimum value will owe an assessable payment if a full-time employee is certified as having enrolled in a qualified health plan on an Exchange with respect to which a premium tax credit is allowed with respect to the employee.

Section 3(b)(2) of the EHCCA provides that the reporting requirements of sections 6055 and 6056 of the Code and the provisions of section 4980H of the Code relating to the employer shared responsibility provisions for applicable large employers continue to apply with respect to expatriate health plans and qualified expatriates. Section 3(b)(2) of the EHCCA provides a special rule for the use of electronic media for statements required under sections 6055 and 6056 of the Code. Specifically, the required statements may be provided to a primary insured for coverage under an expatriate health plan using electronic media unless the primary insured has explicitly refused to consent to receive the statement electronically.

<sup>6</sup> See HHS Notice of Benefit and Payment Parameters for 2014 (78 FR 15410) (March 11, 2013) and HHS Notice of Benefit and Payment Parameters for 2016 (80 FR 10750) (February 27, 2015).

<sup>7</sup> See 26 CFR 1.6055–2(a)(2)(i) and 301.6056–2(a)(2)(i).

Section 4980I of the Code, as added by section 9001 of the ACA, imposes an excise tax if the aggregate cost of applicable employer-sponsored coverage provided to an employee exceeds a statutory dollar limit. Section 3(b)(2) of the EHCCA provides that section 4980I of the Code continues to apply to applicable employer-sponsored coverage (as defined in section 4980I(d)(1) of the Code) of a qualified expatriate (as described in section 3(d)(3)(A)(i) of the EHCCA) who is assigned (rather than transferred) to work in the United States.

Section 9010 of the ACA imposes a fee on covered entities engaged in the business of providing health insurance for United States health risks. Section 3(c)(1) of the EHCCA excludes expatriate health plans from the health insurance providers fee imposed by section 9010 of the ACA by providing that, for calendar years after 2015, a qualified expatriate (and any spouse, dependent, or any other individual enrolled in the plan) enrolled in an expatriate health plan is not considered a United States health risk. Section 3(c)(2) of the EHCCA provides a special rule solely for purposes of determining the health insurance providers fee imposed by section 9010 of the ACA for the 2014 and 2015 fee years.

Section 162(m)(6) of the Code, as added by section 9014 of the ACA, in general, limits to \$500,000 the allowable deduction for remuneration attributable to services performed by certain individuals for a covered health insurance provider. For taxable years beginning after December 31, 2012, section 162(m)(6)(C)(i) of the Code and 26 CFR 1.162–31(b)(4)(A) provide that a health insurance issuer is a covered health insurance provider if not less than 25 percent of the gross premiums that it receives from providing health insurance coverage during the taxable year are from minimum essential coverage. Section 3(a)(3) of the EHCCA provides that the provisions of the ACA (including section 162(m)(6) of the Code) do not apply to expatriate health insurance issuers with respect to coverage offered by such issuers under expatriate health plans.

Section 3(d)(2) of the EHCCA provides that an expatriate health plan means a group health plan, health insurance coverage offered in connection with a group health plan, or health insurance coverage offered to certain groups of similarly situated individuals, provided that the plan or coverage meets a number of specific requirements. Section 3(d)(2)(A) of the EHCCA provides that substantially all of the primary enrollees of an expatriate

health plan must be qualified expatriates. For this purpose, primary enrollees do not include individuals who are not nationals of the United States and reside in the country of their citizenship. Section 3(d)(2)(B) of the EHCCA provides that substantially all of the benefits provided under a plan or coverage must be benefits that are not excepted benefits. Section 3(d)(2)(C) of the EHCCA provides that the plan or coverage must provide coverage for inpatient hospital services, outpatient facility services, physician services, and emergency services that are comparable to the emergency services coverage that was described in or offered under 5 U.S.C. 8903(1) for the 2009 plan year.<sup>8</sup> Also, coverage for these services must be provided in certain countries. For qualified expatriates described in section 3(d)(3)(A) of the EHCCA (category A) and qualified expatriates described in section 3(d)(3)(B) of the EHCCA (category B), coverage for these services must be provided in the country or countries where the individual is working, and such other country or countries as the Secretary of HHS, in consultation with the Secretary of the Treasury and the Secretary of Labor, may designate. For qualified expatriates who are members of a group of similarly situated individuals described in section 3(d)(3)(C) of the EHCCA (category C), the coverage must be provided in the country or countries that the Secretary of HHS, in consultation with the Secretary of the Treasury and the Secretary of Labor, may designate.

Section 3(d)(2)(D) of the EHCCA provides that a plan qualifies as an expatriate health plan under the EHCCA only if the plan sponsor reasonably believes that benefits under the plan satisfy a standard at least actuarially equivalent to the level provided for in section 36B(c)(2)(C)(ii) of the Code (that is, “minimum value”). Section 3(d)(2)(E) of the EHCCA provides that dependent coverage of children, if offered under the expatriate health plan, must continue to be available until the individual attains age 26 (unless the individual is the child of a child receiving dependent coverage). Section 3(d)(2)(G) of the EHCCA provides that an expatriate health plan must satisfy the provisions of title XXVII of the PHS Act, Chapter 100 of the Code, and part 7 of subtitle B of title I of ERISA, that would otherwise apply if the ACA had

not been enacted. These provisions are sometimes referred to as the HIPAA portability and nondiscrimination requirements.

Section 3(d)(1) of the EHCCA provides that an expatriate health insurance issuer means a health insurance issuer that issues expatriate health plans. Section 3(d)(2)(F)(i) of the EHCCA provides that an expatriate health plan or coverage must be issued by an expatriate health plan issuer, or administered by an administrator, that together with any person in the issuer's or administrator's controlled group: (1) Maintains network provider agreements that provide for direct claims payments (directly or through third-party contracts), with health care providers in eight or more countries; (2) maintains call centers (directly or through third-party contracts) in three or more countries and accepts calls in eight or more languages; (3) processes at least \$1 million in claims in foreign currency equivalents each year; (4) makes global evacuation/repatriation coverage available; (5) maintains legal and compliance resources in three or more countries; and (6) has licenses to sell insurance in more than two countries. In addition, section 3(d)(2)(F)(ii) of the EHCCA provides that the plan or coverage must offer reimbursement for items or services under such plan or coverage in the local currency in eight or more countries.

Section 3(d)(3) of the EHCCA describes three categories of qualified expatriates. A category A qualified expatriate, under section 3(d)(3)(A) of the EHCCA, is an individual whose skills, qualifications, job duties, or expertise has caused the individual's employer to transfer or assign the individual to the United States for a specific and temporary purpose or assignment tied to the individual's employment and who the plan sponsor has reasonably determined requires access to health insurance and other related services and support in multiple countries, and is offered other multinational benefits on a periodic basis (such as tax equalization, compensation for cross-border moving expenses, or compensation to enable the expatriate to return to the expatriate's home country). A category B qualified expatriate, under section 3(d)(3)(B) of the EHCCA, is a primary insured who is working outside the United States for at least 180 days during a consecutive 12-month period that overlaps with the plan year. A category C qualified expatriate, under section 3(d)(3)(C) of the EHCCA, is an individual who is a member of a group of similarly situated individuals that is formed for the

<sup>8</sup> These are emergency services comparable to emergency services offered under a government-wide comprehensive health plan under the Federal Employees Health Benefits (FEHB) program prior to the enactment of the ACA.

purpose of traveling or relocating internationally in service of one or more of the purposes listed in section 501(c)(3) or (4) of the Code, or similarly situated organizations or groups, provided the group is not formed primarily for the sale of health insurance coverage and the Secretary of HHS, in consultation with the Secretary of the Treasury and the Secretary of Labor, determines the group requires access to health insurance and other related services and support in multiple countries.

Section 3(d)(4) of the EHCCA defines the United States as the 50 States, the District of Columbia, and Puerto Rico.

Section 3(f) of the EHCCA provides that, unless otherwise specified, the requirements of the EHCCA apply to expatriate health plans issued or renewed on or after July 1, 2015.

#### IRS Notice 2015–43

On July 20, 2015, the Treasury Department and the IRS issued Notice 2015–43 (2015–29 IRB 73) to provide interim guidance on the implementation of the EHCCA and the application of certain provisions of the ACA to expatriate health insurance issuers, expatriate health plans, and employers in their capacity as plan sponsors of expatriate health plans. The Departments of Labor and HHS reviewed and concurred with the interim guidance of Notice 2015–43. Comments were received in response to Notice 2015–43, and these comments have been considered in drafting these proposed regulations. The relevant portions of Notice 2015–43 and the related comments are discussed in the Overview of Proposed Regulations section of this preamble.<sup>9</sup>

#### IRS Notices 2015–29 and 2016–14

On March 30, 2015, the Treasury Department and the IRS issued Notice 2015–29 (2015–15 IRB 873) to provide guidance implementing the special rule of section 3(c)(2) of the EHCCA for fee years 2014 and 2015 with respect to the health insurance providers fee imposed by section 9010 of the ACA. Notice 2015–29 defines expatriate health plan by reference to the definition of expatriate policies in the MLR final rule issued by HHS<sup>10</sup> (MLR final rule definition) solely for the purpose of applying the special rule for fee years 2014 and 2015. The Treasury Department and the IRS determined that the MLR final rule definition of expatriate policies was sufficiently broad to cover potential expatriate

health plans described in section 3(d)(2) of the EHCCA. The MLR final rule defines expatriate policies as predominantly group health insurance policies that provide coverage to employees, substantially all of whom are: (1) Working outside their country of citizenship; (2) working outside their country of citizenship and outside the employer's country of domicile; or (3) non-U.S. citizens working in their home country.

On January 29, 2016, the Treasury Department and the IRS issued Notice 2016–14 (2016–7 IRB 315) to provide guidance implementing the definition of expatriate health plan for fee year 2016 with respect to the health insurance providers fee imposed by section 9010 of the ACA. Like Notice 2015–29, Notice 2016–14 provides that the definition of expatriate health plan will be the same as provided in the MLR final rule definition, solely for the purpose of the health insurance providers fee imposed by section 9010 of the ACA for fee year 2016.<sup>11</sup>

The Consolidated Appropriations Act, 2016, Public Law 114–113, Division P, Title II, § 201, Moratorium on Annual Fee on Health Insurance Providers (the Consolidated Appropriations Act), suspends collection of the health insurance providers fee for the 2017 calendar year. Thus, health insurance issuers are not required to pay the fee for 2017.

#### Excepted Benefits

Sections 2722 and 2763 of the PHS Act, section 732 of ERISA, and section 9831 of the Code provide that the respective requirements of title XXVII of the PHS Act, part 7 of ERISA, and Chapter 100 of the Code generally do not apply to the provision of certain types of benefits, known as “excepted benefits.” These excepted benefits are described in section 2791(c) of the PHS Act, section 733(c) of ERISA, and section 9832(c) of the Code.

There are four statutorily enumerated categories of excepted benefits. One category, under section 2791(c)(1) of the PHS Act, section 733(c)(1) of ERISA, and section 9832(c)(1) of the Code, identifies benefits that are excepted in all circumstances, including automobile insurance, liability insurance, workers compensation, and accidental death and dismemberment coverage. Under section 2791(c)(1)(H) of the PHS Act (and the parallel provisions of ERISA and the Code), this category of excepted benefits also includes “[o]ther similar insurance coverage, specified in regulations, under which benefits for

medical care are secondary or incidental to other insurance benefits.”

The second category of excepted benefits is limited excepted benefits, which may include limited scope vision or dental benefits, and benefits for long-term care, nursing home care, home health care, or community-based care. Section 2791(c)(2)(C) of the PHS Act, section 733(c)(2)(C) of ERISA, and section 9832(c)(2)(C) of the Code authorize the Secretaries of HHS, Labor, and the Treasury (collectively, the Secretaries) to issue regulations establishing other, similar limited benefits as excepted benefits. The Secretaries exercised this authority previously with respect to certain health flexible spending arrangements.<sup>12</sup> To be an excepted benefit under this second category, the statute provides that these limited benefits must either: (1) Be provided under a separate policy, certificate, or contract of insurance; or (2) otherwise not be an integral part of a group health plan, whether insured or self-insured.<sup>13</sup>

The third category of excepted benefits, referred to as “noncoordinated excepted benefits,” includes both coverage for only a specified disease or illness (such as cancer-only policies), and hospital indemnity or other fixed indemnity insurance. These benefits are excepted under section 2722(c)(2) of the PHS Act, section 732(c)(2) of ERISA, and section 9831(c)(2) of the Code only if all of the following conditions are met: (1) The benefits are provided under a separate policy, certificate, or contract of insurance; (2) there is no coordination between the provision of such benefits and any exclusion of benefits under any group health plan maintained by the same plan sponsor; and (3) the benefits are paid with respect to any event without regard to whether benefits are provided under any group health plan maintained by the same plan sponsor. In the group market, the regulations further provide that to be hospital indemnity or other fixed indemnity insurance, the insurance must pay a fixed dollar amount per day (or per other time period) of hospitalization or illness (for example, \$100/day) regardless of the amount of expenses incurred.<sup>14</sup>

Since the issuance of these regulations, the Departments have released FAQs to address various requests for clarification as to what types of coverage meet the conditions

<sup>12</sup> 26 CFR 54.9831–1(c)(3)(v), 29 CFR 2590.732(c)(3)(v), 45 CFR 146.145(b)(3)(v).

<sup>13</sup> PHS Act section 2722(c)(1), ERISA section 732(c)(1), Code section 9831(c)(1).

<sup>14</sup> 26 CFR 54.9831–1(c)(4)(i), 29 CFR 2590.732(c)(4)(i), 45 CFR 146.145(b)(4)(i).

<sup>9</sup> See 26 CFR 601.601(d)(2)(ii)(B).

<sup>10</sup> 45 CFR 158.120(d)(4).

<sup>11</sup> See 26 CFR 601.601(d)(2)(ii)(B).

necessary to be hospital indemnity or other fixed indemnity insurance that are excepted benefits. Affordable Care Act Implementation FAQs Part XI, Q&A–7 clarified that group health insurance coverage in which benefits are provided in varying amounts based on the type of procedure or item, such as the type of surgery actually performed or prescription drug provided is not a hospital indemnity or other fixed indemnity insurance excepted benefit because it does not meet the condition that benefits be provided on a per day (or per other time period, such as per week) basis, regardless of the amount of expenses incurred.<sup>15</sup>

The fourth category, under section 2791(c)(4) of the PHS Act, section 733(c)(4) of ERISA, and section 9832(c)(4) of the Code, is supplemental excepted benefits. Benefits are supplemental excepted benefits only if they are provided under a separate policy, certificate, or contract of insurance and are Medicare supplemental health insurance (also known as Medigap), TRICARE supplemental programs, or “similar supplemental coverage provided to coverage under a group health plan.” The phrase “similar supplemental coverage provided to coverage under a group health plan” is not defined in the statute or regulations. However, the Departments’ regulations clarify that one requirement to be similar supplemental coverage is that the coverage “must be specifically designed to fill gaps in primary coverage, such as coinsurance or deductibles.”<sup>16</sup>

In 2007 and 2008, the Departments issued guidance on the circumstances under which supplemental health insurance would be considered excepted benefits under section 2791(c)(4) of the PHS Act (and the parallel provisions of ERISA, and the Code).<sup>17</sup> The guidance identifies several factors the Departments will apply when evaluating whether supplemental health insurance will be considered to be “similar supplemental coverage provided to coverage under a group health plan.” Specifically the Departments’ guidance provides that

supplemental health insurance will be considered an excepted benefit if it is provided through a policy, certificate, or contract of insurance separate from the primary coverage under the plan and meets all of the following requirements: (1) The supplemental policy, certificate, or contract of insurance is issued by an entity that does not provide the primary coverage under the plan; (2) the supplemental policy, certificate, or contract of insurance is specifically designed to fill gaps in primary coverage, such as coinsurance or deductibles, but does not include a policy, certificate, or contract of insurance that becomes secondary or supplemental only under a coordination of benefits provision; (3) the cost of the supplemental coverage is 15 percent or less of the cost of primary coverage (determined in the same manner as the applicable premium is calculated under a COBRA continuation provision); and (4) the supplemental coverage sold in the group health insurance market does not differentiate among individuals in eligibility, benefits, or premiums based upon any health factor of the individual (or any dependents of the individual).

On February 13, 2015, the Departments issued Affordable Care Act Implementation FAQs Part XXIII, providing additional guidance on the circumstances under which health insurance coverage that supplements group health plan coverage may be considered supplemental excepted benefits.<sup>18</sup> The FAQ states that the Departments intend to propose regulations clarifying the circumstances under which supplemental insurance products that do not fill in cost-sharing under the primary plan are considered to be specifically designed to fill gaps in primary coverage. Specifically, the FAQ provides that health insurance coverage that supplements group health coverage by providing coverage of additional categories of benefits (as opposed to filling in cost-sharing gaps under the primary plan) would be considered to be designed to “fill in the gaps” of the primary coverage only if the benefits covered by the supplemental insurance product are not essential health benefits (EHB) in the State in which the product is being marketed. The FAQ further states that, until regulations are issued and effective, the Departments will not take enforcement action under certain conditions for failure to comply with the applicable insurance market reforms

with respect to group or individual health insurance coverage that provides coverage of additional categories of benefits that are not EHBs in the applicable State. States were encouraged to exercise similar enforcement discretion.

### Short-Term, Limited-Duration Insurance Coverage

Short-term limited duration insurance is a type of health insurance coverage that is designed to fill in temporary gaps in coverage when an individual is transitioning from one plan or coverage to another plan or coverage. Although short-term, limited-duration insurance is not an excepted benefit, it is similarly exempt from PHS Act requirements because it is not individual health insurance coverage. Section 2791(b)(5) of the PHS Act provides that the term “individual health insurance coverage” means health insurance coverage offered to individuals in the individual market, but does not include short-term, limited-duration insurance. The PHS Act does not define short-term, limited-duration insurance. Under existing regulations, short-term, limited-duration insurance means “health insurance coverage provided pursuant to a contract with an issuer that has an expiration date specified in the contract (taking into account any extensions that may be elected by the policyholder without the issuer’s consent) that is less than 12 months after the original effective date of the contract.”<sup>19</sup>

### Prohibition on Lifetime and Annual Limits

Section 2711 of the PHS Act, as added by the ACA, generally prohibits group health plans and health insurance issuers offering group or individual health insurance coverage from imposing lifetime and annual dollar limits on EHB, as defined in section 1302(b) of the ACA. These prohibitions apply to both grandfathered and non-grandfathered health plans, except the annual limits prohibition does not apply to grandfathered individual health insurance coverage.

Under the ACA, self-insured group health plans, large group market health plans, and grandfathered health plans are not required to offer EHB, but they generally cannot place lifetime or annual dollar limits on covered services that are considered EHB. The Departments’ regulations provide that, for plan years (in the individual market, policy years) beginning on or after January 1, 2017, a plan or issuer that is

<sup>15</sup> Frequently Asked Questions about Affordable Care Act Implementation (Part XI), available at <http://www.dol.gov/ebsa/faqs/faq-aca11.html> and [http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/aca\\_implementation\\_faqs11.html](http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/aca_implementation_faqs11.html).

<sup>16</sup> 26 CFR 54.9831–1(c)(5)(i)(C), 29 CFR 2590.732(c)(5)(i)(C), and 45 CFR 146.145(b)(5)(i)(C).

<sup>17</sup> See EBSA Field Assistance Bulletin No. 2007–04 (available at <http://www.dol.gov/ebsa/regs/fab2007-4.html>); CMS Insurance Standards Bulletin 08–01 (available at [http://www.cms.gov/CCIIO/Resources/Files/Downloads/hipaa\\_08\\_01\\_508.pdf](http://www.cms.gov/CCIIO/Resources/Files/Downloads/hipaa_08_01_508.pdf)); and IRS Notice 2008–23 (available at [http://www.irs.gov/irb/2008-07\\_IRB/ar09.html](http://www.irs.gov/irb/2008-07_IRB/ar09.html)).

<sup>18</sup> Frequently Asked Questions about Affordable Care Act Implementation (Part XXIII), available at <http://www.dol.gov/ebsa/pdf/faq-aca23.pdf> and [https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/Supplemental-FAQ\\_2-13-15-final.pdf](https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/Supplemental-FAQ_2-13-15-final.pdf).

<sup>19</sup> 26 CFR 54.9801–2, 29 CFR 2590.701–2, 45 CFR 144.103.

not required to provide EHB may select from among any of the 51 base-benchmark plans selected by a State or applied by default pursuant to 45 CFR 156.100, or one of the three FEHBP options specified at 45 CFR 156.100(a)(3), for purposes of complying with the lifetime and annual limits prohibition in section 2711 of the PHS Act.<sup>20</sup>

## II. Overview of the Proposed Regulations

### A. Expatriate Health Plans

#### In General

Section 3(a) of the EHCCA provides that the ACA generally does not apply to expatriate health plans, employers with respect to expatriate health plans but solely in their capacity as plan sponsors of expatriate health plans, and expatriate health insurance issuers with respect to coverage offered by such issuers under expatriate health plans. Consistent with this provision, the proposed regulations provide that the market reform provisions enacted or amended as part of the ACA, included in sections 2701 through 2728 of the PHS Act and incorporated into section 9815 of the Code and section 715 of ERISA, do not apply to an expatriate health plan, an employer, solely in its capacity as plan sponsor of an expatriate health plan, and an expatriate health insurance issuer with respect to coverage under an expatriate health plan. Similarly, section 162(m)(6) of the Code does not apply to an expatriate health insurance issuer with respect to premiums received for coverage under an expatriate health plan. In addition, under the EHCCA, the PCORTF fee under sections 4375 and 4376 of the Code and the transitional reinsurance program fee under section 1341 of the ACA do not apply to expatriate health plans. The EHCCA excludes expatriate health plans from the health insurance providers fee imposed by section 9010 except that the EHCCA provides a special rule solely for purposes of determining the fee for the 2014 and 2015 fee years. The EHCCA also designates certain coverage by an expatriate health plan as minimum essential coverage under section 5000A(f) of the Code, and provides special rules for the application of the reporting rules under sections 6055 and 6056 of the Code to expatriate health plans.

### Definition of Expatriate Health Insurance Issuer

Consistent with sections 3(d)(1) and (d)(2)(F) of the EHCCA, the proposed regulations define “expatriate health insurance issuer” as a health insurance issuer (as defined under 26 CFR 54.9801–2, 29 CFR 2590.701–2 and 45 CFR 144.103) that issues expatriate health plans and satisfies certain requirements.<sup>21</sup> The requirements for the issuer to be an expatriate health insurance issuer include that, in the course of its normal business operations, the issuer: (1) Maintains network provider agreements that provide for direct claims payments with health care providers in eight or more countries; (2) maintains call centers in three or more countries, and accepts calls from customers in eight or more languages; (3) processed at least \$1 million in claims in foreign currency equivalents during the preceding calendar year; (4) makes global evacuation/repatriation coverage available; (5) maintains legal and compliance resources in three or more countries; and (6) has licenses or other authority to sell insurance in more than two countries, including the United States. For purposes of meeting the \$1 million threshold for claims processed in foreign currency equivalents, the proposed regulations provide that the dollar value of claims processed is determined using the Treasury Department’s currency exchange rate in effect on the last day of the preceding calendar year.<sup>22</sup> Comments are requested regarding whether use of the calendar year as the basis for measuring the dollar amount of claims processed presents administrative challenges, and how the resulting challenges, if any, may be addressed. The proposed regulations provide that each of the applicable requirements may be satisfied by two or more entities (including one entity that is the health

<sup>21</sup> Section 3(d)(1) of the EHCCA provides that the term “expatriate health insurance issuer” means a health insurance issuer that issues expatriate health plans; section 3(d)(5)(A) of the EHCCA provides that the term “health insurance issuer” has the meaning given in section 2791 of the PHS Act. The definition of health insurance issuer in section 9832(b)(2) of the Code and section 733(b)(2) of ERISA and underlying regulations are substantively identical to the definition under section 2791 of the PHS Act and its underlying regulations.

As discussed in the section of this preamble entitled “Definition of Expatriate Health Plan” a health insurance issuer as defined in section 2791 of the PHS Act is limited to an entity licensed to engage in the business of insurance in a State and subject to State law that regulates insurance.

<sup>22</sup> The most recent Treasury Department currency exchange rate can be found at <https://www.fiscal.treasury.gov/jsreports/rpt/treasRptRateExch/currentRates.htm>.

insurance issuer) that are members of the health insurance issuer’s controlled group or through contracts between the expatriate health insurance issuer and third parties.

### Definition of Expatriate Health Plan

Consistent with section 3(d)(2) of the EHCCA, the proposed regulations define “expatriate health plan” as a plan offered to qualified expatriates and that satisfies certain requirements. With respect to qualified expatriates in categories A or B, the plan must be a group health plan (whether or not insured). In contrast, with respect to qualified expatriates in category C, the plan must be health insurance coverage that is not a group health plan. In addition, consistent with section 3(d)(2)(A) of the EHCCA, the proposed regulations require that substantially all primary enrollees in the expatriate health plan must be qualified expatriates. The proposed regulations define a primary enrollee as the individual covered by the plan or policy whose eligibility for coverage is not due to that individual’s status as the spouse, dependent, or other beneficiary of another covered individual. However, notwithstanding this definition, an individual is not a primary enrollee if the individual is not a national of the United States and the individual resides in his or her country of citizenship. Further, the proposed regulations provide that, for this purpose, a “national of the United States” has the meaning used in the Immigration and Nationality Act (8 U.S.C. 1101 et. seq.) and 8 CFR parts 301 to 392, including U.S. citizens. Thus, for example, an individual born in American Samoa is a national of the United States at birth for purposes of the EHCCA and the proposed regulations.

Comments in response to Notice 2015–43 requested clarification of the “substantially all” enrollment requirement, with one comment suggesting that 93 percent of the enrollees would be an appropriate threshold. In response to the request for clarification, the proposed regulations provide that a plan satisfies the “substantially all” enrollment requirement if, on the first day of the plan year, less than 5 percent of the primary enrollees (or less than 5 primary enrollees if greater) are not qualified expatriates (effectively a 95 percent threshold). Consistent with section 3(d)(2)(B) of the EHCCA, the proposed regulations further provide that substantially all of the benefits provided under an expatriate health plan must be benefits that are not excepted benefits as described in 26

<sup>20</sup> 26 CFR 54.9815–2711(c), 29 CFR 2590.715–2711(c), 45 CFR 147.126(c).

CFR 54.9831–1(c), 29 CFR 2590.732(c), 45 CFR 146.145(b) and 148.220, as applicable. The Departments intend that the first day of the plan year approach, which has been used in other contexts, will be simple to administer.<sup>23</sup> Moreover, the 95% threshold has been used in certain other circumstances in applying a “substantially all” standard.<sup>24</sup> The Departments solicit comment on this regulatory approach and whether the current regulatory language is sufficient to protect against potential abuses, or whether any further anti-abuse provision is necessary.

Consistent with section 3(d)(2)(C) of the EHCCA, the proposed regulations also require that an expatriate health plan cover certain types of services. Specifically, an expatriate health plan must provide coverage for inpatient hospital services, outpatient facility services, physician services, and emergency services (comparable to emergency services coverage that was described in and offered under section 8903(1) of title 5, United States Code for plan year 2009). Coverage for such services must be available in certain countries depending on the type of qualified expatriates covered by the plan. The statute authorizes the Secretary of HHS, in consultation with the Secretary of the Treasury and Secretary of Labor, to designate other countries where coverage for such services must be made available to the qualified expatriate.

Consistent with section 3(d)(2)(D) of the EHCCA, the proposed regulations provide that in the case of an expatriate health plan, the plan sponsor must reasonably believe that benefits provided by the plan satisfy the minimum value requirements of section 36B(c)(2)(C)(ii) of the Code.<sup>25</sup> For this purpose, the proposed regulations provide that the plan sponsor is permitted to rely on the reasonable representations of the issuer or administrator regarding whether benefits offered by the group health plan or issuer satisfy the minimum value requirements unless the plan sponsor knows or has reason to know that the benefits fail to satisfy the minimum value requirements. Consistent with section 3(d)(2)(D) of the EHCCA, in the case of an expatriate health plan that provides dependent coverage of children, the proposed regulations provide that such coverage must be

available until the individual attains age 26, unless the individual is the child of a child receiving dependent coverage. Additionally, consistent with section 3(d)(2)(F)(ii) of the EHCCA, the plan or coverage must offer reimbursements for items or services in the local currency in eight or more countries.

Consistent with section 3(d)(2)(F) of the EHCCA, the proposed regulations also provide that the policy or coverage under an expatriate health plan must be issued by an expatriate health insurance issuer or administered by an expatriate health plan administrator. With respect to qualified expatriates in categories A or B (generally, individuals whose travel or relocation is related to their employment with an employer), the coverage must be under a group health plan (whether insured or self-insured). With respect to qualified expatriates in category C (generally, groups of similarly situated individuals travelling for certain tax-exempt purposes), the coverage must be under a policy issued by an expatriate health insurance issuer.

Finally, consistent with section 3(d)(2)(G) of the EHCCA, the proposed regulations provide that an expatriate health plan must satisfy the provisions of Chapter 100 of the Code, part 7 of subtitle B of title I of ERISA and title XXVII of the PHS Act that would otherwise apply if the ACA had not been enacted. Among other requirements, those provisions limited the ability of a group health plan or group health insurance issuer to impose preexisting condition exclusions (which are now prohibited for grandfathered and non-grandfathered group health plans and health insurance coverage offered in connection with such plans, and non-grandfathered individual health insurance coverage under the ACA), including a requirement that the period of any preexisting condition exclusion be reduced by the length of any period of creditable coverage the individual had without a 63-day break in coverage.

Prior to the enactment of the ACA, HIPAA and underlying regulations also generally required that plans and issuers provide certificates of creditable coverage when an individual ceased to be covered by a plan or policy and upon request. Following the enactment of the ACA, the regulations under these provisions have eliminated the requirement for providing certificates of creditable coverage beginning December 31, 2014, because the requirement is generally no longer relevant to plans and participants as a result of the prohibition on preexisting condition exclusions. The Departments recognize that reimposing the requirement to

provide certificates of creditable coverage on expatriate health plans would only be useful in situations in which an individual transferred from one expatriate health plan to another and that reimposing the requirement on all health plans would require certificates that would be unnecessary except in limited cases, such as for an individual who ceased coverage with a health plan or policy and began coverage under an expatriate health plan that imposed a preexisting condition exclusion. Because reimposing the requirement to provide certificates of creditable coverage would be inefficient and overly broad, and relevant in only limited circumstances, the proposed regulations do not require expatriate health plans to provide certificates of creditable coverage. However, expatriate health plans imposing a preexisting condition exclusion must still comply with certain limitations on preexisting condition exclusions that would otherwise apply if the ACA had not been enacted. Therefore, the proposed regulations require expatriate health plans to ensure that individuals who enroll in the expatriate health plan are provided an opportunity to demonstrate creditable coverage to offset any preexisting condition exclusion. For example, an email from the prior issuer (or former plan administrator or plan sponsor) providing information about past coverage could be sufficient confirmation of prior creditable coverage.

Comments in response to Notice 2015–43 requested clarification of the treatment of health coverage provided by a foreign government. Specifically, comments requested that health coverage provided by a foreign government be treated as minimum essential coverage under section 5000A of the Code, and that, for purposes of the employer shared responsibility provision of section 4980H of the Code, an offer of such coverage be treated as an offer of minimum essential coverage for certain foreign employees working in the United States. These issues are generally beyond the scope of these proposed regulations. Under the existing regulations under section 5000A(f)(1)(E) of the Code, there are procedures for health benefits coverage not otherwise designated under section 5000A(f)(1) of the Code as minimum essential coverage to be recognized by the Secretary of HHS, in coordination with the Secretary of the Treasury, as minimum essential coverage. The Secretary of HHS has provided that coverage under a group health plan

<sup>23</sup> 26 CFR 54.9831–1(b), 29 CFR 2590.732(b), 45 CFR 146.145(b).

<sup>24</sup> See e.g., 26 CFR 1.460–6(d)(4)(i)(D)(1).

<sup>25</sup> For this purpose, generally “minimum value” takes into account the provision of “essential health benefits” as defined in section 1302(b)(1) of the Affordable Care Act.

provided through insurance regulated by a foreign government is minimum essential coverage for expatriates who meet specified conditions.<sup>26</sup> Furthermore, plan sponsors of health coverage that is not recognized as minimum essential coverage through statute, regulation, or guidance may submit an application to CMS for minimum essential coverage recognition pursuant to 45 CFR 156.604.<sup>27</sup> For a complete list of coverage recognized by CMS as minimum essential coverage under section 5000A(f)(1)(E) of the Code, see <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Market-Reforms/minimum-essential-coverage.html>.

Comments also requested that policies sold by non-United States health insurance issuers be treated as minimum essential coverage under section 5000A of the Code, or as expatriate health plans. Section 3(d)(5)(A) of the EHCCA specifies that the terms “health insurance issuer” and “health insurance coverage” have the meanings given those terms by section 2791 of the PHS Act. Section 2791 of the PHS Act (and parallel provisions in section 9832(b) of the Code and section 733(b) of ERISA) define those terms by reference to an entity licensed to engage in the business of insurance in a State and subject to State law that regulates insurance. Under section 2791 of the PHS Act, the term “State” means each of the several States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands. Consistent with those provisions, these proposed regulations limit an expatriate health insurance issuer to a health insurance issuer within the meaning of those sections (and that meets the other requirements set forth in the proposed regulations). As such, a non-United States health insurance issuer does not qualify as an expatriate health insurance issuer within the meaning of the EHCCA, and coverage issued by a non-United States issuer that is not otherwise minimum essential coverage

is not minimum essential coverage pursuant to the EHCCA.

#### Definition of Expatriate Health Plan Administrator

The proposed regulations define “expatriate health plan administrator,” with respect to self-insured coverage, as an administrator of self-insured coverage that generally satisfies the same requirements as an “expatriate health insurance issuer.”

#### Definition of Qualified Expatriate

Consistent with section 3(d)(3) of the EHCCA, the proposed regulations define “qualified expatriate” as one of three types of individuals. The first type of qualified expatriate, a category A expatriate, is an individual who has the skills, qualifications, job duties, or expertise that has caused the individual’s employer to transfer or assign the individual to the United States for a specific and temporary purpose or assignment that is tied to the individual’s employment with the employer. A category A expatriate may only be an individual who: (1) The plan sponsor has reasonably determined requires access to health coverage and other related services and support in multiple countries, (2) is offered other multinational benefits on a periodic basis (such as tax equalization, compensation for cross-border moving expenses, or compensation to enable the individual to return to the individual’s home country), and (3) is not a national of the United States. The proposed regulations provide that an individual who is not expected to travel outside the United States at least one time per year during the coverage period would not reasonably “require access” to health coverage and other related services and support in multiple countries. Furthermore, under the proposed regulations, the offer of a one-time *de minimis* benefit would not meet the standard for the “periodic” offer of “other multinational benefits.”

Section 3(d)(3)(B) of the EHCCA provides that a second type of qualified expatriate, a category B expatriate, is an individual who works outside the United States for a period of at least 180 days in a consecutive 12-month period that overlaps with the plan year. A comment requested that the regulations clarify that the 12-month period could either be within a single plan year, or across two consecutive plan years. Consistent with the statutory language, the proposed regulations provide that a category B expatriate is an individual who is a national of the United States and who works outside the United States for at least 180 days in a

consecutive 12-month period that is within a single plan year, or across two consecutive plan years. Section 3(d)(2)(C)(ii) of the EHCCA requires an expatriate health plan provided to category B expatriates to cover certain specified services, such as inpatient and outpatient services, in the country in which the individual is “present in connection” with his employment. The Departments request comments on whether it would be helpful to provide further administrative clarification of this statutory language regarding the country or countries in which the services must be provided, and, if so, whether there are facts or circumstances that will present particular challenges in applying this rule.

Finally, consistent with section 3(d)(3)(C) of the EHCCA, the proposed regulations provide that a third type of qualified expatriate, a category C expatriate, is an individual who is a member of a group of similarly situated individuals that is formed for the purpose of traveling or relocating internationally in service of one or more of the purposes listed in section 501(c)(3) or (4) of the Code, or similarly situated organizations or groups, and meets certain other conditions.<sup>28</sup> A category C expatriate does not include an individual in a group that is formed primarily for the sale or purchase of health insurance coverage. To qualify as this type of qualified expatriate, the Secretary of HHS, in consultation with the Secretary of the Treasury and the Secretary of Labor, must determine that the group requires access to health coverage and other related services and support in multiple countries. The proposed regulations clarify that a category C expatriate does not include an individual whose international travel or relocation is related to employment. Thus, an individual whose travel is employment-related may be a qualified expatriate only in category A or B. The proposed regulations also provide that, in the case of a group organized to travel or relocate outside the United States, the individual must be expected to travel or reside outside the United States for at least 180 days in a consecutive 12-month period that overlaps with the policy year (or in the case of a policy year that is less than 12 months, at least

<sup>26</sup> See CMS Insurance Standards Bulletin Series. CCIIO Sub-Regulatory Guidance: Process for Obtaining Recognition as Minimum Essential Coverage (Oct. 31, 2013), available at <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/mec-guidance-10-31-2013.pdf>.

<sup>27</sup> See CMS Insurance Standards Bulletin Series. CCIIO Sub-Regulatory Guidance: Process for Obtaining Recognition as Minimum Essential Coverage (Oct. 31, 2013), available at <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/mec-guidance-10-31-2013.pdf>. See also CMS Insurance Standards Bulletin Series. CCIIO Sub-Regulatory Guidance: Minimum Essential Coverage.

<sup>28</sup> Code section 501(c)(3) describes an organization formed for religious, charitable, scientific, public safety, literary, or educational purposes, or to foster national or international amateur sports competition, or for the prevention of cruelty to children or animals, and not for political candidate campaign or legislative purposes or propaganda. Code section 501(c)(4) describes an organization operated exclusively for the promotion of social welfare.

half of the policy year), and in the case of a group organized to travel or relocate within the United States, the individual must be expected to travel or reside in the United States for not more than 12 months. The proposed regulations provide that a group of category C expatriates must also meet the test for having associational ties under section 2791(d)(3)(B) through (F) of the PHS Act (42 U.S.C. 300gg–91(d)(3)(B) through (F)).

For purposes of section 3(d)(3)(C)(iii) of the EHCCA, the proposed regulations provide that the Secretary of HHS, in consultation with the Secretary of the Treasury and the Secretary of Labor, has determined that, in the case of a group of similarly situated individuals that meets all of the criteria in the proposed regulations, the group requires access to health coverage and other related services and support in multiple countries.

Comments in response to Notice 2015–43 requested that category C expatriates not be limited to individuals expected to travel or reside in the United States for 12 or fewer months. While the EHCCA does not include a time limit for category C expatriates, section 3(e) of the EHCCA provides that the Departments “may promulgate regulations necessary to carry out this Act, including such rules as may be necessary to prevent inappropriate expansion of the exclusions under the Act from applicable laws and regulations.” In the group market, the EHCCA and the proposed regulations define a category A expatriate with respect to a “specific and temporary purpose or assignment” tied to the individual’s employment in the United States. It is the view of HHS, in consultation with the Departments of Labor and the Treasury, that similar safeguards are necessary in the individual market to prevent inappropriate expansion of the exception for category C expatriates.

Comments are requested on all aspects of the proposed definition of a category C expatriate. Comments are also requested on the time limit for category C expatriates being expected to travel or reside in the United States, and what standards, if any, may be adopted in lieu of the 12-month maximum that would ensure that the definition does not permit inappropriate expansion of the exception. For example, comments are requested on whether a “specific and temporary purpose” standard should be adopted for category C expatriates, consistent with the standard for category A expatriates, or whether category C expatriates should be expected to seek medical care outside

the United States at least one time per year in order to be considered to reasonably require access to health coverage and other related services and support in multiple countries. Comments are also requested on the proposed standard with respect to category C expatriates being expected to travel or reside outside the United States for at least 180 days in a consecutive 12-month period that overlaps with the policy year, and whether there are fact patterns in which the 12-month period could either be within a single policy year, or across two consecutive policy years.

#### **Definitions of Group Health Plan and United States**

Consistent with section 3(d)(5)(A) of the EHCCA, for purposes of applying the definition of expatriate health plan, “group health plan” means a group health plan as defined under 26 CFR 54.9831–1(a)(1), 29 CFR 2590.732(a)(1) or 45 CFR 146.145(a)(1), as applicable. Consistent with section 3(d)(4) of the EHCCA, the proposed regulations define “United States” to mean the 50 States, the District of Columbia and Puerto Rico.

#### **Section 9010 of the ACA**

Section 3(c)(1) of the EHCCA provides that, for purposes of the health insurance providers fee imposed by section 9010 of the ACA, a qualified expatriate enrolled in an expatriate health plan is not a United States health risk for calendar years after 2015. Section 3(c)(2) of the EHCCA provides a special rule applicable to calendar years 2014 and 2015. The Treasury Department and the IRS issued Notices 2015–29 and 2016–14 to address the definition of expatriate health plan for purposes of the health insurance providers fee imposed by section 9010 for the 2014, 2015, and 2016 fee years. No fee is due in the 2017 fee year because the Consolidated Appropriations Act suspends collection of the health insurance providers fee imposed by section 9010 of ACA for 2017.

These proposed regulations provide that, for any fee that is due on or after the date final regulations are published in the **Federal Register**, a qualified expatriate enrolled in an expatriate health plan as defined in these proposed regulations is not a United States health risk. These proposed regulations also authorize the IRS to specify in guidance in the Internal Revenue Bulletin the manner of determining excluded premiums for qualified expatriates in expatriate health plans. Until the date the final regulations are published in

the **Federal Register**, taxpayers may rely on these proposed regulations with respect to any fee that is due beginning with the 2018 fee year.

#### **Federal Tax Provision: Section 162(m)(6) of the Code**

Section 162(m)(6) of the Code, as added by section 9014 of the ACA, in general, limits to \$500,000 the allowable deduction for remuneration attributable to services performed by certain individuals for a covered health insurance provider. For taxable years beginning after December 31, 2012, section 162(m)(6)(C)(i) of the Code and 26 CFR 1.162–31(b)(4)(A) provide that a health insurance issuer is a covered health insurance provider if not less than 25 percent of the gross premiums that it receives from providing health insurance coverage during the taxable year are from minimum essential coverage. Section 3(a)(3) of the EHCCA provides that the provisions of the ACA (which include section 162(m)(6) of the Code) do not apply to expatriate health insurance issuers with respect to coverage offered by such issuers under expatriate health plans. Consistent with this rule, the proposed regulations exclude from the definition of the term “premium” for purposes of section 162(m)(6) of the Code amounts received in payment for coverage under an expatriate health plan. As a result, those amounts received are included in neither the numerator nor the denominator for purposes of determining whether the 25 percent standard under section 162(m)(6)(C)(i) of the Code and 26 CFR 1.162–31(b)(4)(A) is met, and they have no impact on whether a particular issuer is a covered health insurance provider.

#### **Federal Tax Provision: Section 4980I of the Code**

Section 3(b)(2) of the EHCCA provides that section 4980I of the Code applies to employer-sponsored coverage of a qualified expatriate who is assigned, rather than transferred, to work in the United States. As amended by section 101 of Division P of the Consolidated Appropriations Act, section 4980I of the Code first applies to coverage provided in taxable years beginning after December 31, 2019. Comments in response to Notice 2015–43 requested additional guidance on what it means for an employer to assign rather than transfer an employee. These proposed regulations do not address the interaction of the EHCCA and section 4980I of the Code because the Treasury Department and the IRS anticipate that this issue will be addressed in future

guidance promulgated under section 4980I of the Code.

**Federal Tax Provision: Section 5000A of the Code and Minimum Essential Coverage**

The proposed regulations provide that, beginning January 1, 2017, coverage under an expatriate health plan that provides coverage for a qualified expatriate qualifies as minimum essential coverage for all participants in the plan. If the expatriate health plan provides coverage to category A or category B expatriates, the coverage of any participant in the plan is treated as an eligible employer-sponsored plan under section 5000A(f)(2) of the Code. If the expatriate health plan provides coverage to category C expatriates, the coverage of any enrollee in the plan is treated as a plan in the individual market under section 5000A(f)(1)(C) of the Code.

**Federal Tax Provision: Sections 6055 and 6056 of the Code**

Section 3(b)(2) of the EHCCA permits the use of electronic media to provide the statements required under sections 6055 and 6056 of the Code to individuals for coverage under an expatriate health plan unless the primary insured has explicitly refused to receive the statement electronically. The proposed regulations provide that, for an expatriate health plan, the recipient is treated as having consented to receive the required statement electronically unless the recipient has explicitly refused to receive the statement in an electronic format. In addition, the proposed regulations provide that the recipient may explicitly refuse either electronically or in a paper document. For a recipient to be treated as having consented under this special rule, the furnisher must provide a notice in compliance with the general disclosure requirements under sections 6055 and 6056 that informs the recipient that the statement will be furnished electronically unless the recipient explicitly refuses to consent to receive the statement in electronic form. The notice must be provided to the recipient at least 30 days prior to the due date for furnishing of the first statement the furnisher intends to furnish electronically to the recipient. Absent receipt of this notice, a recipient will not be treated as having consented to electronic furnishing of statements. Treasury and IRS request comments on further guidance that will assist issuers and plan sponsors in providing this notice in the least burdensome manner while still ensuring that the recipient has sufficient information and

opportunity to opt out of the electronic reporting if the recipient desires. For example, Treasury and the IRS specifically request comments on whether the ability to provide this notice as part of the enrollment materials for the coverage would meet these goals.

**Federal Tax Provision: PCORTF Fee**

The proposed regulations provide that the excise tax under sections 4375 and 4376 of the Code (the PCORTF fee) does not apply to an expatriate health plan as defined at 26 CFR 54.9831-1(f)(3). Section 4375 of the Code limits the application of the fee to policies issued to individuals residing in the United States. Existing regulations under sections 4375, 4376, and 4377 of the Code exclude coverage under a plan from the fee if the plan is designed specifically to cover primarily employees who are working and residing outside the United States. A comment requested clarification about the existing PCORTF fee exemption for plans that primarily cover employees working and residing outside the United States. Consistent with the provisions of the EHCCA, the proposed regulations expand the exclusion from the PCORTF fee to also exclude an expatriate health plan regardless of whether the plan provides coverage for qualified expatriates residing or working in or outside the United States if the plan is an expatriate health plan.

**Section 1341 of the ACA: Transitional Reinsurance Program**

A comment also requested that the current exclusion under the PCORTF fee regulations for individuals working and residing outside the United States be applied to the transitional reinsurance fee under section 1341 of the ACA. Existing regulations relating to section 1341 of the ACA include an exception for certain expatriate health plans,<sup>29</sup> including expatriate group health coverage as defined by the Secretary of HHS and, for the 2015 and 2016 benefit years, self-insured group health plans with respect to which enrollment is limited to participants who reside outside their home country for at least six months of the plan year, and any covered dependents. HHS solicits comment on whether amendments are needed to 45 CFR 153.400(a)(1)(iii) to clarify the alignment with the EHCCA and exempt all expatriate plans from the requirement to make reinsurance contributions.

<sup>29</sup> 45 CFR 153.400(a)(1)(iii).

**Section 2718 of the PHS Act: MLR Program**

Section 2718 of the PHS Act, as added by sections 1001 and 10101 of the ACA, generally requires health insurance issuers to provide rebates to consumers if issuers do not achieve specified MLRs, as well as to submit an annual MLR report to HHS. The proposed regulations provide that expatriate policies described in 45 CFR 158.120(d)(4) continue to be subject to the reporting and rebate requirements of 45 CFR part 158, but update the description of expatriate policies in 45 CFR 158.120(d)(4) to exclude policies that are expatriate health plans under the EHCCA. Given this modification, issuers may find that the number of expatriate policies that remain subject to MLR requirements is low, and that it is administratively burdensome and there is no longer a qualitative justification for continuing separate reporting of such policies. Therefore, comments are requested on whether the treatment of expatriate policies for purposes of the MLR regulations should be amended so that expatriate policies that do not meet the definition of expatriate health plan under the EHCCA would not be required to be reported separately from other health insurance policies.

Section 833(c)(5) of the Code, as added by section 9016 of the ACA, and amended by section 102 of Division N of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235, 128 Stat. 2130), provides that section 833(a)(2) and (3) do not apply to any organization unless the organization's MLR for the taxable year was at least 85 percent. In describing the MLR computation under section 833(c)(5), the statute and implementing regulations provide that the elements in the MLR computation are to be "as reported under section 2718 of the Public Service Health Act." Accordingly, the proposed regulations under section 2718 of the PHS Act would effectively apply the EHCCA exemption to section 833(c)(5) of the Code by carving out expatriate health plans under the EHCCA from the section 833(c)(5) requirements as well.

**Excepted Benefits**

*Supplemental Health Insurance Coverage*

The proposed regulations incorporate the guidance from the Affordable Care Act Implementation FAQs Part XXIII addressing supplemental health insurance products that provide categories of benefits in addition to those in the primary coverage. Under the proposed regulations, if group or

individual supplemental health insurance coverage provides benefits for items and services not covered by the primary coverage (referred to as providing “additional categories of benefits”), the coverage would be considered to be designed “to fill gaps in primary coverage,” for purposes of being supplemental excepted benefits if none of the benefits provided by the supplemental policy are an EHB, as defined for purposes of section 1302(b) of the ACA, in the State in which the coverage is issued. Conversely, if any benefit provided by the supplemental policy is an EHB in the State where the coverage is issued, the insurance coverage would not be supplemental excepted benefits under the proposed regulations. This standard is proposed to apply only to the extent that the supplemental health insurance provides coverage of additional categories of benefits. Supplemental health insurance products that both fill in cost sharing in the primary coverage, such as coinsurance or deductibles, and cover additional categories of benefits that are not EHB, also would be considered supplemental excepted benefits under these proposed regulations provided all other criteria are met.

#### Travel Insurance

The Departments are aware that certain travel insurance products may include limited health benefits. However, these products typically are not designed as major medical coverage. Instead, the risks being insured relate primarily to: (1) The interruption or cancellation of a trip (2) the loss of baggage or personal effects; (3) damages to accommodations or rental vehicles; or (4) sickness, accident, disability, or death occurring during travel, with any health benefits usually incidental to other coverage.

Section 2791(c)(1)(H) of the PHS Act, section 733(c)(1)(H) of ERISA, and section 9832(c)(1)(H) of the Code provide that the Departments may, in regulations, designate as excepted benefits “benefits for medical care that are secondary or incidental to other insurance benefits.” Pursuant to this authority, and to clarify which types of travel-related insurance products are excepted benefits under the PHS Act, ERISA, and the Code, the proposed regulations provide that certain travel-related products that provide only incidental health benefits are excepted benefits. The proposed regulations define the term “travel insurance” as insurance coverage for personal risks incident to planned travel, which may include, but is not limited to, interruption or cancellation of a trip or

event, loss of baggage or personal effects, damages to accommodations or rental vehicles, and sickness, accident, disability, or death occurring during travel, provided that the health benefits are not offered on a stand-alone basis and are incidental to other coverage. For this purpose, travel insurance does not include major medical plans that provide comprehensive medical protection for travelers with trips lasting 6 months or longer, including, for example, those working overseas as an expatriate or military personnel being deployed. This definition is consistent with the definition of travel insurance under final regulations for the health insurance providers fee imposed by section 9010 of the ACA issued by the Treasury Department and the IRS,<sup>30</sup> which uses a modified version of the National Association of Insurance Commissioners (NAIC) definition of travel insurance.

#### Hospital Indemnity and Other Fixed Indemnity Insurance

These proposed regulations also include an amendment to the “noncoordinated excepted benefits” category as it relates to hospital indemnity and other fixed indemnity insurance in the group market. Since the issuance of final regulations defining excepted benefits, the Departments have become aware of some hospital indemnity and other fixed indemnity insurance policies that provide comprehensive benefits related to health care costs. In addition, although hospital indemnity and other fixed indemnity insurance under section 2791 of the PHS Act, section 733 of ERISA, and section 9832 of the Code is not intended to be major medical coverage, the Departments are aware that some group health plans that provide coverage through hospital indemnity or other fixed indemnity insurance policies that meet the conditions necessary to be an excepted benefit have made representations to participants that the coverage is minimum essential coverage under section 5000A of the Code. The Departments are concerned that some individuals may incorrectly understand these policies to be comprehensive major medical coverage that would be considered minimum essential coverage.

To avoid confusion among group health plan enrollees and potential enrollees, the proposed regulations revise the conditions necessary for hospital indemnity and other fixed indemnity insurance in the group market to be excepted benefits so that

any application or enrollment materials provided to enrollees and potential enrollees at or before the time enrollees and potential enrollees are given the opportunity to enroll in the coverage must include a statement that the coverage is a supplement to, rather than a substitute for, major medical coverage and that a lack of minimum essential coverage may result in an additional tax payment. The proposed regulations include specific language that must be used by group health plans and issuers of group health insurance coverage to satisfy this notice requirement, which is consistent with the notice requirement for individual market fixed indemnity coverage under regulations issued by HHS.<sup>31</sup> The Departments request comments on this proposed notice requirement as well as whether any additional requirements should be added to prevent confusion among enrollees and potential enrollees regarding the limited coverage provided by hospital indemnity and other fixed indemnity insurance. The Departments anticipate that conforming changes will be made in the final regulations to ensure the notice language in the individual market is consistent with the notice language in the group market, and solicit comments on this approach.

Additionally, the Departments have become aware of hospital indemnity or other fixed indemnity insurance policies that provide benefits for doctors’ visits at a fixed amount per visit, for prescription drugs at a fixed amount per drug, or for certain services at a fixed amount per day but in amounts that vary by the type of service. These types of policies do not meet the condition that benefits be provided on a per day (or per other time period, such as per week) basis. Accordingly, the proposed regulations clarify this standard by stating that the amount of benefits provided must be determined without regard to the type of items or services received. The proposed regulations add two examples demonstrating that group health plans and issuers of group health insurance coverage that provide coverage through hospital indemnity or fixed indemnity insurance policies that provide benefits based on the type of item or services received do not meet the conditions necessary to be an excepted benefit. The first example would incorporate into regulations guidance previously provided by the Departments in Affordable Care Act Implementation FAQs Part XI, which clarified that if a policy provides benefits in varying amounts based on the type of procedure

<sup>30</sup> 26 CFR 57.2(h)(4).

<sup>31</sup> 45 CFR 148.220(b)(4)(iv).

or item received, the policy does not satisfy the condition that benefits be provided on a per day (or per other time period, such as per week) basis. The second example demonstrates that a hospital indemnity or other fixed indemnity insurance policy that provides benefits for certain services at a fixed amount per day, but in varying amounts depending on the type of service, does not meet the condition that benefits be provided on a per day (or per other time period, such as per week) basis. The Departments request comments on these examples specifically, as well as on the requirement that hospital indemnity and other fixed indemnity insurance in the group market that are excepted benefits must provide benefits on a per day (or per other time period, such as per week) basis in an amount that does not vary based on the type of items or services received. The Departments also request comments on whether the conditions for hospital indemnity or other fixed indemnity insurance to be considered excepted benefits should be more substantively aligned between the group and individual markets. For example, the requirements for hospital indemnity or other fixed indemnity insurance in the individual market could be modified to be consistent with the group market provisions of these proposed regulations by limiting payment strictly on a per-period basis and not on a per-service basis.

### Specified Disease Coverage

The Departments have been asked whether a policy covering multiple specified diseases or illnesses may be considered to be excepted benefits. The statute provides that the noncoordinated excepted benefits category includes “coverage of a specified disease or illness” if the coverage meets the conditions for being offered as independent, noncoordinated benefits, and the Departments’ implementing regulations identify cancer-only policies as one example of specified disease coverage.<sup>32</sup> The Departments are concerned that individuals who purchase a specified disease policy covering multiple diseases or illnesses (including policies that cover one overarching medical condition such as “mental illness” as opposed to a specific condition such as depression) may incorrectly believe they are purchasing comprehensive medical coverage when, in fact, these policies may not include many of the important consumer protections under the PHS

Act, ERISA, and the Code. The Departments solicit comments on this issue and on whether, if such policies are permitted to be considered excepted benefits, protections are needed to ensure such policies are not mistaken for comprehensive medical coverage. For example, the Departments solicit comments on whether to limit the number of diseases or illnesses that may be covered in a specified disease policy that is considered to be excepted benefits or whether issuers should be required to disclose that such policies are not minimum essential coverage under section 5000A(f) of the Code.

### Short-Term, Limited-Duration Insurance

Under existing regulations, short-term, limited-duration insurance means “health insurance coverage provided pursuant to a contract with an issuer that has an expiration date specified in the contract (taking into account any extensions that may be elected by the policyholder without the issuer’s consent) that is less than 12 months after the original effective date of the contract.”<sup>33</sup> Before enactment of the ACA, short-term, limited-duration insurance was an important means for individuals to obtain health coverage when transitioning from one job to another (and from one group health plan to another) or in a similar situation. But with the guaranteed availability of coverage and special enrollment period requirements in the individual health insurance market under the ACA, short-term, limited-duration insurance is no longer the only means to obtain transitional coverage.

The Departments recently have become aware that short-term, limited-duration insurance is being sold to address situations other than the situations that the exception was initially intended to address.<sup>34</sup> In some instances individuals are purchasing this coverage as their primary form of health coverage and, contrary to the intent of the 12-month coverage limitation in the current definition of short-term, limited-duration insurance, some issuers are providing renewals of the coverage that extend the duration beyond 12 months. The Departments are concerned that these policies, because they are exempt from market reforms, may have significant limitations, such as lifetime and annual dollar limits on

EHBs and pre-existing condition exclusions, and therefore may not provide meaningful health coverage. Further, because these policies can be medically underwritten based on health status, healthier individuals may be targeted for this type of coverage, thus adversely impacting the risk pool for ACA-compliant coverage.

To address the issue of short-term, limited-duration insurance being sold as a type of primary coverage, the proposed regulations revise the definition of short-term, limited-duration insurance so that the coverage must be less than three months in duration, including any period for which the policyholder renews or has an option to renew with or without the issuer’s consent. The proposed regulations also provide that a notice must be prominently displayed in the contract and in any application materials provided in connection with enrollment in such coverage with the following language: THIS IS NOT QUALIFYING HEALTH COVERAGE (“MINIMUM ESSENTIAL COVERAGE”) THAT SATISFIES THE HEALTH COVERAGE REQUIREMENT OF THE AFFORDABLE CARE ACT. IF YOU DON’T HAVE MINIMUM ESSENTIAL COVERAGE, YOU MAY OWE AN ADDITIONAL PAYMENT WITH YOUR TAXES.

This change would align the definition more closely with the initial intent of the regulation: To refer to coverage intended to fill temporary coverage gaps when an individual transitions between primary coverage. Further, limiting the coverage to less than three months improves coordination with the exemption from the individual shared responsibility provision of section 5000A of the Code for gaps in coverage of less than three months (the short coverage gap exemption), 26 CFR 1.5000A–3. Under current law, individuals who are enrolled in short-term, limited-duration coverage instead of minimum essential coverage for three months or more are generally not eligible for the short coverage gap exemption. The proposed regulations help ensure that individuals who purchase short-term, limited-duration coverage will still be eligible for the short coverage gap exemption (assuming other requirements are met) during the temporary coverage period.

In addition to proposing to reduce the length of short-term, limited-duration insurance to less than three months, the proposed regulations add the words “with or” in front of “without the issuer’s consent” to address the Departments’ concern that some issuers are taking liberty with the current

<sup>33</sup> 26 CFR 54.9801–2, 29 CFR 2590.702–2, 45 CFR 144.103.

<sup>34</sup> See e.g., Mathews, Anna W. “Sales of Short-Term Health Policies Surge,” *The Wall Street Journal* April 10, 2016, available at <http://www.wsj.com/articles/sales-of-short-term-health-policies-surge-1460328539>.

<sup>32</sup> 26 CFR 54.9831–1(c)(4), 29 CFR 2590.732(c)(4), 45 CFR 146.145(b)(4) and 148.220(b)(3).

definition of short-term, limited-duration insurance either by automatically renewing such policies or having a simplified reapplication process with the result being that such coverage lasts much longer than 12 months and serves as an individual's primary coverage but does not contain the important protections of the ACA. As indicated above, this type of coverage should only be sold for the purpose of providing coverage on a short-term basis such as filling in coverage gaps as a result of transitioning from one group health plan to another. The addition of the words "with or" clarifies that short-term, limited-duration insurance must be less than 3 months in total taking into account any option to renew or to reapply for the same or similar coverage.

The Departments seek comment on this proposal, including information and data on the number of short-term, limited-duration insurance policies offered for sale in the market, the types of individuals who typically purchase this coverage, and the reasons for which they purchase it.

#### **Definition of EHB for Purposes of the Prohibition on Lifetime and Annual Limits**

On November 18, 2015, the Departments issued final regulations implementing section 2711 of the PHS Act.<sup>35</sup> The final regulations provide that, for plan years beginning on or after January 1, 2017, a plan or issuer that is not required to provide EHBs must define EHB, for purposes of the prohibition on lifetime and annual dollar limits, in a manner consistent with any of the 51 EHB base-benchmark plans applicable in a State or the District of Columbia, or one of the three FEHBP base-benchmarks, as specified under 45 CFR 156.100.

The final regulations under section 2711 of the PHS Act include a reference to selecting a "base-benchmark" plan, as specified under 45 CFR 156.100, for purposes of determining which benefits cannot be subject to lifetime or annual dollar limits. The base-benchmark plan selected by a State or applied by default under 45 CFR 156.100, however, may not reflect the complete definition of EHB in the applicable State. For that reason, the Departments propose to amend the regulations at 26 CFR 54.9815–2711(c), 29 CFR 2590.715–2711(c), and 45 CFR 147.126(c) to refer to the provisions that capture the complete definition of EHB in a State. Specifically, the Departments propose to replace the phrase "in a manner

consistent with one of the three Federal Employees Health Benefit Program (FEHBP) options as defined by 45 CFR 156.100(a)(3) or one of the base-benchmark plans selected by a State or applied by default pursuant to 45 CFR 156.100" in each of the regulations with the following: "In a manner that is consistent with (1) one of the EHB-benchmark plans applicable in a State under 45 CFR 156.110, and includes coverage of any additional required benefits that are considered essential health benefits consistent with 45 CFR 155.170(a)(2); or (2) one of the three Federal Employees Health Benefit Program (FEHBP) options as defined by 45 CFR 156.100(a)(3), supplemented, as necessary, to meet the standards in 45 CFR 156.110." This change reflects the possibility that base-benchmark plans, including the FEHBP plan options, could require supplementation under 45 CFR 156.110, and ensures the inclusion of State-required benefit mandates enacted on or before December 31, 2011 in accordance with 45 CFR 155.170, which when coupled with a State's EHB-benchmark plan, establish the definition of EHB in that State under regulations implementing section 1302(b) of the ACA.<sup>36</sup> The Departments seek comment on the requirement that, when one of the FEHBP plan options is selected as the benchmark, it would be supplemented, as needed, to ensure coverage in all ten statutory EHB categories, and the benchmark plan options that should be available for this purpose.

#### **Proposed Applicability Date and Reliance**

Except as otherwise provided herein, these proposed regulations are proposed to be applicable for plan years (or, in the individual market, policy years) beginning on or after January 1, 2017. Issuers, employers, administrators, and individuals are permitted to rely on these proposed regulations pending the applicability date of final regulations in

the **Federal Register**. To the extent final regulations or other guidance is more restrictive on issuers, employers, administrators, and individuals than these proposed regulations, the final regulations or other guidance will be applied without retroactive effect and issuers, employers, administrators, and individuals will be provided sufficient time to come into compliance with the final regulations.

#### **III. Economic Impact and Paperwork Burden**

##### *A. Summary—Department of Labor and Department of Health and Human Services*

As stated above, the proposed regulations would provide guidance on the rules for expatriate health plans, expatriate health plan issuers, and qualified expatriates under the EHCCA. The EHCCA generally provides that the requirements of the ACA do not apply with respect to expatriate health plans, expatriate health insurance issuers for coverage under expatriate health plans, and employers in their capacity as plan sponsors of expatriate health plans.

The proposed regulations address how certain requirements relating to minimum essential coverage under section 5000A of the Code, the health care reporting provisions of sections 6055 and 6056 of the Code, and the health insurance providers fee imposed by section 9010 of the ACA continue to apply subject to certain provisions while providing that the excise tax under sections 4375 and 4376 of the Code do not apply to expatriate health plans.

The proposed regulations also propose amendments to the Departments' regulations concerning excepted benefits, which would specify the conditions for supplemental health insurance products that are designed "to fill gaps in primary coverage" by providing additional categories of benefits (as opposed to filling in gaps in cost sharing) to constitute supplemental excepted benefits, and clarify that certain travel-related insurance products that provide only incidental health benefits constitute excepted benefits. The proposed regulations also require that, to be considered hospital indemnity or other fixed indemnity insurance in the group market, any application or enrollment materials provided to participants at or before the time participants are given the opportunity to enroll in the coverage must include a statement that the coverage is a supplement to, rather than a substitute for, major medical coverage and that a lack of minimum essential

<sup>36</sup> In the HHS Notice of Benefit and Payment Parameters for 2016 published February 27, 2015 (80 FR 10750), HHS instructed States to select a new base-benchmark plan to take effect beginning with plan or policy years beginning in 2017. The new final EHB base-benchmark plans selected as a result of this process are publicly available at [downloads.cms.gov/ccio/](http://downloads.cms.gov/ccio/) *Final%20List%20of%20BMPs\_15\_10\_21.pdf*. Additional information about the new base-benchmark plans, including plan documents and summaries of benefits, is available at [www.cms.gov/CCIO/Resources/Data-Resources/ehb.html](http://www.cms.gov/CCIO/Resources/Data-Resources/ehb.html). The definition of EHB in each of the 50 states and the District of Columbia is based on the base-benchmark plan, and takes into account any additions to the base-benchmark plan, such as supplementation under 45 CFR 156.110, and State-required benefit mandates in accordance with 45 CFR 155.170.

<sup>35</sup> 80 FR 72192.

coverage may result in an additional tax payment. Further, the regulations clarify that hospital indemnity and other fixed indemnity insurance must pay a fixed dollar amount per day (or per other time period, such as per week) regardless of the type of items or services received.

The regulations also propose revisions to the definition of short-term, limited-duration insurance so that the coverage has to be less than 3 months in duration (as opposed to the current definition of less than 12 months in duration), and that a notice must be prominently displayed in the contract and in any application materials provided in connection with the coverage that provides that such coverage is not minimum essential coverage.

The proposed regulations also include amendments to 45 CFR part 158 to clarify that the MLR reporting requirements do not apply to expatriate health plans under the EHCCA.

Finally, the proposed regulations propose to amend the definition of “essential health benefits” for purposes of the prohibition of annual and lifetime dollar limits for group health plans and health insurance issuers that are not required to provide essential health benefits.

The Departments are publishing these proposed regulations to implement the protections intended by the Congress in the most economically efficient manner possible. The Departments have examined the effects of this rule as required by Executive Order 13563 (76 FR 3821, January 21, 2011), Executive Order 12866 (58 FR 51735, September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), Executive Order 13132 on Federalism, and the Congressional Review Act (5 U.S.C. 804(2)).

#### *B. Executive Orders 12866 and 13563—Department of Labor and Department of Health and Human Services*

Executive Order 12866 (58 FR 51735) directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity). Executive Order 13563 (76 FR 3821, January 21, 2011) is supplemental to and reaffirms the principles, structures, and definitions governing regulatory review as established in Executive Order 12866.

Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action that is likely to result in a final rule—(1) having an annual effect on the economy of \$100 million or more in any one year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as “economically significant”); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

A regulatory impact analysis (RIA) must be prepared for rules with economically significant effects (for example, \$100 million or more in any 1 year), and a “significant” regulatory action is subject to review by the OMB. The Departments have determined that this regulatory action is not likely to have economic impacts of \$100 million or more in any one year, and therefore is not significant within the meaning of Executive Order 12866. The Departments expect the impact of these proposed regulations to be limited because they do not require any additional action or impose any requirements on issuers, employers and plan sponsors.

#### 1. Need for Regulatory Action

Consistent with the EHCCA, enacted as Division M of the Consolidated Clarification Continuing Appropriations Act, 2015 Public Law 113–235 (128 Stat. 2130), these proposed regulations provide that the market reform provisions enacted as part of the ACA generally do not apply to expatriate health plans, any employer solely in its capacity as a plan sponsor of an expatriate health plan, and any expatriate health insurance issuer with respect to coverage under an expatriate health plan. Further, the proposed regulations define the benefit and administrative requirements for expatriate health issuers, expatriate health plans, and qualified expatriates and provide clarification regarding the applicability of certain fee and reporting requirements under the Code.

Consistent with section 2 of the EHCCA, these proposed regulations are necessary to carry out the intent of Congress that (1) American expatriate

health insurance issuers should be permitted to compete on a level playing field in the global marketplace; (2) the global competitiveness of American companies should be encouraged; and (3) in implementing the health insurance providers fee imposed by section 9010 of the ACA and other provisions of the ACA, the unique and multinational features of expatriate health plans and the United States companies that operate such plans and the competitive pressures of such plans and companies should continue to be recognized.

In response to feedback the Departments have received from stakeholders, the proposed regulations would also clarify the conditions for supplemental health insurance and travel insurance to be considered excepted benefits. These clarifications will provide health insurance issuers offering supplemental insurance coverage and travel insurance products with a clearer understanding of whether these types of coverage are subject to the market reforms under title XXVII of the PHS Act, part 7 of ERISA, and Chapter 100 of the Code. The proposed regulations also would amend the definition of short-term, limited-duration insurance and impose a new notice requirement in response to recent reports that this type of coverage is being sold for purposes other than for which the exclusion for short-term, limited-duration insurance was initially intended to cover.

#### 2. Summary of Impacts

These proposed regulations would implement the rules for expatriate health plans, expatriate health insurance issuers, and qualified expatriates under the EHCCA. The proposed regulations also outline the conditions for travel insurance and supplemental insurance coverage to be considered excepted benefits, and revise the definition of short-term, limited-duration insurance.

Based on the NAIC 2014 Supplemental Health Care Exhibit Report,<sup>37</sup> which generally uses the definition of expatriate coverage in the MLR final rule at 45 CFR 158.120(d)(4),<sup>38</sup> there are an estimated

<sup>37</sup> NAIC, 2014 Supplemental Health Care Exhibit Report, Volume 1 (2015), available at [http://www.naic.org/documents/prod\\_serv\\_statistical\\_hcs\\_zb.pdf](http://www.naic.org/documents/prod_serv_statistical_hcs_zb.pdf).

<sup>38</sup> Section 45 CFR 158.120(d)(4) defines expatriate policies as predominantly group health insurance policies that provide coverage to employees, substantially all of whom are: (1) Working outside their country of citizenship; (2) working outside their country of citizenship and outside the employer’s country of domicile; or (3) non-U.S. citizens working in their home country.

eight issuers (one issuer in the small group market and seven issuers in the large group market) domiciled in the United States that provide expatriate health plans for approximately 270,349 enrollees. While the Departments acknowledge that some expatriate health insurance issuers and employers in their capacity as plan sponsor of an expatriate health plan may incur costs in order to comply with certain provisions of the EHCCA and these proposed regulations, as discussed below, the Departments believe that these costs will be relatively insignificant and limited.

The vast majority of expatriate health plans described in the EHCCA would qualify as expatriate health plans under the transitional relief provided in the Departments' Affordable Care Act Implementation FAQs Part XVIII, Q&A-6 and Q&A-7. The FAQs provide that expatriate health plans with plan years ending on or before December 31, 2016 are exempt from the ACA market reforms and provide that coverage provided under an expatriate group health plan is a form of minimum essential coverage under section 5000A of the Code. The EHCCA permanently exempts expatriate health plans with plan or policy years beginning on or after July 1, 2015 from the ACA market reform requirements and provides that coverage provided under an expatriate health plan is a form of minimum essential coverage under section 5000A of the Code.

Because the Departments believe that most, if not all, expatriate health plans described in the EHCCA would qualify as expatriate health plans under the Departments' previous guidance, and the proposed regulations codify the provisions of the EHCCA by making the temporary relief in the Departments' Affordable Care Act Implementation FAQs Part XVIII, Q&A-6 and Q&A-7 permanent for specified expatriate health plans, the Departments believe that the proposed regulations will result in only marginal, if any, impact on these plans. Furthermore, the Departments believe the proposed regulations outlining the conditions for travel insurance and supplemental insurance coverage to be considered excepted benefits are consistent with prevailing industry practice and will not result in significant cost to health insurance issuers of these products.

The Departments believe that any costs incurred by issuers of short-term, limited-duration insurance and hospital indemnity and other fixed indemnity insurance to include the required notice in application or enrollment materials will be negligible since the Departments

have provided the exact text for the notice. Further, the Departments note that issuers of hospital indemnity and other fixed indemnity insurance in the individual market already provide a similar notice.

As a result, the Departments have concluded that the impacts of these proposed regulations are not economically significant. The Departments request comments on the assumptions used to evaluate the economic impact of these proposed regulations, including specific data and information on the number of expatriate health plans.

#### *C. Paperwork Reduction Act*

##### *1. Department of the Treasury*

The collection of information in these proposed regulations are in 26 CFR 1.6055-2(a)(8) and 301.6056-2(a)(8). The collection of information in these proposed regulations relates to statements required to be furnished to a responsible individual under section 6055 of the Code and statements required to be furnished to an employee under section 6056 of the Code. The collection of information in these proposed regulations would, in accordance with the EHCCA, permit a furnisher to furnish the required statements electronically unless the recipient has explicitly refused to consent to receive the statement in an electronic format. The collection of information contained in this notice of proposed rulemaking will be taken into account and submitted to the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) in connection with the next review of the collection of information for IRS Form 1095-B (OMB # 1545-2252) and IRS Form 1095-C (OMB # 1545-2251).

Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by August 9, 2016. Comments are sought on whether the proposed collection of information is necessary for the proper performance of the IRS, including whether the information will have practical utility; the accuracy of the estimated burden associated with the proposed collection of information; how the quality, utility, and clarity of the information to be collected may be

enhanced; how the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques and other forms of information technology; and estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information. Comments on the collection of information should be received by August 9, 2016.

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

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

##### *2. Department of the Treasury, Department of Labor, and Department of Health and Human Services*

The proposed regulations provide that to be considered hospital or other fixed indemnity excepted benefits in the group market for plan years beginning on or after January 1, 2017, a notice must be included in any application or enrollment materials provided to participants at or before the time participants are given the opportunity to enroll in the coverage, indicating that the coverage is a supplement to, rather than a substitute for major medical coverage and that a lack of minimum essential coverage may result in an additional tax payment. The proposed regulations also provide that to be considered short-term, limited-duration insurance for policy years beginning on or after January 1, 2017, a notice must be prominently displayed in the contract and in any application materials, stating that the coverage is not minimum essential coverage and that failure to have minimum essential coverage may result in an additional tax payment. The Departments have provided the exact text for these notice requirements and the language will not need to be customized. The burden associated with these notices is not subject to the Paperwork Reduction Act of 1995 in accordance with 5 CFR 1320.3(c)(2) because they do not contain a "collection of information" as defined in 44 U.S.C. 3502(11).

#### *D. Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes

certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a proposed rule is not likely to have a significant economic impact on a substantial number of small entities, section 603 of RFA requires that the agency present an initial regulatory flexibility analysis at the time of the publication of the notice of proposed rulemaking describing the impact of the rule on small entities and seeking public comment on such impact. Small entities include small businesses, organizations and governmental jurisdictions.

The RFA generally defines a “small entity” as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA) (13 CFR 121.201); (2) a nonprofit 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.”) The Departments use as their measure of significant economic impact on a substantial number of small entities a change in revenues of more than 3 to 5 percent.

These proposed regulations are not likely to impose additional costs on small entities. According to SBA size standards, entities with average annual receipts of \$38.5 million or less would be considered small entities for these North American Industry Classification System codes. The Departments believe that, since the majority of small issuers belong to larger holding groups, many if not all are likely to have non-health lines of business that would result in their revenues exceeding \$38.5 million. Therefore, the Departments certify that the proposed regulations will not have a significant impact on a substantial number of small entities. In addition, section 1102(b) of the Social Security Act requires agencies to prepare a regulatory impact analysis if a 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 604 of the RFA. These proposed regulations would not affect small rural hospitals. Therefore, the Departments have determined that these proposed regulations would not have a significant impact on the operations of a substantial number of small rural hospitals.

#### *E. Special Analysis—Department of the Treasury*

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

Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

#### *F. Unfunded Mandates Reform Act*

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*), as well as Executive Order 12875, these proposed rules do not include any Federal mandate that may result in expenditures by State, local, or tribal governments, or the private sector, which may impose an annual burden of \$146 million adjusted for inflation since 1995.

#### *G. Federalism—Department of Labor and Department of Health and Human Services*

Executive Order 13132 outlines fundamental principles of federalism. It requires adherence to specific criteria by Federal agencies in formulating and implementing policies that have “substantial direct effects” on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with State and local officials, and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the final regulation.

In the Departments’ view, these proposed regulations do not have federalism implications, because they do not have direct effects on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among various levels of government.

#### *H. Congressional Review Act*

These proposed regulations are subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of

1996 (5 U.S.C. 801 *et seq.*), and, if finalized, will be transmitted to the Congress and to the Comptroller General for review in accordance with such provisions.

#### *I. Statement of Availability of IRS Documents*

IRS Revenue Procedures, Revenue Rulings notices, and other guidance cited in this document are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or by visiting the IRS Web site at <http://www.irs.gov>.

#### **IV. Statutory Authority**

The Department of the Treasury regulations are proposed to be adopted pursuant to the authority contained in sections 7805 and 9833 of the Code.

The Department of Labor regulations are proposed pursuant to the authority contained in 29 U.S.C. 1135, and 1191c; Secretary of Labor’s Order 1–2011, 77 FR 1088 (Jan. 9, 2012).

The Department of Health and Human Services regulations are proposed to be adopted pursuant to the authority contained in sections 2701 through 2763, 2791, and 2792 of the PHS Act (42 U.S.C. 300gg through 300gg–63, 300gg–91, and 300gg–92), as amended.

#### **List of Subjects**

##### *26 CFR Part 1*

Income taxes.

##### *26 CFR Part 46*

Excise taxes, Health care, Health insurance, Pensions, Reporting and recordkeeping requirements.

##### *26 CFR Part 54*

Pension and excise taxes.

##### *26 CFR Part 57*

Health insurance providers fee.

##### *26 CFR Part 301*

Procedure and administration.

##### *29 CFR Part 2590*

Continuation coverage, Disclosure, Employee benefit plans, Group health plans, Health care, Health insurance, Medical child support, Reporting and recordkeeping requirements.

##### *45 CFR Parts 144, 146 and 147*

Health care, Health insurance, Reporting and recordkeeping requirements.

##### *45 CFR Part 148*

Administrative practice and procedure, Health care, Health

insurance, Penalties, Reporting and recordkeeping requirements.

**45 CFR Part 158**

Health insurance, Medical loss ratio, Reporting and rebate requirements.

**John Dalrymple,**

*Deputy Commissioner for Services and Enforcement, Internal Revenue Service.*

Signed this 1st day of June 2016.

**Phyllis C. Borzi,**

*Assistant Secretary, Employee Benefits Security Administration, Department of Labor.*

Dated: June 2, 2016.

**Andrew M. Slavitt,**

*Acting Administrator, Centers for Medicare & Medicaid Services.*

Dated: June 3, 2016.

**Sylvia M. Burwell,**

*Secretary, Department of Health and Human Services.*

**DEPARTMENT OF THE TREASURY**

**Internal Revenue Service**

**Proposed Amendments to the Regulations**

Accordingly, 26 CFR parts 1, 46, 54, 57, and 301 are proposed to be amended as follows:

**PART 1—INCOME TAXES**

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

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

■ 2. Section 1.162–31 is amended by adding paragraph (b)(5)(v) to read as follows:

**§ 1.162–31 The \$500,000 deduction limitation for remuneration provided by certain health insurance providers.**

\* \* \* \* \*

(b) \* \* \*

(5) \* \* \*

(v) *Expatriate health plan coverage.*

For purposes of this section, amounts received in payment for expatriate health plan coverage, as defined in § 54.9831–1(f)(3), are not premiums.

\* \* \* \* \*

■ 3. Section 1.5000A–2 is amended by adding paragraphs (c)(1)(i)(D) and (d)(3) to read as follows:

**§ 1.5000A–2 Minimum essential coverage.**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(i) \* \* \*

(D) A group health plan that is an expatriate health plan within the meaning of § 54.9831–1(f)(3) of this chapter if the requirements of § 54.9831–1(f)(3)(i) of this chapter are met by providing coverage for qualified

expatriates described in § 54.9831–1(f)(6)(i) or (ii) of this chapter.

\* \* \* \* \*

(d) \* \* \*

(3) *Certain expatriate health plans.* An expatriate health plan within the meaning of § 54.9831–1(f)(3) of this chapter that is not an eligible employer-sponsored plan under paragraph (c)(1)(i)(D) of this section is a plan in the individual market.

\* \* \* \* \*

■ 4. Section 1.6055–2 is amended by adding paragraph (a)(8) to read as follows:

**§ 1.6055–2 Electronic furnishing of statements.**

(a) \* \* \*

(8) *Special rule for expatriate health plan coverage—(i) In general.* In the case of an individual covered under an expatriate health plan (within the meaning of § 54.9831–1(f)(3) of this chapter), the recipient is treated as having consented under paragraph (a)(2) of this section unless the recipient has explicitly refused to consent to receive the statement in an electronic format. The refusal to consent may be made electronically or in a paper document. A recipient's request for a paper statement is treated as an explicit refusal to receive the statement in electronic format. A furnisher relying on this paragraph (a)(8) must satisfy the requirements of paragraphs (a)(3) through (7) of this section, except that the statement required under paragraph (a)(3) must be provided at least 30 days prior to the time for furnishing under § 1.6055–1(g)(4)(i)(A) of this chapter of the first statement that the furnisher intends to furnish electronically to the recipient, and the other requirements of paragraph (a)(3) are modified to reflect that the statement will be furnished electronically unless the recipient explicitly refuses to consent to receive the statement in an electronic format.

(ii) *Manner and time of notifying recipient.* The IRS may specify in other guidance published in the Internal Revenue Bulletin the manner and timing for the initial notification of recipients that the statement required under paragraph (a)(3) of this section will be furnished electronically unless the recipient explicitly refuses to consent to receive the statement in an electronic format. See § 601.601(d)(2)(ii)(B) of this chapter.

(iii) *Effective/applicability date.* The provisions of this paragraph (a)(8) apply as of January 1, 2017.

\* \* \* \* \*

**PART 46—EXCISE TAXES, HEALTH CARE, HEALTH INSURANCE, PENSIONS, REPORTING AND RECORDKEEPING**

■ 5. The authority citation for part 46 continues to read as follows:

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

■ 6. Section 46.4377–1 is amended by redesignating paragraph (c) as paragraph (d) and adding new paragraph (c) to read as follows:

**§ 46.4377–1. Definitions and special rules.**

\* \* \* \* \*

(c) *Treatment of expatriate health plans.* For policy years and plan years that end after January 1, 2017, the fees imposed by sections 4375 and 4376 do not apply to an expatriate health plan within the meaning of § 54.9831–1(f)(3).

\* \* \* \* \*

**PART 54—PENSION AND EXCISE TAXES**

■ 7. The authority citation for part 54 continues to read in part as follows:

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

■ 8. Section 54.9801–2 is amended by:

- a. Adding in alphabetical order definitions for “expatriate health insurance issuer”, “expatriate health plan”, and “qualified expatriate;”
- b. Revising the definition of “short-term, limited-duration insurance”; and
- c. Adding in alphabetical order a definition for “travel insurance”.

The additions and revisions read as follows:

**§ 54.9801–2 Definitions.**

\* \* \* \* \*

*Expatriate health insurance issuer* means an expatriate health insurance issuer within the meaning of § 54.9831–1(f)(2).

*Expatriate health plan* means an expatriate health plan within the meaning of § 54.9831–1(f)(3).

\* \* \* \* \*

*Qualified expatriate* means a qualified expatriate within the meaning of § 54.9831–1(f)(6).

*Short-term, limited-duration insurance* means health insurance coverage provided pursuant to a contract with an issuer that:

- (1) Has an expiration date specified in the contract (taking into account any extensions that may be elected by the policyholder with or without the issuer's consent) that is less than 3 months after the original effective date of the contract; and
- (2) Displays prominently in the contract and in any application materials provided in connection with

enrollment in such coverage in at least 14 point type the following: “THIS IS NOT QUALIFYING HEALTH COVERAGE (“MINIMUM ESSENTIAL COVERAGE”) THAT SATISFIES THE HEALTH COVERAGE REQUIREMENT OF THE AFFORDABLE CARE ACT. IF YOU DON’T HAVE MINIMUM ESSENTIAL COVERAGE, YOU MAY OWE AN ADDITIONAL PAYMENT WITH YOUR TAXES.”

\* \* \* \* \*

*Travel insurance* means insurance coverage for personal risks incident to planned travel, which may include, but is not limited to, interruption or cancellation of trip or event, loss of baggage or personal effects, damages to accommodations or rental vehicles, and sickness, accident, disability, or death occurring during travel, provided that the health benefits are not offered on a stand-alone basis and are incidental to other coverage. For this purpose, the term travel insurance does not include major medical plans that provide comprehensive medical protection for travelers with trips lasting 6 months or longer, including, for example, those working overseas as an expatriate or military personnel being deployed.

\* \* \* \* \*

■ 9. Section 54.9815–2711 is amended by revising paragraph (c) to read as follows:

**§ 54.9815–2711 No lifetime or annual limits.**

\* \* \* \* \*

(c) *Definition of essential health benefits.* The term “essential health benefits” means essential health benefits under section 1302(b) of the Patient Protection and Affordable Care Act and applicable regulations. For this purpose, a group health plan or a health insurance issuer that is not required to provide essential health benefits under section 1302(b) must define “essential health benefits” in a manner that is consistent with—

(1) One of the EHB-benchmark plans applicable in a State under 45 CFR 156.110, and includes coverage of any additional required benefits that are considered essential health benefits consistent with 45 CFR 155.170(a)(2); or

(2) One of the three Federal Employees Health Benefit Program (FEHBP) options as defined by 45 CFR 156.100(a)(3), supplemented, as necessary, to meet the standards in 45 CFR 156.110.

\* \* \* \* \*

**§ 54.9831–1 [Amended]**

■ 10. Section 54.9831–1 is amended in paragraph (b)(1) by removing the reference “54.9812–1T” and adding in

its place the reference “54.9812–1, 54.9815–1251 through 54.9815–2719A,” and in paragraph (c)(1) by removing the reference “54.9811–1T, 54.9812–1T” with the phrase “54.9811–1, 54.9812–1, 54.9815–1251 through 54.9815–2719A”.

■ 11. Section 54.9831–1 is amended:

■ a. In paragraph (c)(2)(vii) by removing “and” at the end;

■ b. In paragraph (c)(2)(viii) by adding “and” at the end;

■ c. Adding paragraph (c)(2)(ix);

■ d. Revising paragraph (c)(4)(i);

■ e. Adding paragraph (c)(4)(ii)(D);

■ f. Revising paragraphs (c)(4)(iii) and (c)(5)(i)(C); and

■ g. Adding paragraph (f).

The revisions and additions read as follows:

**§ 54.9831–1 Special rules relating to group health plans.**

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(ix) Travel insurance within the meaning of § 54.9801–2 of this section.

\* \* \* \* \*

(4) *Noncoordinated benefits—(i) Excepted benefits that are not coordinated.* Coverage for only a specified disease or illness (for example, cancer-only policies) or hospital indemnity or other fixed indemnity insurance is excepted only if the coverage meets each of the conditions specified in paragraph (c)(4)(ii) of this section.

(ii) \* \* \*

(D) To be hospital indemnity or other fixed indemnity insurance, the insurance must pay a fixed dollar amount per day (or per other time period, such as per week) of hospitalization or illness (for example, \$100/day) without regard to the amount of expenses incurred or the type of items or services received and—

(1) The plan or issuer must provide, in any application or enrollment materials provided to participants at or before the time participants are given the opportunity to enroll in the coverage, a notice that prominently displays in at least 14 point type the following language: “THIS IS A SUPPLEMENT TO HEALTH INSURANCE AND IS NOT A SUBSTITUTE FOR MAJOR MEDICAL COVERAGE. THIS IS NOT QUALIFYING HEALTH COVERAGE (“MINIMUM ESSENTIAL COVERAGE”) THAT SATISFIES THE HEALTH COVERAGE REQUIREMENT OF THE AFFORDABLE CARE ACT. IF YOU DON’T HAVE MINIMUM ESSENTIAL COVERAGE, YOU MAY OWE AN ADDITIONAL PAYMENT WITH YOUR TAXES.”

(2) If participants are required to reenroll (in either paper or electronic form) for renewal or reissuance, the notice described in paragraph (c)(4)(ii)(D)(1) of this section must be displayed in the reenrollment materials that are provided to the participants at or before the time participants are given the opportunity to reenroll in the coverage.

(3) If a notice satisfying the requirements of this paragraph (c)(4)(ii)(D) is timely provided to a participant, the obligation to provide the notice is satisfied for both the plan and the issuer.

(iii) *Examples.* The rules of this paragraph (c)(4) are illustrated by the following examples:

*Example 1. (i) Facts.* An employer sponsors a group health plan that provides coverage through an insurance policy. The policy provides benefits only for hospital stays at a fixed percentage of hospital expenses up to a maximum of \$100 a day.

(ii) *Conclusion.* In this *Example 1*, because the policy pays a percentage of expenses incurred rather than a fixed dollar amount per day (or per other time period, such as per week), the policy is not hospital indemnity or other fixed indemnity insurance that is an excepted benefit under this paragraph (c)(4). This is the result even if, in practice, the policy pays the maximum of \$100 for every day of hospitalization.

*Example 2. (i) Facts.* An employer sponsors a group health plan that provides coverage through an insurance policy. The policy provides benefits for doctors’ visits at \$50 per visit, hospitalization at \$100 per day, various surgical procedures at different dollar rates per procedure, and prescription drugs at \$15 per prescription.

(ii) *Conclusion.* In this *Example 2*, for doctors’ visits, surgery, and prescription drugs, payment is not made on a per-period basis, but instead is based on whether a procedure or item is provided, such as whether an individual has surgery or a doctor visit or is prescribed a drug, and the amount of payment varies based on the type of procedure or item. Because benefits related to office visits, surgery, and prescription drugs are not paid based on a fixed dollar amount per day (or per other time period, such as per week), as required under paragraph (c)(4) of this section, the policy is not hospital indemnity or other fixed indemnity insurance that is an excepted benefit under this paragraph (c)(4).

*Example 3. (i) Facts.* An employer sponsors a group health plan that provides coverage through an insurance policy. The policy provides benefits for certain services at a fixed dollar amount per day, but the dollar amount varies by the type of service.

(ii) *Conclusion.* In this *Example 3*, because the policy provides benefits in a different amount per day depending on the type of service, rather than one specific dollar amount per day regardless of the type of service, the policy is not hospital indemnity or other fixed indemnity insurance that is an excepted benefit under this paragraph (c)(4).

(5) \* \* \*

(i) \* \* \*

(C) *Similar supplemental coverage provided to coverage under a group health plan.* To be similar supplemental coverage, the coverage must be specifically designed to fill gaps in the primary coverage. The preceding sentence is satisfied if the coverage is designed to fill gaps in cost sharing in the primary coverage, such as coinsurance or deductibles, or the coverage is designed to provide benefits for items and services not covered by the primary coverage and that are not essential health benefits in the State where the coverage is issued, or the coverage is designed to both fill such gaps in cost sharing under, and cover such benefits not covered by, the primary coverage. Similar supplemental coverage does not include coverage that becomes secondary or supplemental only under a coordination-of-benefits provision.

\* \* \* \* \*

(f) *Expatriate health plans and expatriate health insurance issuers—(1) In general.* With respect to coverage under an expatriate health plan, the requirements of section 9815 of the Code and implementing rules and regulations (incorporating sections 2701 through 2728 of the Public Health Service Act) do not apply to—

(i) An expatriate health plan (as defined in paragraph (f)(3) of this section),

(ii) An employer, solely in its capacity as plan sponsor of an expatriate health plan, and

(iii) An expatriate health insurance issuer (as defined in paragraph (f)(2) of this section) with respect to coverage under an expatriate health plan.

(2) *Definition of expatriate health insurance issuer—(i) In general.* Expatriate health insurance issuer means a health insurance issuer, within the meaning of § 54.9801–2, that issues expatriate health plans and that in the course of its normal business operations—

(A) Maintains network provider agreements that provide for direct claims payments, with health care providers in eight or more countries;

(B) Maintains call centers in three or more countries, and accepts calls from customers in eight or more languages;

(C) Processed at least \$1 million in claims in foreign currency equivalents during the preceding calendar year, determined using the Treasury Department's currency exchange rate in effect on the last day of the preceding calendar year;

(D) Makes global evacuation/repatriation coverage available;

(E) Maintains legal and compliance resources in three or more countries; and

(F) Has licenses or other authority to sell insurance in more than two countries, including in the United States.

(ii) *Additional rules.* For purposes of meeting the requirements of this paragraph (f)(2), two or more entities, including one entity that is the expatriate health insurance issuer, that are members of the expatriate health insurance issuer's controlled group (as determined under § 57.2(c) of this chapter) are treated as one expatriate health insurance issuer. Alternatively, the requirements of this paragraph (f)(2) may be satisfied through contracts between an expatriate health insurance issuer and third parties.

(3) *Definition of expatriate health plan.* Expatriate health plan means a plan that satisfies the requirements of paragraphs (f)(3)(i) through (iii) of this section.

(i) *Substantially all qualified expatriates requirement.* Substantially all primary enrollees in the expatriate health plan must be qualified expatriates. For purposes of this paragraph (f)(3)(i), the primary enrollee is the individual covered by the plan or policy whose eligibility for coverage is not due to that individual's status as the spouse, dependent, or other beneficiary of another covered individual. Notwithstanding the foregoing, an individual is not a primary enrollee if the individual is not a national of the United States and the individual resides in his or her country of citizenship. A plan satisfies the requirement of this paragraph (f)(3)(i) for a plan or policy year only if, on the first day of the plan or policy year, less than 5 percent of the primary enrollees (or less than 5 primary enrollees if greater) are not qualified expatriates.

(ii) *Substantially all benefits not excepted benefits requirement.* Substantially all of the benefits provided under the plan or coverage must be benefits that are not excepted benefits described in § 54.9831–1(c).

(iii) *Additional requirements.* To qualify as an expatriate health plan, the plan or coverage must also meet the following requirements:

(A) The plan or coverage provides coverage for inpatient hospital services, outpatient facility services, physician services, and emergency services (comparable to emergency services coverage that was described in and offered under section 8903(1) of title 5, United States Code for plan year 2009) in the following locations—

(1) In the case of individuals described in paragraph (f)(6)(i) of this section, in the United States and in the country or countries from which the individual was transferred or assigned, and such other country or countries the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and Secretary of Labor, may designate;

(2) In the case of individuals described in paragraph (f)(6)(ii) of this section, in the country or countries in which the individual is present in connection with his employment, and such other country or countries the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and Secretary of Labor, may designate; or

(3) In the case of individuals described in paragraph (f)(6)(iii) of this section, in the country or countries the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and Secretary of Labor, may designate.

(B) The plan sponsor reasonably believes that benefits provided by the plan or coverage satisfy the minimum value requirements of section 36B(c)(2)(C)(ii). For this purpose, a plan sponsor is permitted to rely on the reasonable representations of the issuer or administrator regarding whether benefits offered by the issuer or group health plan satisfy the minimum value requirements unless the plan sponsor knows or has reason to know that the benefits fail to satisfy the minimum value requirements.

(C) In the case of a plan or coverage that provides dependent coverage of children, such coverage must be available until an individual attains age 26, unless an individual is the child of a child receiving dependent coverage.

(D) The plan or coverage is:

(1) In the case of individuals described in paragraph (f)(6)(i) or (ii) of this section, a group health plan (including health insurance coverage offered in connection with a group health plan), issued by an expatriate health insurance issuer or administered by an expatriate health plan administrator. A group health plan will not fail to be an expatriate health plan merely because any portion of the coverage is provided through a self-insured arrangement.

(2) In the case of individuals described in paragraph (f)(6)(iii) of this section, health insurance coverage issued by an expatriate health insurance issuer.

(E) The plan or coverage offers reimbursements for items or services in

local currency in eight or more countries.

(F) The plan or coverage satisfies the provisions of Chapter 100 and regulations thereunder as in effect on March 22, 2010. For this purpose, the plan or coverage is not required to comply with section 9801(e) (relating to certification of creditable coverage) and underlying regulations. However, to the extent the plan or coverage imposes a preexisting condition exclusion, the plan or coverage must ensure that individuals with prior creditable coverage who enroll in the plan or coverage have an opportunity to demonstrate that they have creditable coverage offsetting the preexisting condition exclusion.

(iv) *Example.* The rule of paragraph (f)(3)(i) of this section is illustrated by the following example:

*Example.* (i) *Facts.* Business has health plan X for 250 U.S. citizens working outside of the United States in Country Y. All of the U.S. citizens working in Country Y satisfy the requirements to be qualified expatriates under § 54.9831-1(f)(6)(ii). In addition to the 250 U.S. citizens, Business employs 100 citizens of Country Y who reside in Country Y and do not satisfy the requirements to be qualified expatriates under § 54.9831-1(f)(6)(ii). Health plan X covers both the U.S. citizens and citizens of Country Y.

(ii) *Conclusion.* Health plan X satisfies the requirement of § 54.9831-1(f)(3)(i) that substantially all primary enrollees of an expatriate health plan be qualified expatriates because 100 percent of the primary enrollees are qualified expatriates. The 100 citizens of Country Y who reside in Country Y are not treated as primary enrollees for purposes of the substantially all requirement of § 54.9831-1(f)(3)(i) because they are not nationals of the United States and they reside in the country of their citizenship.

(4) *Definition of expatriate health plan administrator—(i) In general.* Expatriate health plan administrator means an administrator that in the course of its regular business operations—

(A) Maintains network provider agreements that provide for direct claims payments, with health care providers in eight or more countries,

(B) Maintains call centers, in three or more countries, and accepts calls from customers in eight or more languages,

(C) Processed at least \$1 million in claims in foreign currency equivalents during the preceding calendar year, determined using the Treasury Department's currency exchange rate in effect on the last day of the preceding calendar year,

(D) Makes global evacuation/repatriation coverage available,

(E) Maintains legal and compliance resources in three or more countries, and

(F) Has licenses or other authority to sell insurance in more than two countries, including in the United States.

(ii) *Additional rules.* For purposes of meeting the requirements of this paragraph (f)(4), two or more entities, including one entity that is the expatriate health plan administrator, that are members of the expatriate health plan administrator's controlled group (as determined under § 57.2(c) of this chapter) are treated as one expatriate health plan administrator. Alternatively, the requirements of this paragraph (f)(4) may be satisfied through contracts between an expatriate health plan administrator and third parties.

(5) *Definition of group health plan.* Group health plan, for purposes of this section, means a group health plan as defined in § 54.9831-1(a).

(6) *Definition of qualified expatriate.* Qualified expatriate, for purposes of this section, means an individual who is described in paragraph (f)(6)(i), (ii), or (iii) of this section.

(i) *Individuals transferred or assigned by their employer to work in the United States.* An individual is described in this paragraph (f)(6)(i) only if such individual has the skills, qualifications, job duties, or expertise that has caused the individual's employer to transfer or assign the individual to the United States for a specific and temporary purpose or assignment that is tied to the individual's employment with such employer. This paragraph (f)(6)(i) applies only to an individual who the plan sponsor has reasonably determined requires access to health coverage and other related services and support in multiple countries, and is offered other multinational benefits on a periodic basis (such as tax equalization, compensation for cross-border moving expenses, or compensation to enable the individual to return to the individual's home country), and does not apply to any individual who is a national of the United States. For purposes of this paragraph (f)(6)(i), an individual who is not expected to travel outside the United States at least one time per year during the coverage period would not reasonably require access to health coverage and other related services and support in multiple countries. Furthermore, the offer of a one-time *de minimis* benefit would not meet the standard for the offer of other multinational benefits on a periodic basis.

(ii) *Individuals working outside the United States.* An individual is

described in this paragraph (f)(6)(ii) only if the individual is a national of the United States who is working outside the United States for at least 180 days in a consecutive 12-month period that overlaps with a single plan year, or across two consecutive plan years.

(iii) *Individuals within a group of similarly situated individuals.* (A) An individual is described in this paragraph (f)(6)(iii) only if:

(1) The individual is a member of a group of similarly situated individuals that is formed for the purpose of traveling or relocating internationally in service of one or more of the purposes listed in section 501(c)(3) or (4), or similarly situated organizations or groups. For example, a group of students that is formed for purposes of traveling and studying abroad for a 6-month period is described in this paragraph (f)(6)(iii);

(2) In the case of a group organized to travel or relocate outside the United States, the individual is expected to travel or reside outside the United States for at least 180 days in a consecutive 12-month period that overlaps with the policy year (or in the case of a policy year that is less than 12 months, at least half the policy year);

(3) In the case of a group organized to travel or relocate within the United States, the individual is expected to travel or reside in the United States for not more than 12 months;

(4) The individual is not traveling or relocating internationally in connection with an employment-related purpose; and

(5) The group meets the test for having associational ties under section 2791(d)(3)(B) through (F) of the PHS Act (42 U.S.C. 300gg-91(d)(3)(B) through (F)).

(B) This paragraph (f)(6)(iii) does not apply to a group that is formed primarily for the sale or purchase of health insurance coverage.

(C) If a group of similarly situated individuals satisfies the requirements of this paragraph (f)(6)(iii), the Secretary of Health and Human Services, in consultation with the Secretary and the Secretary of Labor, has determined that the group requires access to health coverage and other related services and support in multiple countries.

(7) *Definition of United States.* Solely for purposes of this paragraph (f), United States means the 50 States, the District of Columbia, and Puerto Rico.

(8) *National of the United States.* For purposes of this paragraph (f), national of the United States, when referring to an individual, has the meaning used in the Immigration and Nationality Act (8 U.S.C. 1101 *et seq.*) and includes U.S.

citizens and non-citizen nationals. Thus, for example, an individual born in American Samoa is a national of the United States at birth.

■ 12. Section 54.9833–1 is amended by adding a sentence at the end to read as follows:

**§ 54.9833–1 Effective dates.**

\* \* \* Notwithstanding the previous sentence, the definition of “short-term limited duration insurance” in §§ 54.9801–2 and 5.9831–1(c)(5)(i)(C) and (f) apply for policy years and plan years beginning on or after January 1, 2017.

**PART 57—HEALTH INSURANCE PROVIDERS FEE**

■ 13. The authority citation for part 57 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805; sec. 9010, Pub. L. 111–148 (124 Stat. 119 (2010)). \* \* \*

■ 14. Section 57.2 is amended by revising paragraph (n) to read as follows:

**§ 57.2 Explanation of terms.**

\* \* \* \* \*

(n) *United States health risk.*—(1) *In general.* The term *United States health risk* means the health risk of any individual who is—

(i) A United States citizen;

(ii) A resident of the United States (within the meaning of section 7701(b)(1)(A)); or

(iii) Located in the United States (within the meaning of paragraph (i) of this section) during the period such individual is so located.

(2) *Qualified expatriates, spouses, and dependents.* The term *United States health risk* does not include the health risk of any individual who is a qualified expatriate (within the meaning of § 54.9831–1(f)(6)) enrolled in an expatriate health plan (within the meaning of § 54.9831–1(f)(3)). For purposes of this paragraph, a qualified expatriate includes any spouse, dependent, or any other individual enrolled in the expatriate health plan.

\* \* \* \* \*

■ 15. Section 57.4 is amended by adding a sentence to the end of paragraph (b)(2) and adding paragraph (b)(3) to read as follows:

**§ 57.4 Fee calculation.**

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \* This presumption does not apply to excluded premiums for qualified expatriates in expatriate health plans as described in § 57.2(n)(2).

(3) *Manner of determining excluded premiums for qualified expatriates in*

*expatriate health plans.* The IRS may specify in other guidance published in the Internal Revenue Bulletin the manner of determining excluded premiums for qualified expatriates in expatriate health plans as described in § 57.2(n)(2).

\* \* \* \* \*

■ 16. Section 57.10 is amended by revising paragraph (a) and adding paragraph (c) to read as follows:

**§ 57.10 Effective/applicability dates.**

(a) *In general.* Except as provided in paragraphs (b) and (c) of this section, §§ 57.1 through 57.9 apply to any fee that is due on or after September 30, 2014.

\* \* \* \* \*

(c) *Qualified expatriates in expatriate health plans.* Section 57.2(n)(2), the last sentence of § 57.4(b)(2), and § 57.4(b)(3) apply to any fee that is due on or after the date the final regulations are published in the **Federal Register**. Until the date the final regulations are published in the **Federal Register**, taxpayers may rely on these rules for any fee that is due on or after September 30, 2018.

**PART 301—PROCEDURE AND ADMINISTRATION**

■ 17. The authority citation for part 301 continues to read in part as follows:

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

■ 18. Section 301.6056–2 is amended by adding paragraph (a)(8) to read as follows:

**§ 301.6056–2. Electronic furnishing of statements.**

(a) \* \* \*

(8) *Special rule for expatriate health plan coverage.*—(i) *In general.* In the case of an individual covered under an expatriate health plan (within the meaning of § 54.9831–1(f)(3) of this chapter), the recipient is treated as having consented under paragraph (a)(2) of this section unless the recipient has explicitly refused to consent to receive the statement in an electronic format. The refusal to consent may be made electronically or in a paper document. A recipient's request for a paper statement is treated as an explicit refusal to receive the statement in electronic format. A furnisher relying on this paragraph (a)(8) must satisfy the requirements of paragraphs (a)(3) through (7) of this section, except that the statement required under paragraph (a)(3) must be provided at least 30 days prior to the time for furnishing under § 301.6056–1(g)(4)(i)(A) of this chapter of the first statement that the furnisher intends to furnish electronically to the

recipient, and the other requirements of paragraph (a)(3) are modified to reflect that the statement will be furnished electronically unless the recipient explicitly refuses consent to receive the statement in an electronic format.

(ii) *Manner and time of notifying recipient.* The IRS may specify in other guidance published in the Internal Revenue Bulletin the manner and timing for the initial notification of recipients that the statement required under paragraph (a)(3) of this section will be furnished electronically unless the recipient explicitly refuses to consent to receive the statement in an electronic format. See § 601.601(d)(2)(ii)(B) of this chapter.

(iii) *Effective/applicability date.* The provisions of this paragraph (a)(8) apply as of January 1, 2017.

\* \* \* \* \*

**DEPARTMENT OF LABOR**

**Employee Benefits Security Administration**

**29 CFR Chapter XXV**

For the reasons stated in the preamble, the Department of Labor proposes to amend 29 CFR part 2590 as set forth below:

**PART 2590—RULES AND REGULATIONS FOR GROUP HEALTH PLANS**

■ 19. The authority citation for part 2590 is revised to read as follows:

**Authority:** 29 U.S.C. 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1181 note, 1185, 1185a, 1185b, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Pub. L. 104–191, 110 Stat. 1936; sec. 401(b), Pub. L. 105–200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Pub. L. 110–343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Pub. L. 111–148, 124 Stat. 119, as amended by Pub. L. 111–152, 124 Stat. 1029; Division M, Pub. L. 113–235, 128 Stat. 2130; Secretary of Labor's Order 1–2011, 77 FR 1088 (Jan. 9, 2012).

■ 20. Section 2590.701–2 is amended by:

■ a. Adding in alphabetical order definitions for “expatriate health insurance issuer”, “expatriate health plan”, and “qualified expatriate”;

■ b. Revising the definition of “short-term, limited-duration insurance”; and

■ c. Adding in alphabetical order a definition for “travel insurance”.

The additions and revisions read as follows:

**§ 2590.701–2 Definitions.**

\* \* \* \* \*

*Expatriate health insurance issuer* means an expatriate health insurance issuer within the meaning of § 2590.732(f)(2).

*Expatriate health plan* means an expatriate health plan within the meaning of § 2590.732(f)(3).

\* \* \* \* \*

*Qualified expatriate* means a qualified expatriate within the meaning of § 2590.732(f)(6).

*Short-term, limited-duration insurance* means health insurance coverage provided pursuant to a contract with an issuer that:

(1) Has an expiration date specified in the contract (taking into account any extensions that may be elected by the policyholder with or without the issuer's consent) that is less than 3 months after the original effective date of the contract; and

(2) Displays prominently in the contract and in any application materials provided in connection with enrollment in such coverage in at least 14 point type the following: "THIS IS NOT QUALIFYING HEALTH COVERAGE ("MINIMUM ESSENTIAL COVERAGE") THAT SATISFIES THE HEALTH COVERAGE REQUIREMENT OF THE AFFORDABLE CARE ACT. IF YOU DON'T HAVE MINIMUM ESSENTIAL COVERAGE, YOU MAY OWE AN ADDITIONAL PAYMENT WITH YOUR TAXES."

\* \* \* \* \*

*Travel insurance* means insurance coverage for personal risks incident to planned travel, which may include, but is not limited to, interruption or cancellation of trip or event, loss of baggage or personal effects, damages to accommodations or rental vehicles, and sickness, accident, disability, or death occurring during travel, provided that the health benefits are not offered on a stand-alone basis and are incidental to other coverage. For this purpose, the term travel insurance does not include major medical plans that provide comprehensive medical protection for travelers with trips lasting 6 months or longer, including, for example, those working overseas as an expatriate or military personnel being deployed.

\* \* \* \* \*

■ 21. Section 2590.715–2711 is amended by revising paragraph (c) to read as follows:

**§ 2590.715–2711 No lifetime or annual limits.**

\* \* \* \* \*

(c) *Definition of essential health benefits.* The term "essential health benefits" means essential health benefits under section 1302(b) of the Patient Protection and Affordable Care Act and applicable regulations. For this purpose, a group health plan or a health insurance issuer that is not required to

provide essential health benefits under section 1302(b) must define "essential health benefits" in a manner that is consistent with—

(1) One of the EHB-benchmark plans applicable in a State under 45 CFR 156.110, and includes coverage of any additional required benefits that are considered essential health benefits consistent with 45 CFR 155.170(a)(2); or

(2) One of the three Federal Employees Health Benefit Program (FEHBP) options as defined by 45 CFR 156.100(a)(3), supplemented, as necessary, to meet the standards in 45 CFR 156.110.

\* \* \* \* \*

■ 22. Section 2590.732 is amended:

■ a. In paragraph (c)(2)(vii) by removing "and" at the end;

■ b. In paragraph (c)(2)(viii) by adding "and" at the end;

■ c. Adding paragraph (c)(2)(ix);

■ d. Revising paragraph (c)(4)(i);

■ e. Adding paragraph (c)(4)(ii)(D);

■ f. Revising paragraphs (c)(4)(iii) and (c)(5)(i)(C); and

■ g. Adding paragraph (f).

The revisions and additions read as follows:

**§ 2590.732 Special rules relating to group health plans.**

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(ix) Travel insurance, within the meaning of § 2590.701–2 of this part.

\* \* \* \* \*

(4) *Noncoordinated benefits*—(i) *Excepted benefits that are not coordinated.* Coverage for only a specified disease or illness (for example, cancer-only policies) or hospital indemnity or other fixed indemnity insurance is excepted only if the coverage meets each of the conditions specified in paragraph (c)(4)(ii) of this section.

(ii) \* \* \*

(D) To be hospital indemnity or other fixed indemnity insurance, the insurance must pay a fixed dollar amount per day (or per other time period, such as per week) of hospitalization or illness (for example, \$100/day) without regard to the amount of expenses incurred or the type of items or services received and—

(1) The plan or issuer must provide, in any application or enrollment materials provided to participants at or before the time participants are given the opportunity to enroll in the coverage, a notice that prominently displays in at least 14 point type the following language: "THIS IS A SUPPLEMENT TO HEALTH INSURANCE AND IS NOT A

SUBSTITUTE FOR MAJOR MEDICAL COVERAGE. THIS IS NOT QUALIFYING HEALTH COVERAGE ("MINIMUM ESSENTIAL COVERAGE") THAT SATISFIES THE HEALTH COVERAGE REQUIREMENT OF THE AFFORDABLE CARE ACT. IF YOU DON'T HAVE MINIMUM ESSENTIAL COVERAGE, YOU MAY OWE AN ADDITIONAL PAYMENT WITH YOUR TAXES."

(2) If participants are required to reenroll (in either paper or electronic form) for renewal or reissuance, the notice described in paragraph (c)(4)(ii)(D)(1) of this section must be displayed in the reenrollment materials that are provided to the participants at or before the time participants are given the opportunity to reenroll in the coverage.

(3) If a notice satisfying the requirements of this paragraph (c)(4)(ii)(D) is timely provided to a participant, the obligation to provide the notice is satisfied for both the plan and the issuer.

(iii) *Examples.* The rules of this paragraph (c)(4) are illustrated by the following examples:

*Example 1. (i) Facts.* An employer sponsors a group health plan that provides coverage through an insurance policy. The policy provides benefits only for hospital stays at a fixed percentage of hospital expenses up to a maximum of \$100 a day.

(ii) *Conclusion.* In this *Example 1*, because the policy pays a percentage of expenses incurred rather than a fixed dollar amount per day (or per other time period, such as per week), the policy is not hospital indemnity or other fixed indemnity insurance that is an excepted benefit under this paragraph (c)(4). This is the result even if, in practice, the policy pays the maximum of \$100 for every day of hospitalization.

*Example 2. (i) Facts.* An employer sponsors a group health plan that provides coverage through an insurance policy. The policy provides benefits for doctors' visits at \$50 per visit, hospitalization at \$100 per day, various surgical procedures at different dollar rates per procedure, and prescription drugs at \$15 per prescription.

(ii) *Conclusion.* In this *Example 2*, for doctors' visits, surgery, and prescription drugs, payment is not made on a per-period basis, but instead is based on whether a procedure or item is provided, such as whether an individual has surgery or a doctor visit or is prescribed a drug, and the amount of payment varies based on the type of procedure or item. Because benefits related to office visits, surgery, and prescription drugs are not paid based on a fixed dollar amount per day (or per other time period, such as per week), as required under paragraph (c)(4) of this section, the policy is not hospital indemnity or other fixed indemnity insurance that is an excepted benefit under this paragraph (c)(4).

*Example 3. (i) Facts.* An employer sponsors a group health plan that provides coverage

through an insurance policy. The policy provides benefits for certain services at a fixed dollar amount per day, but the dollar amount varies by the type of service.

(ii) *Conclusion.* In this *Example 3*, because the policy provides benefits in a different amount per day depending on the type of service, rather than one specific dollar amount per day regardless of the type of service, the policy is not hospital indemnity or other fixed indemnity insurance that is an excepted benefit under this paragraph (c)(4).

(5) \* \* \*

(i) \* \* \*

(C) *Similar supplemental coverage provided to coverage under a group health plan.* To be similar supplemental coverage, the coverage must be specifically designed to fill gaps in the primary coverage. The preceding sentence is satisfied if the coverage is designed to fill gaps in cost sharing in the primary coverage, such as coinsurance or deductibles, or the coverage is designed to provide benefits for items and services not covered by the primary coverage and that are not essential health benefits in the State where the coverage is issued, or the coverage is designed to both fill such gaps in cost sharing under, and cover such benefits not covered by, the primary coverage. Similar supplemental coverage does not include coverage that becomes secondary or supplemental only under a coordination-of-benefits provision.

\* \* \* \* \*

(f) *Expatriate health plans and expatriate health insurance issuers—(1) In general.* With respect to coverage under an expatriate health plan, the requirements of section 715 of ERISA and implementing rules and regulations (incorporating sections 2701 through 2728 of the Public Health Service Act) do not apply to—

(i) An expatriate health plan (as defined in paragraph (f)(3) of this section),

(ii) An employer, solely in its capacity as plan sponsor of an expatriate health plan, and

(iii) An expatriate health insurance issuer (as defined in paragraph (f)(2) of this section) with respect to coverage under an expatriate health plan.

(2) *Definition of expatriate health insurance issuer—(i) In general.*

Expatriate health insurance issuer means a health insurance issuer, within the meaning of § 2590.701–2, that issues expatriate health plans and that in the course of its normal business operations—

(A) Maintains network provider agreements that provide for direct claims payments, with health care providers in eight or more countries;

(B) Maintains call centers in three or more countries, and accepts calls from customers in eight or more languages;

(C) Processed at least \$1 million in claims in foreign currency equivalents during the preceding calendar year, determined using the Treasury Department's currency exchange rate in effect on the last day of the preceding calendar year;

(D) Makes global evacuation/repatriation coverage available;

(E) Maintains legal and compliance resources in three or more countries; and

(F) Has licenses or other authority to sell insurance in more than two countries, including in the United States.

(ii) *Additional rules.* For purposes of meeting the requirements of this paragraph (f)(2), two or more entities, including one entity that is the expatriate health insurance issuer, that are members of the expatriate health insurance issuer's controlled group (as determined under 26 CFR 57.2(c)) are treated as one expatriate health insurance issuer. Alternatively, the requirements of this paragraph (f)(2) may be satisfied through contracts between an expatriate health insurance issuer and third parties.

(3) *Definition of expatriate health plan.* Expatriate health plan means a plan that satisfies the requirements of paragraphs (f)(3)(i) through (iii) of this section.

(i) *Substantially all qualified expatriates requirement.* Substantially all primary enrollees in the expatriate health plan must be qualified expatriates. For purposes of this paragraph (f)(3)(i), the primary enrollee is the individual covered by the plan or policy whose eligibility for coverage is not due to that individual's status as the spouse, dependent, or other beneficiary of another covered individual. Notwithstanding the foregoing, an individual is not a primary enrollee if the individual is not a national of the United States and the individual resides in his or her country of citizenship. A plan satisfies the requirement of this paragraph (f)(3)(i) for a plan or policy year only if, on the first day of the plan or policy year, less than 5 percent of the primary enrollees (or less than 5 primary enrollees if greater) are not qualified expatriates.

(ii) *Substantially all benefits not excepted benefits requirement.* Substantially all of the benefits provided under the plan or coverage must be benefits that are not excepted benefits described in § 2590.732(c).

(iii) *Additional requirements.* To qualify as an expatriate health plan, the

plan or coverage must also meet the following requirements:

(A) The plan or coverage provides coverage for inpatient hospital services, outpatient facility services, physician services, and emergency services (comparable to emergency services coverage that was described in and offered under section 8903(1) of title 5, United States Code for plan year 2009) in the following locations—

(1) In the case of individuals described in paragraph (f)(6)(i) of this section, in the United States and in the country or countries from which the individual was transferred or assigned, and such other country or countries the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and Secretary of Labor, may designate;

(2) In the case of individuals described in paragraph (f)(6)(ii) of this section, in the country or countries in which the individual is present in connection with his employment, and such other country or countries the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and Secretary of Labor, may designate; or

(3) In the case of individuals described in paragraph (f)(6)(iii) of this section, in the country or countries the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and Secretary of Labor, may designate.

(B) The plan sponsor reasonably believes that benefits provided by the plan or coverage satisfy the minimum value requirements of Internal Revenue Code section 36B(c)(2)(C)(ii). For this purpose, a plan sponsor is permitted to rely on the reasonable representations of the issuer or administrator regarding whether benefits offered by the issuer or group health plan satisfy the minimum value requirements unless the plan sponsor knows or has reason to know that the benefits fail to satisfy the minimum value requirements.

(C) In the case of a plan or coverage that provides dependent coverage of children, such coverage must be available until an individual attains age 26, unless an individual is the child of a child receiving dependent coverage.

(D) The plan or coverage is:

(1) In the case of individuals described in paragraph (f)(6)(i) or (ii) of this section, a group health plan (including health insurance coverage offered in connection with a group health plan), issued by an expatriate health insurance issuer or administered by an expatriate health plan administrator. A group health plan will not fail to be an expatriate health plan

merely because any portion of the coverage is provided through a self-insured arrangement.

(2) In the case of individuals described in paragraph (f)(6)(iii) of this section, health insurance coverage issued by an expatriate health insurance issuer.

(E) The plan or coverage offers reimbursements for items or services in local currency in eight or more countries.

(F) The plan or coverage satisfies the provisions of this part as in effect on March 22, 2010. For this purpose, the plan or coverage is not required to comply with section 701(e) (relating to certification of creditable coverage) and underlying regulations. However, to the extent the plan or coverage imposes a preexisting condition exclusion, the plan or coverage must ensure that individuals with prior creditable coverage who enroll in the plan or coverage have an opportunity to demonstrate that they have creditable coverage offsetting the preexisting condition exclusion.

(iv) *Example.* The rule of paragraph (f)(3)(i) of this section is illustrated by the following example:

*Example.* (i) *Facts.* Business has health plan X for 250 U.S. citizens working outside of the United States in Country Y. All of the U.S. citizens working in Country Y satisfy the requirements to be qualified expatriates under § 2590.732(f)(6)(ii). In addition to the 250 U.S. citizens, Business employs 100 citizens of Country Y who reside in Country Y and do not satisfy the requirements to be qualified expatriates under § 2590.732(f)(6)(ii). Health plan X covers both the U.S. citizens and citizens of Country Y.

(ii) *Conclusion.* Health plan X satisfies the requirement of § 2590.732(f)(3)(i) that substantially all primary enrollees of an expatriate health plan be qualified expatriates because 100 percent of the primary enrollees are qualified expatriates. The 100 citizens of Country Y who reside in Country Y are not treated as primary enrollees for purposes of the substantially all requirement of § 2590.732(f)(3)(i) because they are not nationals of the United States and they reside in the country of their citizenship.

(4) *Definition of expatriate health plan administrator*—(i) *In general.* Expatriate health plan administrator means an administrator that in the course of its regular business operations—

(A) Maintains network provider agreements that provide for direct claims payments, with health care providers in eight or more countries,

(B) Maintains call centers, in three or more countries, and accepts calls from customers in eight or more languages,

(C) Processed at least \$1 million in claims in foreign currency equivalents

during the preceding calendar year, determined using the Treasury Department's currency exchange rate in effect on the last day of the preceding calendar year,

(D) Makes global evacuation/repatriation coverage available,

(E) Maintains legal and compliance resources in three or more countries, and

(F) Has licenses or other authority to sell insurance in more than two countries, including in the United States.

(ii) *Additional rules.* For purposes of meeting the requirements of this paragraph (f)(4), two or more entities, including one entity that is the expatriate health plan administrator, that are members of the expatriate health plan administrator's controlled group (as determined under 26 CFR 57.2(c)) are treated as one expatriate health plan administrator. Alternatively, the requirements of this paragraph (f)(4) may be satisfied through contracts between an expatriate health plan administrator and third parties.

(5) *Definition of group health plan.* Group health plan, for purposes of this section, means a group health plan as defined in § 2590.732(a).

(6) *Definition of qualified expatriate.* Qualified expatriate, for purposes of this section, means an individual who is described in paragraph (f)(6)(i), (ii) or (iii) of this section.

(i) *Individuals transferred or assigned by their employer to work in the United States.* An individual is described in this paragraph (f)(6)(i) only if such individual has the skills, qualifications, job duties, or expertise that has caused the individual's employer to transfer or assign the individual to the United States for a specific and temporary purpose or assignment that is tied to the individual's employment with such employer. This paragraph (f)(6)(i) applies only to an individual who the plan sponsor has reasonably determined requires access to health coverage and other related services and support in multiple countries, and is offered other multinational benefits on a periodic basis (such as tax equalization, compensation for cross-border moving expenses, or compensation to enable the individual to return to the individual's home country), and does not apply to any individual who is a national of the United States. For purposes of this paragraph (f)(6)(i), an individual who is not expected to travel outside the United States at least one time per year during the coverage period would not reasonably require access to health coverage and other related services and support in multiple countries.

Furthermore, the offer of a one-time *de minimis* benefit would not meet the standard for the offer of other multinational benefits on a periodic basis.

(ii) *Individuals working outside the United States.* An individual is described in this paragraph (f)(6)(ii) only if the individual is a national of the United States who is working outside the United States for at least 180 days in a consecutive 12-month period that overlaps with a single plan year, or across two consecutive plan years.

(iii) *Individuals within a group of similarly situated individuals.* (A) An individual is described in this paragraph (f)(6)(iii) only if:

(1) The individual is a member of a group of similarly situated individuals that is formed for the purpose of traveling or relocating internationally in service of one or more of the purposes listed in Internal Revenue Code section 501(c)(3) or (4), or similarly situated organizations or groups. For example, a group of students that is formed for purposes of traveling and studying abroad for a 6-month period is described in this paragraph (f)(6)(iii);

(2) In the case of a group organized to travel or relocate outside the United States, the individual is expected to travel or reside outside the United States for at least 180 days in a consecutive 12-month period that overlaps with the policy year (or in the case of a policy year that is less than 12 months, at least half the policy year);

(3) In the case of a group organized to travel or relocate within the United States, the individual is expected to travel or reside in the United States for not more than 12 months;

(4) The individual is not traveling or relocating internationally in connection with an employment-related purpose; and

(5) The group meets the test for having associational ties under section 2791(d)(3)(B) through (F) of the PHS Act (42 U.S.C. 300gg–91(d)(3)(B) through (F)).

(B) This paragraph (f)(6)(iii) does not apply to a group that is formed primarily for the sale or purchase of health insurance coverage.

(C) If a group of similarly situated individuals satisfies the requirements of this paragraph (f)(6)(iii), the Secretary of Health and Human Services, in consultation with the Secretary and the Secretary of the Treasury, has determined that the group requires access to health coverage and other related services and support in multiple countries.

(7) *Definition of United States.* Solely for purposes of this paragraph (f),

United States means the 50 States, the District of Columbia, and Puerto Rico.

(8) *National of the United States*. For purposes of this paragraph (f), national of the United States, when referring to an individual, has the meaning used in the Immigration and Nationality Act (8 U.S.C. 1101 *et seq.*) and includes U.S. citizens and non-citizen nationals. Thus, for example, an individual born in American Samoa is a national of the United States at birth.

■ 23. Section 2590.736 is amended by adding a sentence at the end to read as follows:

**§ 2590.736 Applicability dates.**

\* \* \* Notwithstanding the previous sentences, the definition of “short-term, limited-duration insurance” in §§ 2590.701–2 and 2590.732(c)(5)(i)(C) and (f) apply for plan years beginning on or after January 1, 2017.

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**45 CFR Chapter 1**

For the reasons stated in the preamble, the Department of Health and Human Services proposes to amend 45 CFR parts 144, 146, 147, 148, and 158 as set forth below:

**PART 144—REQUIREMENTS RELATING TO HEALTH INSURANCE COVERAGE**

■ 24. The authority citation for part 144 continues to read as follows:

**Authority:** Secs. 2701 through 2763, 2791, and 2792 of the Public Health Service Act, 42 U.S.C. 300gg through 300gg–63, 300gg–91, and 300gg–92.

■ 25. Section 144.103 is amended by:

- a. Adding in alphabetical order definitions for “expatriate health insurance issuer”, “expatriate health plan”, and “qualified expatriate”;
- b. Revising the definition of “short-term, limited-duration insurance”; and
- c. Adding in alphabetical order a definition for “travel insurance”.

The additions and revision read as follows:

**§ 144.103 Definitions.**

\* \* \* \* \*

*Expatriate health insurance issuer* means an expatriate health insurance issuer within the meaning of § 147.170(b) of this subchapter.

*Expatriate health plan* means an expatriate health plan within the meaning of § 147.170(c) of this subchapter.

\* \* \* \* \*

*Qualified expatriate* means a qualified expatriate within the meaning of § 147.170(f) of this subchapter.

*Short-term, limited-duration insurance* means health insurance coverage provided pursuant to a contract with an issuer that:

(1) Has an expiration date specified in the contract (taking into account any extensions that may be elected by the policyholder with or without the issuer’s consent) that is less than 3 months after the original effective date of the contract; and

(2) Displays prominently in the contract and in any application materials provided in connection with enrollment in such coverage in at least 14 point type the following: “THIS IS NOT QUALIFYING HEALTH COVERAGE (“MINIMUM ESSENTIAL COVERAGE”) THAT SATISFIES THE HEALTH COVERAGE REQUIREMENT OF THE AFFORDABLE CARE ACT. IF YOU DON’T HAVE MINIMUM ESSENTIAL COVERAGE, YOU MAY OWE AN ADDITIONAL PAYMENT WITH YOUR TAXES.”

\* \* \* \* \*

*Travel insurance* means insurance coverage for personal risks incident to planned travel, which may include, but is not limited to, interruption or cancellation of trip or event, loss of baggage or personal effects, damages to accommodations or rental vehicles, and sickness, accident, disability, or death occurring during travel, provided that the health benefits are not offered on a stand-alone basis and are incidental to other coverage. For this purpose, the term travel insurance does not include major medical plans that provide comprehensive medical protection for travelers with trips lasting 6 months or longer, including, for example, those working overseas as an expatriate or military personnel being deployed.

\* \* \* \* \*

**PART 146—REQUIREMENTS FOR THE GROUP HEALTH INSURANCE MARKET**

■ 26. The authority citation for part 146 continues to read as follows:

**Authority:** Secs. 2702 through 2705, 2711 through 2723, 2791, and 2792 of the Public Health Service Act (42 U.S.C. 300gg–1 through 300gg–5, 300gg–11 through 300gg–23, 300gg–91, and 300gg–92).

■ 27. Section 146.145 is amended by:

- a. Adding paragraph (b)(2)(ix);
- b. Revising paragraph (b)(4)(i);
- c. Adding paragraph (b)(4)(ii)(D); and
- d. Revising paragraph (b)(5)(i)(C).

The additions and revisions read as follows:

**§ 146.145 Special rules relating to group health plans.**

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(ix) Travel insurance, within the meaning of § 144.103 of this subchapter.

\* \* \* \* \*

(4) *Noncoordinated benefits*—(i) *Excepted benefits that are not coordinated*. Coverage for only a specified disease or illness (for example, cancer-only policies) or hospital indemnity or other fixed indemnity insurance is excepted only if the coverage meets each of the conditions specified in paragraph (b)(4)(ii) of this section.

(ii) \* \* \*

(D) To be hospital indemnity or other fixed indemnity insurance, the insurance must pay a fixed dollar amount per day (or per other time period, such as per week) of hospitalization or illness (for example, \$100/day) without regard to the amount of expenses incurred or the type of items or services received and—

(1) The plan or issuer must provide, in any application or enrollment materials provided to participants at or before the time participants are given the opportunity to enroll in the coverage, a notice that prominently displays in at least 14 point type the following language: “THIS IS A SUPPLEMENT TO HEALTH INSURANCE AND IS NOT A SUBSTITUTE FOR MAJOR MEDICAL COVERAGE. THIS IS NOT QUALIFYING HEALTH COVERAGE (“MINIMUM ESSENTIAL COVERAGE”) THAT SATISFIES THE HEALTH COVERAGE REQUIREMENT OF THE AFFORDABLE CARE ACT. IF YOU DON’T HAVE MINIMUM ESSENTIAL COVERAGE, YOU MAY OWE AN ADDITIONAL PAYMENT WITH YOUR TAXES.”

(2) If participants are required to reenroll (in either paper or electronic form) for renewal or reissuance, the notice described in paragraph (b)(4)(ii)(D)(1) of this section must be displayed in the reenrollment materials that are provided to the participants at or before the time participants are given the opportunity to reenroll in the coverage.

(3) If a notice satisfying the requirements of this paragraph (b)(4)(ii)(D) is timely provided to a participant, the obligation to provide the notice is satisfied for both the plan and the issuer.

(iii) *Examples*. The rules of this paragraph (b)(4) are illustrated by the following examples:

*Example 1. (i) Facts*. An employer sponsors a group health plan that provides coverage through an insurance policy. The policy

provides benefits only for hospital stays at a fixed percentage of hospital expenses up to a maximum of \$100 a day.

(ii) *Conclusion.* In this *Example 1*, because the policy pays a percentage of expenses incurred rather than a fixed dollar amount per day (or per other time period, such as per week), the policy is not hospital indemnity or other fixed indemnity insurance that is an excepted benefit under this paragraph (b)(4). This is the result even if, in practice, the policy pays the maximum of \$100 for every day of hospitalization.

*Example 2.* (i) *Facts.* An employer sponsors a group health plan that provides coverage through an insurance policy. The policy provides benefits for doctors' visits at \$50 per visit, hospitalization at \$100 per day, various surgical procedures at different dollar rates per procedure, and prescription drugs at \$15 per prescription.

(ii) *Conclusion.* In this *Example 2*, for doctors' visits, surgery, and prescription drugs, payment is not made on a per-period basis, but instead is based on whether a procedure or item is provided, such as whether an individual has surgery or a doctor visit or is prescribed a drug, and the amount of payment varies based on the type of procedure or item. Because benefits related to office visits, surgery, and prescription drugs are not paid based on a fixed dollar amount per day (or per other time period, such as per week), as required under paragraph (b)(4) of this section, the policy is not hospital indemnity or other fixed indemnity insurance that is an excepted benefit under this paragraph (b)(4).

*Example 3.* (i) *Facts.* An employer sponsors a group health plan that provides coverage through an insurance policy. The policy provides benefits for certain services at a fixed dollar amount per day, but the dollar amount varies by the type of service.

(ii) *Conclusion.* In this *Example 3*, because the policy provides benefits in a different amount per day depending on the type of service, rather than one specific dollar amount per day regardless of the type of service, the policy is not hospital indemnity or other fixed indemnity insurance that is an excepted benefit under this paragraph (b)(4).

(5) \* \* \*

(i) \* \* \*

(C) *Similar supplemental coverage provided to coverage under a group health plan.* To be similar supplemental coverage, the coverage must be specifically designed to fill gaps in the primary coverage. The preceding sentence is satisfied if the coverage is designed to fill gaps in cost sharing in the primary coverage, such as coinsurance or deductibles, or the coverage is designed to provide benefits for items and services not covered by the primary coverage and that are not essential health benefits in the State where the coverage is issued, or the coverage is designed to both fill such gaps in cost sharing under, and cover such benefits not covered by, the primary coverage. Similar supplemental

coverage does not include coverage that becomes secondary or supplemental only under a coordination-of-benefits provision.

\* \* \* \* \*

## PART 147—HEALTH INSURANCE REFORM REQUIREMENTS FOR THE GROUP AND INDIVIDUAL HEALTH INSURANCE MARKETS

■ 28. The authority citation for part 147 continues to read as follows:

**Authority:** Secs. 2701 through 2763, 2791, and 2792 of the Public Health Service Act (42 U.S.C. 300gg through 300gg–63, 300gg–91, and 300gg–92), as amended.

■ 29. Section 147.126 is amended by revising paragraph (c) to read as follows:

### § 147.126 No lifetime or annual limits.

\* \* \* \* \*

(c) *Definition of essential health benefits.* The term “essential health benefits” means essential health benefits under section 1302(b) of the Patient Protection and Affordable Care Act and applicable regulations. For this purpose, a group health plan or a health insurance issuer that is not required to provide essential health benefits under section 1302(b) must define “essential health benefits” in a manner that is consistent with—

(1) One of the EHB-benchmark plans applicable in a State under 45 CFR 156.110, and includes coverage of any additional required benefits that are considered essential health benefits consistent with 45 CFR 155.170(a)(2); or

(2) One of the three Federal Employees Health Benefit Program (FEHBP) options as defined by 45 CFR 156.100(a)(3), supplemented, as necessary, to meet the standards in 45 CFR 156.110.

\* \* \* \* \*

■ 30. Section 147.170 is added to read as follows:

### § 147.170 Expatriate health plans and expatriate health insurance issuers.

(a) *In general.* With respect to coverage under an expatriate health plan, the requirements of (including any amendment made by) the Patient Protection and Affordable Care Act and of title I and subtitle B of title II of the Health Care and Education and Reconciliation Act of 2010, and implementing rules and regulations do not apply to—

(1) An expatriate health plan (as defined in paragraph (c) of this section),

(2) An employer, solely in its capacity as plan sponsor of an expatriate health plan, and

(3) An expatriate health insurance issuer (as defined in paragraph (b) of

this section) with respect to coverage under an expatriate health plan.

(b) *Definition of expatriate health insurance issuer—(1) In general.*

Expatriate health insurance issuer means a health insurance issuer, within the meaning of § 144.103 of this subchapter, that issues expatriate health plans and that in the course of its normal business operations—

(i) Maintains network provider agreements that provide for direct claims payments, with health care providers in eight or more countries;

(ii) Maintains call centers in three or more countries, and accepts calls from customers in eight or more languages;

(iii) Processed at least \$1 million in claims in foreign currency equivalents during the preceding calendar year, determined using the Treasury Department's currency exchange rate in effect on the last day of the preceding calendar year;

(iv) Makes global evacuation/repatriation coverage available;

(v) Maintains legal and compliance resources in three or more countries; and

(vi) Has licenses or other authority to sell insurance in more than two countries, including in the United States.

(2) *Additional rules.* For purposes of meeting the requirements of this paragraph (b), two or more entities, including one entity that is the expatriate health insurance issuer, that are members of the expatriate health insurance issuer's controlled group (as determined under 26 CFR 57.2(c)) are treated as one expatriate health insurance issuer. Alternatively, the requirements of this paragraph (b) may be satisfied through contracts between an expatriate health insurance issuer and third parties.

(c) *Definition of expatriate health plan.* Expatriate health plan means a plan that satisfies the requirements of paragraphs (c)(1) through (3) of this section.

(1) *Substantially all qualified expatriates requirement.* Substantially all primary enrollees in the expatriate health plan must be qualified expatriates. For purposes of this paragraph (c)(1), the primary enrollee is the individual covered by the plan or policy whose eligibility for coverage is not due to that individual's status as the spouse, dependent, or other beneficiary of another covered individual.

Notwithstanding the foregoing, an individual is not a primary enrollee if the individual is not a national of the United States and the individual resides in his or her country of citizenship. A plan satisfies the requirement of this

paragraph (c)(1) for a plan or policy year only if, on the first day of the plan or policy year, less than 5 percent of the primary enrollees (or less than 5 primary enrollees if greater) are not qualified expatriates.

(2) *Substantially all benefits not excepted benefits requirement.*

Substantially all of the benefits provided under the plan or coverage must be benefits that are not excepted benefits described in § 146.145(b) and § 148.220 of this subchapter.

(3) *Additional requirements.* To qualify as an expatriate health plan, the plan or coverage must also meet the following requirements:

(i) The plan or coverage provides coverage for inpatient hospital services, outpatient facility services, physician services, and emergency services (comparable to emergency services coverage that was described in and offered under section 8903(1) of title 5, United States Code for plan year 2009) in the following locations—

(A) In the case of individuals described in paragraph (f)(1) of this section, in the United States and in the country or countries from which the individual was transferred or assigned, and such other country or countries the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and Secretary of Labor, may designate;

(B) In the case of individuals described in paragraph (f)(2) of this section, in the country or countries in which the individual is present in connection with his employment, and such other country or countries the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and Secretary of Labor, may designate; or

(C) In the case of individuals described in paragraph (f)(3) of this section, in the country or countries the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and Secretary of Labor, may designate.

(ii) The plan sponsor reasonably believes that benefits provided by the plan or coverage satisfy the minimum value requirements of section 36B(c)(2)(C)(ii) of the Internal Revenue Code. For this purpose, a plan sponsor is permitted to rely on the reasonable representations of the issuer or administrator regarding whether benefits offered by the issuer or group health plan satisfy the minimum value requirements unless the plan sponsor knows or has reason to know that the benefits fail to satisfy the minimum value requirements.

(iii) In the case of a plan or coverage that provides dependent coverage of children, such coverage must be available until an individual attains age 26, unless an individual is the child of a child receiving dependent coverage.

(iv) The plan or coverage is:

(A) In the case of individuals described in paragraphs (f)(1) or (f)(2) of this section, a group health plan (including health insurance coverage offered in connection with a group health plan), issued by an expatriate health insurance issuer or administered by an expatriate health plan administrator. A group health plan will not fail to be an expatriate health plan merely because any portion of the coverage is provided through a self-insured arrangement.

(B) In the case of individuals described in paragraph (f)(3) of this section, health insurance coverage issued by an expatriate health insurance issuer.

(v) The plan or coverage offers reimbursements for items or services in local currency in eight or more countries.

(vi) The plan or coverage satisfies the provisions of title XXVII of the Public Health Service Act (42 U.S.C. 300gg *et seq.*) and regulations thereunder as in effect on March 22, 2010. For this purpose, the plan or coverage is not required to comply with section 2701(e) (relating to certification of creditable coverage) and underlying regulations. However, to the extent the plan or coverage imposes a preexisting condition exclusion, the plan or coverage must ensure that individuals with prior creditable coverage who enroll in the plan or coverage have an opportunity to demonstrate that they have creditable coverage offsetting the preexisting condition exclusion.

(v) Example. The rule of paragraph (c)(1) of this section is illustrated by the following example:

*Example.* (i) *Facts.* Business has health plan X for 250 U.S. citizens working outside of the United States in Country Y. All of the U.S. citizens working in Country Y satisfy the requirements to be qualified expatriates under § 147.170(f)(2). In addition to the 250 U.S. citizens, Business employs 100 citizens of Country Y who reside in Country Y and do not satisfy the requirements to be qualified expatriates under § 147.170(f). Health plan X covers both the U.S. citizens and citizens of Country Y.

(ii) *Conclusion.* Health plan X satisfies the requirement of § 147.170(c)(1) that substantially all primary enrollees of an expatriate health plan be qualified expatriates because 100 percent of the primary enrollees are qualified expatriates. The 100 citizens of Country Y who reside in Country Y are not treated as primary

enrollees for purposes of the substantially all requirement of § 147.170(c)(1) because they are not nationals of the United States and they reside in the country of their citizenship.

(d) *Definition of expatriate health plan administrator—*(1) *In general.* Expatriate health plan administrator means an administrator that in the course of its regular business operations—

(i) Maintains network provider agreements that provide for direct claims payments, with health care providers in eight or more countries,

(ii) Maintains call centers, in three or more countries, and accepts calls from customers in eight or more languages,

(iii) Processed at least \$1 million in claims in foreign currency equivalents during the preceding calendar year, determined using the Treasury Department's currency exchange rate in effect on the last day of the preceding calendar year,

(iv) Makes global evacuation/repatriation coverage available,

(v) Maintains legal and compliance resources in three or more countries, and

(vi) Has licenses or other authority to sell insurance in more than two countries, including in the United States.

(2) *Additional rules.* For purposes of meeting the requirements of this paragraph (d), two or more entities, including one entity that is the expatriate health plan administrator, that are members of the expatriate health plan administrator's controlled group (as determined under 26 CFR 57.2(c)) are treated as one expatriate health plan administrator. Alternatively, the requirements of this paragraph (d) may be satisfied through contracts between an expatriate health plan administrator and third parties.

(e) *Definition of group health plan.* Group health plan, for purposes of this section, means a group health plan as defined in § 146.145(a) of this subchapter.

(f) *Definition of qualified expatriate.* Qualified expatriate, for purposes of this section, means an individual who is described in paragraph (f)(1), (2), or (3) of this section.

(1) *Individuals transferred or assigned by their employer to work in the United States.* An individual is described in this paragraph (f)(1) only if such individual has the skills, qualifications, job duties, or expertise that has caused the individual's employer to transfer or assign the individual to the United States for a specific and temporary purpose or assignment that is tied to the individual's employment with such

employer. This paragraph (f)(1) applies only to an individual who the plan sponsor has reasonably determined requires access to health coverage and other related services and support in multiple countries, and is offered other multinational benefits on a periodic basis (such as tax equalization, compensation for cross-border moving expenses, or compensation to enable the individual to return to the individual's home country), and does not apply to any individual who is a national of the United States. For purposes of this paragraph (f)(1), an individual who is not expected to travel outside the United States at least one time per year during the coverage period would not reasonably require access to health coverage and other related services and support in multiple countries. Furthermore, the offer of a one-time *de minimis* benefit would not meet the standard for the offer of other multinational benefits on a periodic basis.

(2) *Individuals working outside the United States.* An individual is described in this paragraph (f)(2) only if the individual is a national of the United States who is working outside the United States for at least 180 days in a consecutive 12-month period that overlaps with a single plan year, or across two consecutive plan years.

(3) *Individuals within a group of similarly situated individuals.* (i) An individual is described in this paragraph (f)(3) only if:

(A) The individual is a member of a group of similarly situated individuals that is formed for the purpose of traveling or relocating internationally in service of one or more of the purposes listed in section 501(c)(3) or (4) of the Internal Revenue Code, or similarly situated organizations or groups. For example, a group of students that is formed for purposes of traveling and studying abroad for a 6-month period is described in this paragraph (f)(3);

(B) In the case of a group organized to travel or relocate outside the United States, the individual is expected to travel or reside outside the United States for at least 180 days in a

consecutive 12-month period that overlaps with the policy year (or in the case of a policy year that is less than 12 months, at least half the policy year);

(C) In the case of a group organized to travel or relocate within the United States, the individual is expected to travel or reside in the United States for not more than 12 months;

(D) The individual is not traveling or relocating internationally in connection with an employment-related purpose; and

(E) The group meets the test for having associational ties under section 2791(d)(3)(B) through (F) of the Public Health Service Act (42 U.S.C. 300gg–91(d)(3)(B) through (F)).

(ii) This paragraph (f)(3) does not apply to a group that is formed primarily for the sale or purchase of health insurance coverage.

(iii) If a group of similarly situated individuals satisfies the requirements of this paragraph (f)(3), the Secretary, in consultation with the Secretary of the Treasury and the Secretary of Labor, has determined that the group requires access to health coverage and other related services and support in multiple countries.

(g) *Definition of United States.* Solely for purposes of this section, United States means the 50 States, the District of Columbia, and Puerto Rico.

(h) *National of the United States.* For purposes of this section, national of the United States, when referring to an individual, has the meaning used in the Immigration and Nationality Act (8 U.S.C. 1101 *et seq.*) and includes U.S. citizens and non-citizen nationals. Thus, for example, an individual born in American Samoa is a national of the United States at birth.

(i) *Applicability date.* The provisions of this section apply for plan years (in the individual market, policy years) beginning on or after January 1, 2017.

#### **PART 148—REQUIREMENTS FOR THE INDIVIDUAL HEALTH INSURANCE MARKET**

■ 31. The authority citation for part 148 continues to read as follows:

**Authority:** Secs. 2701 through 2763, 2791, and 2792 of the Public Health Service Act (42 U.S.C. 300gg through 300gg–63, 300gg–91, and 300gg–92), as amended.

■ 32. Section 148.220 is amended by adding paragraph (a)(9) to read as follows:

#### **§ 148.220 Excepted benefits.**

\* \* \* \* \*

(a) \* \* \*

(9) Travel insurance, within the meaning of § 144.103 of this subchapter.

\* \* \* \* \*

#### **PART 158—ISSUER USE OF PREMIUM REVENUE: REPORTING AND REBATE REQUIREMENTS**

■ 33. The authority citation for part 158 continues to read as follows:

**Authority:** Section 2718 of the Public Health Service Act (42 U.S.C. 300gg–18), as amended.

■ 34. Section 158.120 is amended by revising paragraph (d)(4) to read as follows:

#### **§ 158.120 Aggregate Reporting.**

\* \* \* \* \*

(d) \* \* \*

(4) An issuer with group policies that provide coverage to employees, substantially all of whom are: Working outside their country of citizenship; working outside of their country of citizenship and outside the employer's country of domicile; or non-U.S. citizens working in their home country, must aggregate and report the experience from these policies on a national basis, separately for the large group market and small group market, and separately from other policies, except that coverage offered by an issuer with respect to an expatriate health plan (within the meaning of § 147.170(c) of this subchapter) is not subject to the reporting and rebate requirements of 45 CFR part 158.

\* \* \* \* \*

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## Part VII

### Department of the Interior

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#### Fish and Wildlife Service

Migratory Bird Hunting; Proposed 2017–18 Migratory Game Bird Hunting Regulations (Preliminary) With Requests for Indian Tribal Proposals; Notice of Meetings; Proposed Rule

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 20**

[Docket No. FWS-HQ-MB-2016-0051;  
FF09M21200-156-FXMB1231099BPP0]

RIN 1018-BB40

**Migratory Bird Hunting; Proposed  
2017-18 Migratory Game Bird Hunting  
Regulations (Preliminary) With  
Requests for Indian Tribal Proposals;  
Notice of Meetings**

**AGENCY:** Fish and Wildlife Service,  
Interior.

**ACTION:** Proposed rule; availability of  
supplemental information.

**SUMMARY:** The U.S. Fish and Wildlife Service (hereinafter the Service or we) proposes to establish annual hunting regulations for certain migratory game birds for the 2017-18 hunting season. We annually prescribe outside limits (frameworks) within which States may select hunting seasons. This proposed rule provides the regulatory schedule, announces the Service Migratory Bird Regulations Committee (SRC) and Flyway Council meetings, describes the proposed regulatory alternatives for the 2017-18 duck hunting seasons, and requests proposals from Indian tribes that wish to establish special migratory game bird hunting regulations on Federal Indian reservations and ceded lands. Migratory game bird hunting seasons provide opportunities for recreation and sustenance; aid Federal, State, and tribal governments in the management of migratory game birds; and permit harvests at levels compatible with migratory game bird population status and habitat conditions.

**DATES:** *Comments:* Following subsequent **Federal Register** notices, the public will be given an opportunity to submit comments on this proposed rule and the subsequent proposed frameworks by January 15, 2017. Tribes must submit proposals and related comments on or before December 1, 2016.

*Meetings:* The SRC will conduct an open meeting on June 15, 2016, to identify and discuss preliminary issues concerning the 2017-18 migratory bird hunting regulations. The meeting will commence at approximately 11:00 a.m. EDT. The SRC will meet to consider and develop proposed regulations for the 2017-18 migratory game bird hunting seasons on October 25-26, 2016. Meetings on both days will commence at approximately 8:30 a.m.

**ADDRESSES:** You may submit comments on the proposals by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments on Docket No. FWS-HQ-MB-2016-0051.

- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS-HQ-MB-2016-0051; Division of Policy, Performance, and Management Programs; U.S. Fish and Wildlife Service, MS: BPHC; 5275 Leesburg Pike, Falls Church, VA 22041.

We will not accept emailed or faxed comments. We will post all comments on <http://www.regulations.gov>. This generally means that your entire submission—including any personal identifying information—will be posted on the Web site. See the Public Comments section, below, for more information.

*Meetings:* The June 15, 2016, SRC meeting will be available to the public in the Rachel Carson conference room at 5275 Leesburg Pike, Falls Church, VA 22041. The October 25-26, 2016, SRC meeting will be at the U.S. Fish and Wildlife Service, 5600 American Boulevard, Bloomington, MN 55437.

**FOR FURTHER INFORMATION CONTACT:** Ron W. Kokel at: Division of Migratory Bird Management, U.S. Fish and Wildlife Service, Department of the Interior, MS: MB, 5275 Leesburg Pike, Falls Church, VA 22041; (703) 358-1714.

**SUPPLEMENTARY INFORMATION:**

**New Process for the Annual Migratory Game Bird Hunting Regulations**

As part of DOI's retrospective regulatory review, we developed a schedule for migratory game bird hunting regulations that is more efficient and provides hunting season dates much earlier than was possible under the old process. The new process makes planning much easier for the States and all parties interested in migratory bird hunting. Beginning last year with the development of the 2016-17 hunting seasons, we are using a new schedule for establishing our annual migratory game bird hunting regulations. We combine the previously used early- and late-season regulatory processes into a single process, and make decisions for harvest management based on predictions derived from long-term biological information and established harvest strategies to establish migratory bird hunting seasons much earlier than the system we used for many years. Under the new process, we develop proposed hunting season frameworks for a given year in the fall

of the prior year. We then finalize those frameworks a few months later, thereby enabling the State agencies to select and publish their season dates in early summer.

This proposed rule is the first in a series of rules for the establishment of the 2017-18 hunting seasons.

**Background and Overview**

Migratory game birds are those bird species so designated in conventions between the United States and several foreign nations for the protection and management of these birds. Under the Migratory Bird Treaty Act (16 U.S.C. 703-712), the Secretary of the Interior is authorized to determine when "hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any \* \* \* bird, or any part, nest, or egg" of migratory game birds can take place, and to adopt regulations for this purpose. These regulations are written after giving due regard to "the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds" and are updated annually (16 U.S.C. 704(a)). This responsibility has been delegated to the Service as the lead Federal agency for managing and conserving migratory birds in the United States. However, migratory game bird management is a cooperative effort of State, Tribal, and Federal governments.

The Service develops migratory game bird hunting regulations by establishing the frameworks, or outside limits, for season lengths, bag limits, and areas for migratory game bird hunting. Acknowledging regional differences in hunting conditions, the Service has administratively divided the Nation into four Flyways for the primary purpose of managing migratory game birds. Each Flyway (Atlantic, Mississippi, Central, and Pacific) has a Flyway Council, a formal organization generally composed of one member from each State and Province in that Flyway. The Flyway Councils, established through the Association of Fish and Wildlife Agencies (AFWA), also assist in researching and providing migratory game bird management information for Federal, State, and Provincial governments, as well as private conservation entities and the general public.

The process for adopting migratory game bird hunting regulations, located at 50 CFR part 20, is constrained by three primary factors. Legal and administrative considerations dictate how long the rulemaking process will last. Most importantly, however, the

biological cycle of migratory game birds controls the timing of data-gathering activities and thus the dates on which these results are available for consideration and deliberation.

For the regulatory cycle, Service biologists gather, analyze, and interpret biological survey data and provide this information to all those involved in the process through a series of published status reports and presentations to Flyway Councils and other interested parties. Because the Service is required to take abundance of migratory game birds and other factors into consideration, the Service undertakes a number of surveys throughout the year in conjunction with Service Regional Offices, the Canadian Wildlife Service, and State and Provincial wildlife-management agencies. To determine the appropriate frameworks for each species, we consider factors such as population size and trend, geographical distribution, annual breeding effort, the condition of breeding and wintering habitat, the number of hunters, and the anticipated harvest. After frameworks are established for season lengths, bag limits, and areas for migratory game bird hunting, States may select season dates, bag limits, and other regulatory options for the hunting seasons. States may always be more conservative in their selections than the Federal frameworks, but never more liberal.

#### Service Migratory Bird Regulations Committee Meetings

The SRC will meet October 25–26, 2016, to review information on the current status of migratory game birds and develop 2017–18 migratory game bird regulations recommendations for these species. In accordance with Departmental policy, these meetings are open to public observation. You may submit written comments to the Service on the matters discussed.

#### Announcement of Flyway Council Meetings

Service representatives will be present at the individual meetings of the four Flyway Councils this August, September and October. Although agendas are not yet available, these meetings usually commence at 8 a.m. on the days indicated.

*Atlantic Flyway Council:* October 6–7, Hyatt Regency, 225 East Coastline Drive, Jacksonville, FL.

*Mississippi Flyway Council:* August 25–26, Hyatt Regency, 311 South 4th Street, Louisville, KY.

*Central Flyway Council:* September 22–23, Sheraton Steamboat Resort, 2200 Village Inn Court, Steamboat Springs, CO.

*Pacific Flyway Council:* September 30, Sun Valley Resort, 1 Sun Valley Road, Sun Valley, ID.

#### Notice of Intent To Establish Open Seasons

This document announces our intent to establish open hunting seasons and daily bag and possession limits for certain designated groups or species of migratory game birds for 2017–18 in the contiguous United States, Alaska, Hawaii, Puerto Rico, and the Virgin Islands, under §§ 20.101 through 20.107, 20.109, and 20.110 of subpart K of 50 CFR part 20.

For the 2017–18 migratory game bird hunting season, we will propose regulations for certain designated members of the avian families Anatidae (ducks, geese, and swans); Columbidae (doves and pigeons); Gruidae (cranes); Rallidae (rails, coots, moorhens, and gallinules); and Scolopacidae (woodcock and snipe). We describe these proposals under **Proposed 2017–18 Migratory Game Bird Hunting Regulations (Preliminary)** in this document. We published definitions of waterfowl flyways and mourning dove management units, and a description of the data used in and the factors affecting the regulatory process, in the March 14, 1990, **Federal Register** (55 FR 9618).

#### Regulatory Schedule for 2017–18

This document is the first in a series of proposed, supplemental, and final rulemaking documents for migratory game bird hunting regulations. We will publish additional supplemental proposals for public comment in the **Federal Register** as population, habitat, harvest, and other information become available. Major steps in the 2017–18 regulatory cycle relating to open public meetings and **Federal Register** notifications are illustrated in the diagram at the end of this proposed rule. All publication dates of **Federal Register** documents are target dates.

All sections of this and subsequent documents outlining hunting frameworks and guidelines are organized under numbered headings. These headings are:

1. Ducks
  - A. General Harvest Strategy
  - B. Regulatory Alternatives
  - C. Zones and Split Seasons
  - D. Special Seasons/Species Management
    - i. September Teal Seasons
    - ii. September Teal/Wood Duck Seasons
    - iii. Black Ducks
    - iv. Canvasbacks
    - v. Pintails
    - vi. Scaup
    - vii. Mottled Ducks
    - viii. Wood Ducks
    - ix. Youth Hunt

- x. Mallard Management Units
- xi. Other
2. Sea Ducks
3. Mergansers
4. Canada Geese
  - A. Special Early Seasons
  - B. Regular Seasons
  - C. Special Late Seasons
5. White-Fronted Geese
6. Brant
7. Snow and Ross's (Light) Geese
8. Swans
9. Sandhill Cranes
10. Coots
11. Moorhens and Gallinules
12. Rails
13. Snipe
14. Woodcock
15. Band-tailed Pigeons
16. Doves
17. Alaska
18. Hawaii
19. Puerto Rico
20. Virgin Islands
21. Falconry
22. Other

Later sections of this and subsequent documents will refer only to numbered items requiring your attention. Therefore, it is important to note that we will omit those items requiring no attention, and remaining numbered items will be discontinuous and appear incomplete.

The proposed regulatory alternatives for the 2017–18 duck hunting seasons are contained at the end of this document. We plan to publish final regulatory alternatives in late July. We plan to publish proposed season frameworks in mid-December 2016. We plan to publish final season frameworks in late February 2017.

#### Review of Public Comments

This proposed rulemaking contains the proposed regulatory alternatives for the 2017–18 duck hunting seasons. This proposed rulemaking also describes other recommended changes or specific preliminary proposals that vary from the 2016–17 regulations and issues requiring early discussion, action, or the attention of the States or tribes. We will publish responses to all proposals and written comments when we develop final frameworks for the 2017–18 season. We seek additional information and comments on this proposed rule.

#### Consolidation of Notices

For administrative purposes, this document consolidates the notice of intent to establish open migratory game bird hunting seasons and the request for tribal proposals with the preliminary proposals for the annual hunting regulations-development process. We will publish the remaining proposed and final rulemaking documents separately. For inquiries on tribal

guidelines and proposals, tribes should contact the following personnel:

Region 1 (Idaho, Oregon, Washington, Hawaii, and the Pacific Islands)—Nanette Seto, U.S. Fish and Wildlife Service, 911 NE. 11th Avenue, Portland, OR 97232-4181; (503) 231-6164.

Region 2 (Arizona, New Mexico, Oklahoma, and Texas)—Greg Hughes, U.S. Fish and Wildlife Service, P.O. Box 1306, Albuquerque, NM 87103; (505) 248-7885.

Region 3 (Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin)—Tom Cooper, U.S. Fish and Wildlife Service, 5600 American Blvd. West, Suite 990, Bloomington, MN 55437-1458; (612) 713-5101.

Region 4 (Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Puerto Rico and Virgin Islands, South Carolina, and Tennessee)—Laurel Barnhill, U.S. Fish and Wildlife Service, 1875 Century Boulevard, Room 324, Atlanta, GA 30345; (404) 679-4000.

Region 5 (Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, and West Virginia)—Pam Toschik, U.S. Fish and Wildlife Service, 300 Westgate Center Drive, Hadley, MA 01035-9589; (413) 253-8610.

Region 6 (Colorado, Kansas, Montana, Nebraska, North Dakota, South Dakota, Utah, and Wyoming)—Casey Stemler, U.S. Fish and Wildlife Service, P.O. Box 25486, Denver Federal Building, Denver, CO 80225; (303) 236-8145.

Region 7 (Alaska)—Pete Probasco, U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, AK 99503; (907) 786-3423.

Region 8 (California and Nevada)—Eric Davis, U.S. Fish and Wildlife Service, 2800 Cottage Way, Sacramento, CA 95825-1846; (916) 414-6727.

## Requests for Tribal Proposals

### Background

Beginning with the 1985-86 hunting season, we have employed guidelines described in the June 4, 1985, **Federal Register** (50 FR 23467) to establish special migratory game bird hunting regulations on Federal Indian reservations (including off-reservation trust lands) and ceded lands. We developed these guidelines in response to tribal requests for our recognition of their reserved hunting rights, and for some tribes, recognition of their authority to regulate hunting by both tribal and nontribal members throughout their reservations. The guidelines include possibilities for:

(1) On-reservation hunting by both tribal and nontribal members, with

hunting by nontribal members on some reservations to take place within Federal frameworks, but on dates different from those selected by the surrounding State(s);

(2) On-reservation hunting by tribal members only, outside of usual Federal frameworks for season dates, season length, and daily bag and possession limits; and

(3) Off-reservation hunting by tribal members on ceded lands, outside of usual framework dates and season length, with some added flexibility in daily bag and possession limits.

In all cases, tribal regulations established under the guidelines must be consistent with the annual March 10 to September 1 closed season mandated by the 1916 Convention Between the United States and Great Britain (for Canada) for the Protection of Migratory Birds (Convention). The guidelines are applicable to those tribes that have reserved hunting rights on Federal Indian reservations (including off-reservation trust lands) and ceded lands. They also may be applied to the establishment of migratory game bird hunting regulations for nontribal members on all lands within the exterior boundaries of reservations where tribes have full wildlife-management authority over such hunting, or where the tribes and affected States otherwise have reached agreement over hunting by nontribal members on non-Indian lands.

Tribes usually have the authority to regulate migratory game bird hunting by nonmembers on Indian-owned reservation lands, subject to our approval. The question of jurisdiction is more complex on reservations that include lands owned by non-Indians, especially when the surrounding States have established or intend to establish regulations governing migratory bird hunting by non-Indians on these lands. In such cases, we encourage the tribes and States to reach agreement on regulations that would apply throughout the reservations. When appropriate, we will consult with a tribe and State with the aim of facilitating an accord. We also will consult jointly with tribal and State officials in the affected States where tribes may wish to establish special hunting regulations for tribal members on ceded lands. It is incumbent upon the tribe and/or the State to request consultation as a result of the proposal being published in the **Federal Register**. We will not presume to make a determination, without being advised by either a tribe or a State, that any issue is or is not worthy of formal consultation.

One of the guidelines provides for the continuation of tribal members' harvest of migratory game birds on reservations where such harvest is a customary practice. We do not oppose this harvest, provided it does not take place during the closed season required by the Convention, and it is not so large as to adversely affect the status of the migratory game bird resource. Since the inception of these guidelines, we have reached annual agreement with tribes for migratory game bird hunting by tribal members on their lands or on lands where they have reserved hunting rights. We will continue to consult with tribes that wish to reach a mutual agreement on hunting regulations for on-reservation hunting by tribal members.

Tribes should not view the guidelines as inflexible. We believe that they provide appropriate opportunity to accommodate the reserved hunting rights and management authority of Indian tribes while also ensuring that the migratory game bird resource receives necessary protection. The conservation of this important international resource is paramount. Use of the guidelines is not required if a tribe wishes to observe the hunting regulations established by the State(s) in which the reservation is located.

### Details Needed in Tribal Proposals

Tribes that wish to use the guidelines to establish special hunting regulations for the 2017-18 migratory game bird hunting season should submit a proposal that includes:

(1) The requested migratory game bird hunting season dates and other details regarding the proposed regulations;

(2) Harvest anticipated under the proposed regulations; and

(3) Tribal capabilities to enforce migratory game bird hunting regulations.

For those situations where it could be shown that failure to limit Tribal harvest could seriously impact the migratory game bird resource, we also request information on the methods employed to monitor harvest and any potential steps taken to limit level of harvest.

A tribe that desires the earliest possible opening of the migratory game bird season for nontribal members should specify this request in its proposal, rather than request a date that might not be within the final Federal frameworks. Similarly, unless a tribe wishes to set more restrictive regulations than Federal regulations will permit for nontribal members, the proposal should request the same daily bag and possession limits and season

length for migratory game birds that Federal regulations are likely to permit the States in the Flyway in which the reservation is located.

#### *Tribal Proposal Procedures*

We will publish details of tribal proposals for public review in later **Federal Register** documents. Because of the time required for review by us and the public, Indian tribes that desire special migratory game bird hunting regulations for the 2017–18 hunting season should submit their proposals no later than December 1, 2016. Tribes should direct inquiries regarding the guidelines and proposals to the appropriate Service Regional Office listed above under the caption

**Consolidation of Notices.** Tribes that request special migratory game bird hunting regulations for tribal members on ceded lands should send a courtesy copy of the proposal to officials in the affected State(s).

#### **Public Comments**

The Department of the Interior's policy is, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. Accordingly, we invite interested persons to submit written comments, suggestions, or recommendations regarding the proposed regulations. Before promulgation of final migratory game bird hunting regulations, we will take into consideration all comments we receive. Such comments, and any additional information we receive, may lead to final regulations that differ from these proposals.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not accept comments sent by email or fax or to an address not listed in the **ADDRESSES** section. Finally, we will not consider hand-delivered comments that we do not receive, or mailed comments that are not postmarked, by the date specified in the **DATES** section. We will post all comments in their entirety—including your personal identifying information—on <http://www.regulations.gov>. 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. Comments and materials we

receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Division of Migratory Bird Management, 5275 Leesburg Pike, Falls Church, VA 22041.

For each series of proposed rulemakings, we will establish specific comment periods. We will consider, but may not respond in detail to, each comment. As in the past, we will summarize all comments we receive during the comment period and respond to them after the closing date in any final rules.

#### **National Environmental Policy Act (NEPA) Consideration**

The programmatic document, “Second Final Supplemental Environmental Impact Statement: Issuance of Annual Regulations Permitting the Sport Hunting of Migratory Birds (EIS 20130139),” filed with the Environmental Protection Agency (EPA) on May 24, 2013, addresses NEPA compliance by the Service for issuance of the annual framework regulations for hunting of migratory game bird species. We published a notice of availability in the **Federal Register** on May 31, 2013 (78 FR 32686), and our Record of Decision on July 26, 2013 (78 FR 45376). We also address NEPA compliance for waterfowl hunting frameworks through the annual preparation of separate environmental assessments, the most recent being “Duck Hunting Regulations for 2016–17,” with its corresponding March 10, 2016, finding of no significant impact. In addition, an August 1985 environmental assessment entitled “Guidelines for Migratory Bird Hunting Regulations on Federal Indian Reservations and Ceded Lands” is available from the address indicated under the caption **FOR FURTHER INFORMATION CONTACT**.

#### **Endangered Species Act Consideration**

Before issuance of the 2017–18 migratory game bird hunting regulations, we will comply with provisions of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531–1543; hereinafter the Act), to ensure that hunting is not likely to jeopardize the continued existence of any species designated as endangered or threatened or modify or destroy its critical habitat and is consistent with conservation programs for those species. Consultations under section 7 of the Act may cause us to change proposals in

this and future supplemental proposed rulemaking documents.

#### **Regulatory Planning and Review (Executive Orders 12866 and 13563)**

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. OIRA has reviewed this rule and has determined that this rule is significant because it would have an annual effect of \$100 million or more on the economy.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

An economic analysis was prepared for the 2013–14 season. This analysis was based on data from the 2011 National Hunting and Fishing Survey, the most recent year for which data are available (see discussion in **Regulatory Flexibility Act** section below). We will use this analysis again for the 2017–18 season. This analysis estimated consumer surplus for three alternatives for duck hunting (estimates for other species are not quantified due to lack of data). The alternatives are (1) issue restrictive regulations allowing fewer days than those issued during the 2012–13 season, (2) issue moderate regulations allowing more days than those in alternative 1, and (3) issue liberal regulations identical to the regulations in the 2012–13 season. For the 2013–14 season, we chose Alternative 3, with an estimated consumer surplus across all flyways of \$317.8–\$416.8 million. We also chose Alternative 3 for the 2009–10, the 2010–11, the 2011–12, the 2012–13, the 2014–15, the 2015–16, and the 2016–17 seasons. The 2013–14 analysis is part of the record for this rule and is available at <http://www.regulations.gov> at Docket No. FWS–HQ–MB–2016–0051.

#### **Regulatory Flexibility Act**

The annual migratory bird hunting regulations have a significant economic

impact on substantial numbers of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). We analyzed the economic impacts of the annual hunting regulations on small business entities in detail as part of the 1981 cost-benefit analysis. This analysis was revised annually from 1990–95. In 1995, the Service issued a Small Entity Flexibility Analysis (Analysis), which was subsequently updated in 1996, 1998, 2004, 2008, and 2013. The primary source of information about hunter expenditures for migratory game bird hunting is the National Hunting and Fishing Survey, which is conducted at 5-year intervals. The 2013 Analysis was based on the 2011 National Hunting and Fishing Survey and the U.S. Department of Commerce's County Business Patterns, from which it was estimated that migratory bird hunters would spend approximately \$1.5 billion at small businesses in 2013. Copies of the Analysis are available upon request from the Division of Migratory Bird Management (see **FOR FURTHER INFORMATION CONTACT**) or from <http://www.regulations.gov> at Docket No. FWS-HQ-MB-2016-0051.

### Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

### Small Business Regulatory Enforcement Fairness Act

This proposed rule is a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. For the reasons outlined above, this rule would have an annual effect on the economy of \$100 million or more. However, because this rule would establish hunting seasons, we do

not plan to defer the effective date under the exemption contained in 5 U.S.C. 808(1).

### Paperwork Reduction Act

This proposed rule does not contain any new information collection that requires approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number. OMB has reviewed and approved the information collection requirements associated with migratory bird surveys and assigned the following OMB control numbers:

- 1018–0019—North American Woodcock Singing Ground Survey (expires 5/31/2018).
- 1018–0023—Migratory Bird Surveys (expires 6/30/2017). Includes Migratory Bird Harvest Information Program, Migratory Bird Hunter Surveys, Sandhill Crane Survey, and Parts Collection Survey.

### Unfunded Mandates Reform Act

We have determined and certify, in compliance with the requirements of the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this proposed rulemaking would not impose a cost of \$100 million or more in any given year on local or State government or private entities. Therefore, this rule is not a “significant regulatory action” under the Unfunded Mandates Reform Act.

### Civil Justice Reform—Executive Order 12988

The Department, in promulgating this proposed rule, has determined that this proposed rule will not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of E.O. 12988.

### Takings Implication Assessment

In accordance with E.O. 12630, this proposed rule, authorized by the Migratory Bird Treaty Act, does not have significant takings implications and does not affect any constitutionally protected property rights. This rule would not result in the physical occupancy of property, the physical invasion of property, or the regulatory taking of any property. In fact, this rule would allow hunters to exercise otherwise unavailable privileges and, therefore, reduce restrictions on the use of private and public property.

### Energy Effects—Executive Order 13211

E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions.

While this proposed rule is a significant regulatory action under E.O. 12866, it is not expected to adversely affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

### Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951), E.O. 13175, and 512 DM 2, we have evaluated possible effects on Federally-recognized Indian tribes and have determined that there are no effects on Indian trust resources. However, in this proposed rule, we solicit proposals for special migratory bird hunting regulations for certain Tribes on Federal Indian reservations, off-reservation trust lands, and ceded lands for the 2017–18 migratory bird hunting season. The resulting proposals will be contained in a separate proposed rule. By virtue of these actions, we have consulted with Tribes affected by this rule.

### Federalism Effects

Due to the migratory nature of certain species of birds, the Federal Government has been given responsibility over these species by the Migratory Bird Treaty Act. We annually prescribe frameworks from which the States make selections regarding the hunting of migratory birds, and we employ guidelines to establish special regulations on Federal Indian reservations and ceded lands. This process preserves the ability of the States and tribes to determine which seasons meet their individual needs. Any State or Indian tribe may be more restrictive than the Federal frameworks at any time. The frameworks are developed in a cooperative process with the States and the Flyway Councils. This process allows States to participate in the development of frameworks from which they will make selections, thereby having an influence on their own regulations. These rules do not have a substantial direct effect on fiscal capacity, change the roles or responsibilities of Federal or State governments, or intrude on State policy or administration. Therefore, in accordance with E.O. 13132, these regulations do not have significant federalism effects and do not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

## List of Subjects in 50 CFR Part 20

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

### Authority

The rules that eventually will be promulgated for the 2017–18 hunting season are authorized under 16 U.S.C. 703–711, 16 U.S.C. 712, and 16 U.S.C. 742 a–j.

Dated: May 19, 2016.

**Karen Hyun,**

*Deputy Assistant Secretary for Fish and Wildlife and Parks.*

### Proposed 2017–18 Migratory Game Bird Hunting Regulations (Preliminary)

Pending current information on populations, harvest, and habitat conditions, and receipt of recommendations from the four Flyway Councils, we may defer specific regulatory proposals. No changes from the 2016–17 frameworks are being proposed at this time. Other issues requiring early discussion, action, or the attention of the States or tribes are contained below:

#### 1. Ducks

Categories used to discuss issues related to duck harvest management are: (A) General Harvest Strategy, (B) Regulatory Alternatives, (C) Zones and Split Seasons, and (D) Special Seasons/Species Management. Only those containing substantial recommendations are discussed below.

##### A. General Harvest Strategy

We propose to continue using adaptive harvest management (AHM) to help determine appropriate duck-hunting regulations for the 2017–18 season. AHM permits sound resource decisions in the face of uncertain regulatory impacts and provides a mechanism for reducing that uncertainty over time. We use AHM to evaluate four alternative regulatory levels for duck hunting based on the population status of mallards. (We enact other hunting regulations for species of special concern, such as canvasbacks, scaup, and pintails).

Atlantic, Mississippi, Central, and Pacific Flyways

The prescribed regulatory alternative for the Atlantic, Mississippi, Central, and Pacific Flyways is based on the status of mallards that contributes primarily to each Flyway. In the Atlantic Flyway, we set hunting regulations based on the population status of mallards breeding in eastern North America (Federal survey strata

51–54 and 56, and State surveys in the Northeast and the mid-Atlantic region). In the Central and Mississippi Flyways, we set hunting regulations based on the status and dynamics of mid-continent mallards. Mid-continent mallards are those breeding in central North America (Federal survey strata 13–18, 20–50, and 75–77, and State surveys in Minnesota, Wisconsin, and Michigan). In the Pacific Flyway, we set hunting regulations based on the status and dynamics of western mallards. Western mallards are those breeding in Alaska and the northern Yukon Territory (as based on Federal surveys in strata 1–12), and in California and Oregon (as based on State-conducted surveys).

For the 2017–18 season, we recommend continuing to use independent optimization to determine the optimal regulatory choice for each mallard stock. This means that we would develop regulations for eastern mallards, mid-continent mallards and western mallards independently, based upon the breeding stock that contributes primarily to each Flyway. We detailed implementation of this AHM decision framework for western and mid-continent mallards in the July 24, 2008, **Federal Register** (73 FR 43290) and for eastern mallards in the July 20, 2012, **Federal Register** (77 FR 42920).

Supplemental Environmental Impact Statement (SEIS) Changes to the AHM Process

Beginning with the 2016–17 season, migratory bird hunting regulations are based on predictions from models derived from long-term biological information or the most recently collected monitoring data, and established harvest strategies. Since 1995, the Service and Flyway Councils have applied the principles of adaptive management to inform harvest management decisions in the face of uncertainty while trying to learn about system (bird populations) responses to harvest regulations and environmental changes. Prior to the timing and process changes necessary for implementation of SEIS 2013, the annual AHM process began with the observation of the system's status each spring followed by an updating of model weights and the derivation of an optimal harvest policy that was then used to inform a regulatory decision (*i.e.*, breeding population estimates were used with a policy matrix to determine optimal regulatory decisions). The system then evolves over time in response to the decision and natural variation in population dynamics. The following spring, the monitoring programs observe the status of the system and the iterative

decision-making process continues forward in time. However, with the changes in decision timing specified by the SEIS, the post-survey AHM process will not be possible because monitoring information describing the system will not be available at the time the decision must be made. As a result, the optimization framework used to derive the current harvest policy can no longer calculate current and future harvest values as a function of the current system and model weights. To address this issue, we adjusted the optimization procedures to calculate harvest values conditional on the last observation of the system and regulatory decision.

Results and analysis of our work is contained in a technical report that provides a summary of revised methods and assessment results based on updated AHM protocols developed in response to the preferred alternative specified in the SEIS. The report describes necessary changes to optimization procedures and decision processes for the implementation of AHM for midcontinent, eastern and western mallards, northern pintails, and scaup decision frameworks.

Results indicate that the necessary adjustments to the optimization procedures and AHM protocols to account for changes in decision timing are not expected to result in major changes to expected management performance for mallard, pintail, and scaup AHM. In general, pre-survey (or pre-SEIS necessary changes) harvest policies were similar to harvest policies based on new post-survey (or post-SEIS necessary changes) AHM protocols. We found some subtle differences in the degree to which strategies prescribed regulatory changes in the pre-survey policies with a reduction in the number of cells indicating moderate regulations. In addition, pre-survey policies became more liberal when the previous regulatory decisions were more conservative. These patterns were consistent for each AHM decision-making framework. Overall, a comparison of simulation results of the pre- and post-survey protocols did not suggest substantive changes in the frequency of regulations or in the expected average population size. These results suggest that the additional form of uncertainty that the change in decision timing introduces is not expected to limit our expected harvest management performance with the adoption of the pre-survey AHM protocols.

A complete copy of the AHM report can be found on <http://www.regulations.gov> or at <http://www.fws.gov/migratorybirds/pdf/>

management/AHM/  
SEIS&AHMReportFinal.pdf.

#### Final 2017–18 AHM Protocol

We will detail the final AHM protocol for the 2017–18 season in the supplemental proposed rule, which we will publish in late July (see **Schedule of Biological Information Availability, Regulations Meetings and Federal Register Publications for the 2017–18 Seasons** at the end of this proposed rule for further information). We will propose a specific regulatory alternative for each of the Flyways to use for their 2017–18 seasons after information becomes available in late August 2016.

#### B. Regulatory Alternatives

The basic structure of the current regulatory alternatives for AHM was adopted in 1997. In 2002, based upon recommendations from the Flyway Councils, we extended framework dates in the “moderate” and “liberal” regulatory alternatives by changing the opening date from the Saturday nearest October 1 to the Saturday nearest September 24, and by changing the closing date from the Sunday nearest January 20 to the last Sunday in January. These extended dates were made available with no associated penalty in season length or bag limits. At that time we stated our desire to keep these changes in place for 3 years to allow for a reasonable opportunity to monitor the impacts of framework-date extensions on harvest distribution and rates of harvest before considering any subsequent use (67 FR 12501; March 19, 2002).

For 2017–18, we propose to utilize the same regulatory alternatives that are in effect for the 2016–17 season (see accompanying table for specifics of the regulatory alternatives). Alternatives are specified for each Flyway and are designated as “RES” for the restrictive, “MOD” for the moderate, and “LIB” for the liberal alternative.

#### C. Zones and Split Seasons

Zones and split seasons are “special regulations” designed to distribute hunting opportunities and harvests according to temporal, geographic, and demographic variability in waterfowl and other migratory game bird populations. For ducks, States have been allowed the option of dividing their allotted hunting days into two (or in some cases three) segments to take advantage of species-specific peaks of abundance or to satisfy hunters in different areas who want to hunt during the peak of waterfowl abundance in their area. However, the split-season option does not fully satisfy many States

who wish to provide a more equitable distribution of harvest opportunities. Therefore, we also have allowed the establishment of independent seasons in up to four zones within States for the purpose of providing more equitable distribution of harvest opportunity for hunters throughout the State.

In 1978, we prepared an environmental assessment (EA) on the use of zones to set duck hunting regulations. A primary tenet of the 1978 EA was that zoning would be for the primary purpose of providing equitable distribution of duck hunting opportunities within a State or region and not for the purpose of increasing total annual waterfowl harvest in the zoned areas. In fact, target harvest levels were to be adjusted downward if they exceeded traditional levels as a result of zoning. Subsequent to the 1978 EA, we conducted a review of the use of zones and split seasons in 1990. In 2011, we prepared a new EA analyzing some specific proposed changes to the zone and split-season guidelines. The current guidelines were then finalized in 2011 (76 FR 53536; August 26, 2011).

Currently, every 5 years, States are afforded the opportunity to change the zoning and split-season configuration within which they set their annual duck hunting regulations. The next regularly scheduled open season for changes to zone and split-season configurations was in 2016, for use during the 2016–20 period. However, as we discussed in the September 23, 2014, **Federal Register** (79 FR 56864), the April 13, 2015, **Federal Register** (80 FR 19852), and the August 6, 2015, **Federal Register** (80 FR 47388), we implemented significant changes to the annual regulatory process as outlined in the 2013 SEIS. As a result, the previously identified May 1, 2016, due date for zone and split-season configuration changes that was developed under the old regulatory process was too late for those States wishing to change zone and split-season configurations for implementation in the 2016–17 season. Under the new regulatory schedule implemented last year, we published the proposed rule for all migratory bird seasons the following fall in early December. A final rule tentatively would be published about 75 days after the proposed rule (but no later than April 1). This new schedule precluded inclusion of some States’ new zone descriptions in the 2016–17 proposed rule as had been done in past open seasons. Thus, we utilized a two-phase approach. For those States able to change zone and split-season configurations in time for the 2016–17 season, we included new configuration

and zone descriptions in the 2016–17 hunting regulations. States that do not send in new zone and split-season configuration changes at that time had until the previously identified May 1, 2016, deadline. Those changes will be implemented in the 2017–18 hunting season. The next scheduled open season would remain in 2021 for the 2021–25 seasons, and all States will then resume on the same 5-year schedule regardless of how long their previous zone-split configuration was in place.

For the current open season, the guidelines for duck zone and split-season configurations will be as follows:

#### Guidelines for Duck Zones and Split Seasons

The following zone and split-season guidelines apply only for the regular duck season:

(1) A zone is a geographic area or portion of a State, with a contiguous boundary, for which independent dates may be selected for the regular duck season.

(2) Consideration of changes for management-unit boundaries is not subject to the guidelines and provisions governing the use of zones and split seasons for ducks.

(3) Only minor (less than a county in size) boundary changes will be allowed for any grandfathered arrangement, and changes are limited to the open season.

(4) Once a zone and split option is selected during an open season, it must remain in place for the following 5 years.

Any State may continue the configuration used in the previous 5-year period. If changes are made, the zone and split-season configuration must conform to one of the following options:

(1) No more than four zones with no splits,

(2) Split seasons (no more than 3 segments) with no zones, or

(3) No more than three zones with the option for 2-way (2-segment) split seasons in one, two, or all zones.

#### Grandfathered Zone and Split Arrangements

When we first implemented the zone and split guidelines in 1991, several States had completed experiments with zone and split arrangements different from our original options. We offered those States a one-time opportunity to continue (“grandfather”) those arrangements, with the stipulation that only minor changes could be made to zone boundaries. If any of those States now wish to change their zone and split arrangement:

(1) The new arrangement must conform to one of the 3 options identified above; and

(2) The State cannot go back to the grandfathered arrangement that it previously had in place.

#### Management Units

We will continue to utilize the specific limitations previously established regarding the use of zones and split seasons in special management units, including the High Plains Mallard Management Unit. We note that the original justification and objectives established for the High Plains Mallard Management Unit provided for additional days of hunting opportunity at the end of the regular duck season. In order to maintain the integrity of the management unit, current guidelines prohibit simultaneous zoning and/or 3-way split seasons within a management unit and the remainder of the State. Removal of this limitation would allow additional proliferation of zone and split configurations and compromise the original objectives of the management unit.

#### *D. Special Seasons/Species Management*

#### iv. Canvasbacks

From 1994–2015, we followed a canvasback harvest strategy whereby if canvasback population status and production are sufficient to permit a harvest of one canvasback per day nationwide for the entire length of the regular duck season, while still attaining an objective of 500,000 birds the following spring, the season on canvasbacks should be opened. A partial season would be allowed if the estimated allowable harvest was below that associated with a 1-bird daily bag limit for the entire season. If neither of these conditions can be met, the harvest strategy calls for a closed season on canvasbacks nationwide. In 2008 (73 FR 43290; July 24, 2008), we announced our decision to modify the canvasback harvest strategy to incorporate the option for a 2-bird daily bag limit for canvasbacks when the predicted

breeding population the subsequent year exceeds 725,000 birds.

Since the existing harvest strategy relies on information that will not yet be available at the time we need to establish proposed frameworks under the new regulatory process, the canvasback harvest management strategy is not usable for the 2016–17 season and beyond. At this time we do not have a new harvest strategy to propose for use in the future. Thus, as we did for the 2016–17 season, we will review the most recent information on canvasback populations, habitat conditions, and harvests with the goal of compiling the best information available for use in making a harvest management decision. We will share these results with the Flyways during their fall meetings, with the intention of adopting a decision-making approach in October for the 2017–18 seasons. Over the next year, we will continue to work with the Flyway technical committees and councils to develop a new biologically based process for informing harvest management decisions for use in subsequent years.

#### 16. Doves

As we discussed in the April 13 (80 FR 19852), July 21 (80 FR 43266), and August 6 (80 FR 47388), 2015, **Federal Registers**, 2016 was the next open season for changes to dove zone and split configurations for the 2016–20 period. The current guidelines were approved in 2006 (see July 28, 2006, **Federal Register**, 71 FR 43008), for the use of zones and split seasons for doves with implementation beginning in the 2007–08 season. While the initial period was for 4 years (2007–10), we further stated that beginning in 2011, zoning would conform to a 5-year period.

As discussed above under **C. Zones and Split Seasons** for ducks, because of unintentional and unanticipated issues with changing the regulatory schedule for the 2016–17 season, we decided that a two-phase approach was appropriate. For those States able to change zone and split-season configurations in time for the 2016–17 season, we included that new configuration and zone descriptions in the 2016–17 hunting

seasons. For those States unable to do so last year, we will accept zone and split-season configuration changes until the previously identified May 1, 2016, deadline. We will implement these changes in the 2017–18 hunting season. The next normally scheduled open season will be in 2021 for the 2021–25 seasons.

For the current open season, the guidelines for dove zone and split-season configurations will be as follows:

#### *Guidelines for Dove Zones and Split Seasons in the Eastern and Central Mourning Dove Management Units*

(1) A zone is a geographic area or portion of a State, with a contiguous boundary, for which independent seasons may be selected for dove hunting.

(2) States may select a zone and split option during an open season. The option must remain in place for the following 5 years except that States may make a one-time change and revert to their previous zone and split configuration in any year of the 5-year period. Formal approval will not be required, but States must notify the Service before making the change.

(3) Zoning periods for dove hunting will conform to those years used for ducks, e.g., 2016–20.

(4) The zone and split configuration consists of two zones with the option for 3-way (3-segment) split seasons in one or both zones. As a grandfathered arrangement, Texas will have three zones with the option for 2-way (2-segment) split seasons in one, two, or all three zones.

(5) States that do not wish to zone for dove hunting may split their seasons into no more than 3 segments.

For the 2016–20 period, any State may continue the configuration used in 2011–15. If changes are made, the zone and split-season configuration must conform to one of the options listed above. If Texas uses a new configuration for the entirety of the 5-year period, it cannot go back to the grandfathered arrangement that it previously had in place.

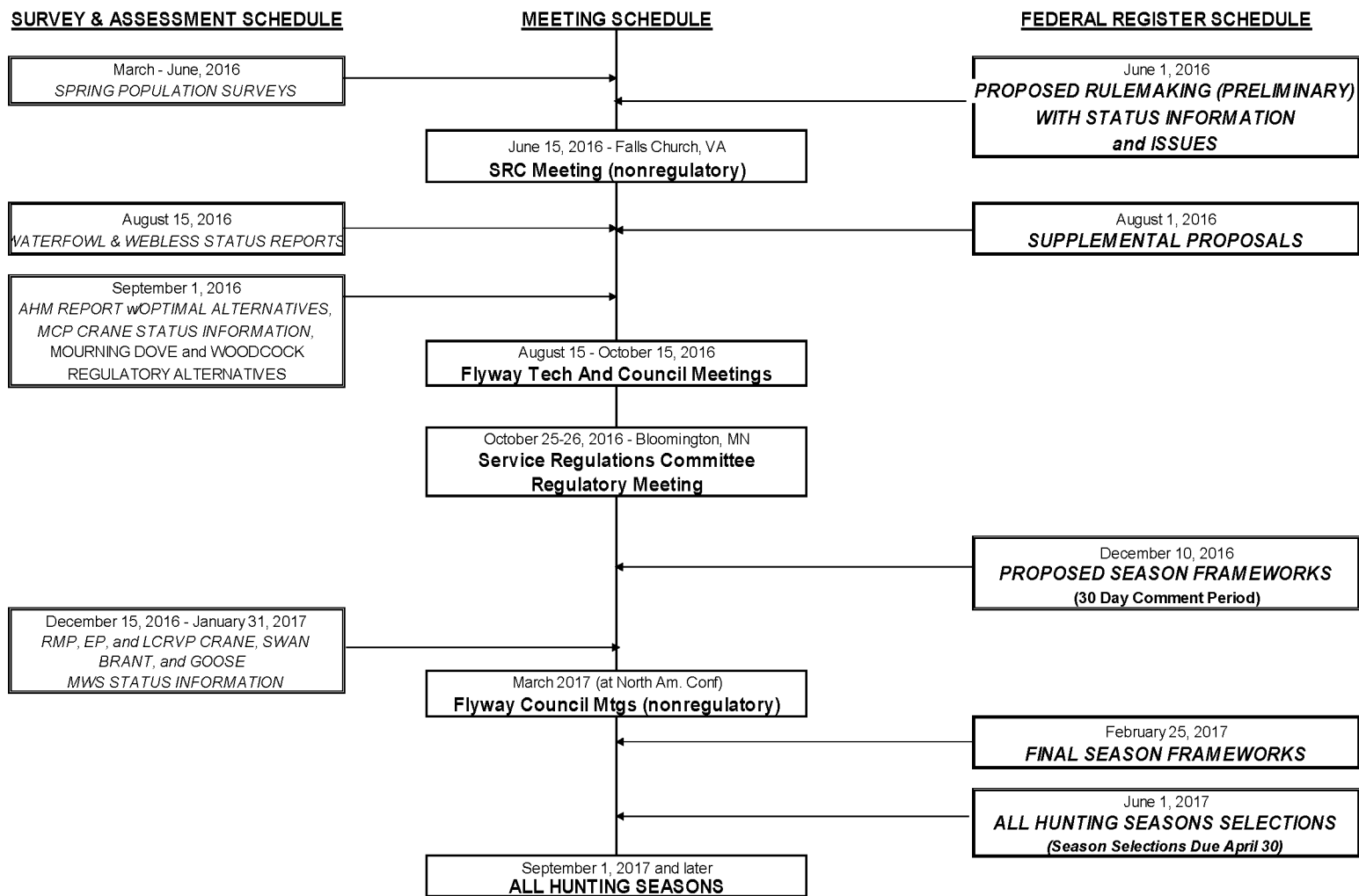
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## PROPOSED REGULATORY ALTERNATIVES FOR DUCK HUNTING DURING THE 2017-18 SEASON

	ATLANTIC FLYWAY			MISSISSIPPI FLYWAY			CENTRAL FLYWAY (a)			PACIFIC FLYWAY (b)(c)		
	RES	MOD	LIB	RES	MOD	LIB	RES	MOD	LIB	RES	MOD	LIB
Beginning Shooting Time	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise
Ending Shooting Time	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset
Opening Date	Oct. 1	Sat. nearest Sept. 24	Sat. nearest Sept. 24	Sat. nearest Oct. 1	Sat. nearest Sept. 24	Sat. nearest Sept. 24	Sat. nearest Oct. 1	Sat. nearest Sept. 24	Sat. nearest Sept. 24	Sat. nearest Oct. 1	Sat. nearest Sept. 24	Sat. nearest Sept. 24
Closing Date	Jan. 20	Last Sunday in Jan.	Last Sunday in Jan.	Sun. nearest Jan. 20	Last Sunday in Jan.	Last Sunday in Jan.	Sun. nearest Jan. 20	Last Sunday in Jan.	Last Sunday in Jan.	Sun. nearest Jan. 20	Last Sunday in Jan.	Last Sunday in Jan.
Season Length (in days)	30	45	60	30	45	60	39	60	74	60	86	107
Daily Bag	3	6	6	3	6	6	3	6	6	4	7	7
<b>Species/Sex Limits within the Overall Daily Bag Limit</b>												
Mallard (Total/Female)	3/1	4/2	4/2	2/1	4/1	4/2	3/1	5/1	5/2	3/1	5/2	7/2

- (a) In the High Plains Mallard Management Unit, all regulations would be the same as the remainder of the Central Flyway, with the exception of season length. Additional days would be allowed under the various alternatives as follows: restrictive - 12, moderate and liberal - 23. Under all alternatives, additional days must be on or after the Saturday nearest December 10.
- (b) In the Columbia Basin Mallard Management Unit, all regulations would be the same as the remainder of the Pacific Flyway, with the exception of season length. Under all alternatives except the liberal alternative, an additional 7 days would be allowed.
- (c) In Alaska, framework dates, bag limits, and season length would be different from the remainder of the Pacific Flyway. The bag limit (depending on the area) would be 5-8 under the restrictive alternative, and 7-10 under the moderate and liberal alternatives. Under all alternatives, season length would be 107 days and framework dates would be Sep. 1 - Jan. 26.

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